

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

SPEECHNOW.ORG, <i>et al.</i> ,)	
)	
Plaintiffs,)	
	)	Civ. No. 08-248 (JR)
v.)	
	)	FEC Response to Plaintiffs'
FEDERAL ELECTION COMMISSION,	)	Proposed Findings of Fact
)	
Defendant.)	
)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S RESPONSE
TO PLAINTIFFS’ PROPOSED FINDINGS OF FACT**

The Federal Election Commission (“Commission”) hereby submits the following response to the Proposed Findings of Fact filed by plaintiffs SpeechNow.org (“SpeechNow”), David Keating, Edward Crane, Fred Young, Brad Russo and Scott Burkhardt (collectively “plaintiffs”). The Commission incorporates by reference its Memorandum In Support of Response to Plaintiffs’ Proposed Findings of Fact (“FEC Resp. Mem.”). Set forth below are additional specific objections and responses, as well as references to the Memorandum in order to note the portions of the Memorandum that are particularly responsive to specific facts.

“I. SpeechNow.org”

1. Plaintiff SpeechNow.org is an independent group of citizens whose mission is to engage in express advocacy in favor of candidates who support the First Amendment and against those who do not. Declaration of David Keating in Support of Proposed Findings of Fact (hereinafter, “Keating Decl.”) at ¶¶ 2, 3; Keating Decl. Ex. H, Bylaws of SpeechNow.org (hereinafter, “Bylaws”), Art. II. Toward that end, SpeechNow.org planned to run television advertisements during the 2008 election cycle in the states and districts of political candidates whose records demonstrate that they do not support full protections for First Amendment rights. Keating Decl. at ¶ 15. While it

appears that SpeechNow.org will not be able to run advertisements in this election, it would like to run advertisements in future elections, including the 2010 election, similar to those it intended to run during the 2008 election season. *Id.* at ¶¶ 15, 30.

FEC RESPONSE: Objection to the use of “independent” as vague and objection to the extent it contains legal conclusions, including the notion that SpeechNow was not “able” to run advertisements during the 2008 election cycle. SpeechNow could have accepted contributions up to the legal limits, but chose not to. (*See* FEC Facts ¶¶ 51-52, 395-401.)

2. Plaintiff David Keating created SpeechNow.org because he believes that the issue of free speech and the threats posed to it by campaign finance laws are vital to the future of the nation. Keating Decl. at ¶ 3. He wants individuals who share this concern to be able pool their funds so they can speak out as loudly and effectively in favor of First Amendment rights as possible. *Id.* Because federal elections provide a rare opportunity both to impact public policy—by affecting the political futures of the candidates who make it—and to influence public debate, Mr. Keating believes that running advertisements calling for the election or defeat of candidates based on their support for free speech and association is the most effective way for private citizens to protect those rights. *Id.* In his view, if an individual is permitted to spend unlimited amounts of money advocating the election or defeat of candidates for office, there is no reason why groups of individuals should be prevented from doing so. He created SpeechNow.org to give ordinary Americans the ability to band together to achieve these purposes. *Id.*

FEC RESPONSE: Objection, relevance, as David Keating’s political opinions and motivation for founding SpeechNow are not relevant to the constitutionality of the challenged provisions. While this paragraph may reflect David Keating’s views, the portion of Mr. Keating’s declaration cited by plaintiffs, Keating Decl. (Doc-39) ¶ 3, only supports the first sentence and part of the second and third sentences of this fact. The cited portion of Mr. Keating’s declaration provides no support for the fourth and fifth sentences of this proposed fact. *Inter alia*, the alleged opinion regarding “the most effective way” and the fourth sentence regarding individuals and groups are unsupported. Objection to the extent it contains legal conclusion, particularly the inaccurate contention

that groups are prevented from spending unlimited amounts of money advocating the election or defeat of candidates.

“A. Structure and Operations of SpeechNow.org”

3. SpeechNow.org is an unincorporated nonprofit association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29- 971.01 et seq., and registered as a “political organization” under section 527 of the Internal Revenue Code. Keating Decl. Ex. G, SpeechNow.org Internal Revenue Form 8871.

FEC RESPONSE: No additional specific response.

4. The general powers of SpeechNow.org lie with five voting “Members.” Bylaws, Art. I, § 5; Art. III, §§ 1, 2. They are David Keating, Jon Coupal, Edward Crane, Daniel Shapiro, and Richard Marder. *Id.* The bylaws also designate four officers of the association: President, Vice President, Secretary, and Treasurer. *Id.*, Art. V, § 1. David Keating is the President and Treasurer of SpeechNow.org, and he administers all of the association’s affairs. Keating Decl. at ¶ 2. Jon Coupal is the Vice President and Secretary. Keating Decl. Ex. D, Member Action by Written Consent in Lieu of an Organizational Meeting of SpeechNow.org.

FEC RESPONSE: No additional specific response.

5. SpeechNow.org will operate solely on private donations from individuals. Keating Decl. at ¶ 8; Bylaws, Art. II. Under its bylaws, SpeechNow.org cannot accept, directly or indirectly, any donations or anything of value from business corporations, labor organizations, national banks, federal government contractors, foreign nationals, political parties, or political committees. Keating Decl. at ¶ 8; Bylaws, Art. VI, § 9; Art X, § 1.

FEC RESPONSE: No additional specific response.

6. Under its bylaws, SpeechNow.org cannot engage in business activities, including the provision of any goods or services that results in income to SpeechNow.org or any advertising or promotional activity that results in income to SpeechNow.org, other than in the form of membership dues or donations. Keating Decl. at ¶ 12. Similarly, SpeechNow.org cannot offer to any donors or members any benefit that is a disincentive for them to disassociate themselves with SpeechNow.org on the basis of the organization’s position on a political issue, and it cannot offer its donors or members credit cards, insurance policies or savings plans, training, education, business information, or any other benefits other than those that are necessary to enable recipients to engage in promotion of SpeechNow.org’s political ideas. *Id.*; Bylaws, Art. VI, §§ 6, 8.

FEC RESPONSE: No additional specific response.

7. SpeechNow.org is independent of any political candidates, political committees, and political party committees, and its bylaws require it to operate wholly independently of any of these entities. Keating Decl. at ¶ 9; Bylaws, Art. VI, § 9; Art. X, §§ 2-10. SpeechNow.org cannot make contributions or donations of any kind directly or indirectly to any FEC-regulated candidate or political committee, and it cannot coordinate its activities, as defined in 2 U.S.C. §§ 441a(a)(7)(B) & (C) and 11 C.F.R. Part 109, with any candidates, national, state, district or local political party committees, or their agents. *Id.*, Art. VI § 10; Art. X §§ 2-10.

FEC RESPONSE: Objection to the use of “wholly independently” as vague and objection to the extent the use of “wholly independently” as it purports to contain a legal conclusion.

8. SpeechNow.org’s bylaws prohibit it from using any vendors for services in producing or distributing its communications featuring a candidate for federal office if that vendor was also engaged during the same election cycle by the candidate featured in the communication. Bylaws, Art. X, § 2. The bylaws similarly prohibit SpeechNow.org from employing any individuals who were employed during the same election cycle by any candidate featured in any of SpeechNow.org’s communications. *Id.*, Art. X, § 3.

FEC RESPONSE: No additional specific response.

9. SpeechNow.org’s bylaws also ensure the independence of the association’s speech by, among other things, requiring members, officers, employees, and agents of the association to read and understand the FEC’s rules concerning coordination, 11 C.F.R. § 109.21, Bylaws, Art. X, § 4, and by prohibiting them from engaging in activities that might lead to coordination with candidates. *Id.*, Art. X, §§ 5-10.

FEC RESPONSE: No additional specific response.

10. Under SpeechNow.org’s bylaws, all of the obligations in the previous two paragraphs must be communicated to all members, officers, employees, agents, and donors of SpeechNow.org and employees and agents must sign an acknowledgement of these obligations as a condition of participating in any association activities. Bylaws, Art. X, § 11. SpeechNow.org’s members and officers have each signed such an acknowledgment. Keating Decl. Ex. I, SpeechNow.org Affirmation.

FEC RESPONSE: No additional specific response.

11. SpeechNow.org will solicit donations from individuals for funds to cover operating expenses and to buy public, political advertising to promote the election or defeat of candidates based on their positions on free speech and associational rights. Keating Decl. at ¶ 11. Some of SpeechNow.org’s solicitations will refer to particular candidates for federal office by name. *Id.*; Declaration of Steven M. Simpson in Support

of Plaintiffs' Proposed Findings of Fact (hereinafter, "Simpson Decl.") Ex. 1, Supplement to AOR 2007-32 (Sample SpeechNow.org Solicitation).

FEC RESPONSE: No additional specific response.

12. SpeechNow.org's solicitations will inform potential donors that their donations may be used for political advertising that will advocate the election or defeat of candidates to federal office based on their support for First Amendment rights. Keating Decl. at ¶ 11. Under its bylaws, SpeechNow.org must also advise donors that their donations are not tax deductible and that they will be spent according to the sole discretion of SpeechNow.org. *Id.* at ¶ 13; Bylaws, Art. VI, § 11.

FEC RESPONSE: No additional specific response.

"B. SpeechNow.org's Planned Political Advertisements"

13. SpeechNow.org plans to run advertisements on television and in other media during the 2008 election cycle and other future election cycles. Keating Decl. at ¶¶ 15-20, 30. SpeechNow.org has prepared television scripts for four such advertisements. Keating Decl. Ex. J, SpeechNow.org Television Scripts. Two of the advertisements call for the defeat of Dan Burton, a Republican Congressman currently running for reelection in the fifth district of Indiana. Both ads criticize Representative Burton for voting for a bill that would restrict the speech of many public interest groups. The first urges voters to "Say no to Burton for Congress." The second states that "Dan Burton voted to restrict our rights. Don't let him do it again." *Id.*; Keating Decl. at ¶ 18. SpeechNow.org would like to broadcast these advertisements in the fifth district of Indiana, where Representative Burton is running for office. *Id.* at ¶¶ 20-24.

FEC RESPONSE: No additional specific response.

14. The other two advertisements call for the defeat of Mary Landrieu, a Democratic Senator currently running for reelection in Louisiana. Keating Decl. at ¶ 19. Both ads criticize Landrieu for voting for a law to restrict the speech of public interest groups. The first urges voters to "Say no to Landrieu for Senate." The second concludes by saying that "Our founding fathers made free speech the First Amendment to the Constitution. Mary Landrieu is taking that right away. Don't let her do it again." *Id.*; Keating Decl. Ex. J. SpeechNow.org would like to broadcast these advertisements in Louisiana, where Senator Landrieu is running for office. Keating Decl. at ¶¶ 20-24.

FEC RESPONSE: No additional specific response.

15. The production costs for these advertisements would be approximately \$12,000. Keating Decl. at ¶ 21; Simpson Decl. Ex. 2, Declaration of Ed Traz in Support of Plaintiffs' Motion for Preliminary Injunction with Exhibits, dated February 8, 2008 at ¶¶ 3-5.

FEC RESPONSE: No additional specific response.

16. The cost to air the advertisements depends on the number of times they are run and the size of the audience SpeechNow.org wants to reach. Keating Decl. at ¶¶ 21-24; Simpson Decl. Ex. 2 at ¶¶ 3-5.

FEC RESPONSE: No additional specific response.

17. Ideally, Mr. Keating would like to be able to run the ads enough times so that the target audience could view the ads at least ten times, but that would cost roughly \$400,000. Keating Decl. at ¶ 24. A less expensive option is simply to run the ads fewer times. *Id.* at ¶¶ 21-24. In either event, the total costs to produce and run advertisements in Indianapolis and either Baton Rouge or New Orleans would exceed \$120,000. *Id.* at ¶ 22.

FEC RESPONSE: No additional specific response.

18. Mr. Keating made and will in the future make the decisions about where and in what races to run SpeechNow.org's advertisements, although he expects to keep the other members of SpeechNow.org apprised of his decisions. Keating Decl. at ¶ 25. Mr. Keating will base his decisions primarily on two factors: (1) the candidates' records on freedom of speech and/or campaign finance laws; and (2) whether the race is close enough that SpeechNow.org's ads might have an impact on the outcome. *Id.* at ¶ 26.

FEC RESPONSE: No additional specific response.

19. Thus, Mr. Keating decided that SpeechNow.org should run ads in Congressman Burton's primary because the Congressman voted for H.R. 513, a bill that restricted the free speech rights of certain nonprofits, as did the majority of House Republicans, and Mr. Keating felt that he was vulnerable to defeat. Keating Decl. at ¶ 27. Mr. Keating spoke to Congressman Burton's opponent, John McGoff, and discovered that he supported freedom of speech and opposed campaign finance laws that infringed on freedom of speech. *Id.* As a result, Mr. Keating concluded that running ads highlighting Congressman Burton's record on campaign finance laws would be a good way to convey to Republicans that they should support freedom of speech and oppose campaign finance laws that would infringe on rights to free speech. *Id.*

FEC RESPONSE: No additional specific response.

20. In his conversation with Mr. McGoff, Mr. Keating discussed only Mr. McGoff's position on issues. Mr. Keating understands that in order to avoid any

questions about coordination and to comply with the FEC's coordination rules, he cannot speak to candidates, campaigns, or political party committees about their plans, projects, or needs. Keating Decl. at ¶ 27.

FEC RESPONSE: Objection to the extent contains legal conclusions. Indeed, the relevant content standards of current coordination regulations permit involvement that is not "material" and discussion that is not "substantial." 11 C.F.R. § 109.21(d)(2),(3).¹

21. Mr. Keating decided that SpeechNow.org should run ads against Mary Landrieu because her election is a high-profile race, and she has consistently supported campaign finance legislation that infringed on freedom of speech. Keating Decl. at ¶ 28. As a result, Mr. Keating concluded that her opponent could not be worse than she is and that running ads in her race would increase the chances of her defeat and garner attention for SpeechNow.org and its message and mission. *Id.*

FEC RESPONSE: Contemporaneous records show that Senator Landrieu was selected only after SpeechNow's consultant took too long preparing the submission of SpeechNow's advisory opinion request. Mr. Keating's conclusion about Senator Landrieu is unsupported and speculative. (*See* FEC Facts ¶¶ 55-57, FEC Resp. Mem. at 3.)

22. SpeechNow.org would run ads in additional races during this election cycle if it were able to do so. Candidates in whose elections SpeechNow.org would consider broadcasting advertisements include any candidate who has voted for or against the Bipartisan Campaign Reform Act; any candidate who voted for or sponsored or opposed H.R. 513 as passed by the House of Representatives in 2006 or similar legislation; any candidate who supports or opposes legislation to create a Federal Election Administration such as that proposed by H.R. 421 in the current Congress. Keating Decl. at ¶ 29. More specifically, for this election cycle, SpeechNow.org would like to run advertisements opposing Democratic congressional candidate Paul Kanjorski in the 11th district of Pennsylvania. *Id.*

FEC RESPONSE: Objections to the extent contains a legal conclusion and suggests that SpeechNow was not able to run ads in additional races. (*See* FEC Facts ¶¶ 51-52, 395-401.)

¹ The coordination regulation is expected to be the subject of a new rulemaking as a result of *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

23. If it is able to, SpeechNow.org will run ads in future election cycles as well. For instance, in the 2010 election cycle, SpeechNow.org would like to run advertisements opposing North Dakota Democratic Senator Byron Dorgan and Colorado Democratic Senator Ken Salazar. Keating Decl. at ¶ 30. SpeechNow.org would consider running advertisements opposing Alaska Republican Senator Lisa Murkowski as well, if she has a credible primary opponent. *Id.*

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to run ads in future election cycles. (*See* FEC Facts ¶¶ 51-52, 395-401.)

24. Assuming SpeechNow.org is able to function and run ads in future elections, it will make decisions about where to run such ads consistent with the general approach described above. Keating Decl. at ¶ 26. If SpeechNow.org is able to raise enough funds, it intends to use methods such as candidate research to determine the past statements and positions of candidates on free speech as well as public opinion polling to obtain more information about the viability of particular candidates in particular races. *Id.* at ¶ 32.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to run ads in future election cycles. (*See* FEC Facts ¶¶ 51-52, 395-401.)

25. SpeechNow.org will disclose its activities under the disclosure and disclaimer provisions in the Federal Election Campaign Act that apply to independent expenditures. Keating Decl. at ¶¶ 6, 33-36.

FEC RESPONSE: Objection, vague, and objection to the extent contains legal conclusions. FECA requires disclosure for independent expenditures by political committees and others, but the disclosure provisions vary depending upon what kind of entity is making the expenditure. 2 U.S.C. § 434 (b)-(d), (g).

26. Accordingly, pursuant to 2 U.S.C. § 434(c), SpeechNow.org will file statements with the FEC reporting the identities of those who contributed to its advertisements and other communications that are independent expenditures under FECA along with the amounts contributed and the other information required by this provision. Keating Decl. at ¶ 35.

FEC RESPONSE: Objection to the extent contains legal conclusions. While SpeechNow and David Keating have agreed to disclose the identities of at least certain contributors as “required by” 2 U.S.C. § 434(c), they have created some ambiguity as to whether they will disclose the identities of contributors when contributions are used for purposes such as candidate research and polling, *see* SN Facts ¶ 24, rather than directly purchasing advertising time. David Keating’s agreement with a decision not to disclose some donors calls into question whether SpeechNow will disclose its donors.

(*See* FEC Facts ¶ 373; “Freeing SpeechNow: Free Speech and Association vs. Campaign Finance Regulation,” Mar. 5, 2008, FEC Exh. 103 at 4.)

27. SpeechNow.org will not accept any targeted or “earmarked” funds, and, as a result, it will disclose all of its contributors in its independent expenditure disclosures. Keating Decl. at ¶ 36. Thus, for each independent expenditure SpeechNow.org makes, Mr. Keating will disclose all donors whose contributions have been used to fund any portion of the independent expenditure at issue. *Id.* All donors to SpeechNow.org will thus be disclosed in the association’s independent expenditure disclosures. *Id.*

FEC RESPONSE: *See supra* Fact 26. Even if SpeechNow and David Keating were interpreted as agreeing to identify all contributors on the independent expenditure reports they file pursuant to 2 U.S.C. § 434(c), those reports are submitted on different forms than those used by political committees, on a different schedule (independent expenditure reports are filed only once, whereas political committees file periodic reports of their financial activity), and independent expenditure reports provide less information to the Commission and the public. (*See* FEC Facts ¶ 372-373, 442-443.)

28. Pursuant to 2 U.S.C. § 441d(d)(2), SpeechNow.org's advertisements will include a statement indicating that SpeechNow.org is responsible for the content of the advertisement. Keating Decl. at ¶ 34.

FEC RESPONSE: Objection to the extent contains legal conclusions.

29. Pursuant to 2 U.S.C. § 441d(a), all of SpeechNow.org's advertisements and other communications will include its name, address, and telephone number or World Wide Web address, along with a statement indicating that the communication was paid for by SpeechNow.org and was not authorized by any candidate or candidate's committee. Keating Decl. at ¶ 33.

FEC RESPONSE: Objection to the extent contains legal conclusions.

30. In addition, as an association organized under section 527 of the Internal Revenue Code, SpeechNow.org must make regular disclosures of all contributions and expenditures. Keating Decl. at ¶ 37, Keating Decl. Ex. L, SpeechNow.org IRS Form 8872; Simpson Decl. Ex. 25, Deposition Transcript of Gregory Scott, taken September 24, 2008 (hereinafter, "Scott Dep.") at 105:2-106:3.

FEC RESPONSE: 527 organizations may choose to pay taxes to avoid disclosure. *See Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1360 (11th Cir. 2003). Disclosures filed by section 527 organizations are not filed on the same schedule, with the same frequency or in the same level of detail as disclosures by political committees under the Act. (*Compare* 2 U.S.C. §§ 433-434 *with* 26 U.S.C. § 527(j)). *See* FEC Exh. 127-128, 161-162).

C. SpeechNow.org's Other Activities

31. In addition to creating advertisements for the Burton and Landrieu races, Mr. Keating has also set up a website, www.speechnow.org, on which he has posted general information about the association, news stories and editorials about SpeechNow.org, and information about this lawsuit. Keating Decl. at ¶ 4; Keating Decl. Ex. A, Web Pages from www.speechnow.org (Home Page).

FEC RESPONSE: No additional specific response.

32. The website allows individuals interested in SpeechNow.org to sign up to receive more information about the association and to check a box if they might in the future consider making a donation to SpeechNow.org if it is legally able to accept donations. Keating Decl. Ex. A (Sign-up Page). Since the website was created late last year, about 180 individuals have signed up to receive more information and about 75 of them have indicated that they would consider making a donation to SpeechNow.org in the future. Keating Decl. at ¶ 5. Mr. Keating has sent articles and other information concerning SpeechNow.org to the individuals on this list. *Id.* at ¶ 4; Keating Decl. Ex. O, Information Sent to Interested Visitors of www.SpeechNow.org.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

33. Mr. Keating has also set up a PayPal account to allow individuals to donate money to SpeechNow.org in the event that the association is legally able to accept donations. Keating Decl. at ¶ 53; Keating Decl. Ex. M, Email from PayPal.com confirming SpeechNow.org account.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

II. The Individual Plaintiffs

34. In addition to being the President and Treasurer of SpeechNow.org, Mr. Keating would also like to donate money to the association to support its mission and activities. Keating Decl. at ¶ 39. If and when SpeechNow.org is legally able to accept donations, Mr. Keating will immediately donate \$5,500 to the group, and he would like to donate more in the future. *Id.* at ¶¶ 39, 51-52.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

35. Other individuals are also ready, willing, and able to immediately donate funds that would allow SpeechNow.org to produce and broadcast the ads it has created, or other similar ads, enough times to have an impact on the audience in the relevant markets. Keating Decl. at ¶ 39. Edward Crane is willing to donate \$6,000. Declaration of Edward Crane in Support of Proposed Findings of Fact (hereinafter, "Crane Decl.") at ¶

6. Richard Marder is willing to donate \$5,500. Keating Decl. at ¶ 39; Simpson Decl. Ex. 3C, SpeechNow.org Request for Advisory Opinion and Supporting Materials, dated November 14, 2007 (hereinafter, “Advisory Opinion Request”) at 6-8 (Declaration of Richard Marder in Support of SpeechNow.org Advisory Opinion Request). Fred M. Young is willing to donate \$110,000. Declaration of Fred M. Young, Jr. in Support of Proposed Findings of Fact (hereinafter, “Young Decl.”) at ¶ 6.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow is not able to accept donations. (*See* FEC Facts ¶¶ 51-52, 395-401.)

36. Plaintiff Ed Crane is the President of the Cato Institute and a long-time supporter of free speech and opponent of campaign finance laws. Crane Decl. at ¶¶ 3, 10. Mr. Crane is an acquaintance of Mr. Keating’s who agreed both to serve as a member of SpeechNow.org and to contribute money to the association when Mr. Keating asked him during the summer of 2007. *Id.* at ¶ 2. Mr. Crane would like to be able to make additional contributions to SpeechNow.org in the future. *Id.* at ¶ 8.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow has not been able or will not be able to accept donations. (*See* FEC Facts ¶¶ 51-52, 395-401.)

37. Mr. Crane supports SpeechNow.org’s mission and believes that calling for the election or defeat of candidates based on their support for First Amendment rights is an ideal way both to affect policy—by affecting the political futures of those who make it—and to promote the importance of free speech. Crane Decl. at ¶ 3. However, Mr. Crane lacks the time or individual resources to do things like produce television advertisements about free speech and candidates that can reach a wide segment of the population. *Id.* at ¶ 4. Thus, the best way for him to speak effectively against candidates who support restrictions on free speech is to associate with other like-minded individuals and a group like SpeechNow.org. *Id.*

FEC RESPONSE: To the extent that the last sentence is not phrased as an opinion of Mr. Crane’s, it is unsupported. Plaintiffs have not demonstrated that giving to a group like SpeechNow is the “best way to speak effectively against candidates.” Plaintiffs do not compare the effect of such a contribution with, for example,

volunteering for a campaign, contributing to a candidate, contributing to a political party, emailing friends, or espousing views on a website.

38. Plaintiff Fred Young is the former CEO of Young Radiator Co. in Racine, Wisconsin. Simpson Decl. Ex. 4, Excerpts from the Deposition Transcript of Fred M. Young, Jr., taken October 3, 2008 at 22:1-4. Mr. Young has supported various libertarian and classical liberal causes through the years, including the Cato Institute and the Club for Growth. *Id.* at 32:5-7, 87:7-9. Mr. Keating knew Mr. Young through Mr. Keating's employment as the executive director of the Club for Growth. *Id.* at 32:14-33:1. Mr. Keating contacted Mr. Young and asked if he would agree to contribute money to SpeechNow.org during the summer of 2007. Young Decl. at ¶ 2. Mr. Young would like to be able to make additional contributions to SpeechNow.org in the future. Young Decl. at ¶ 8.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

39. Mr. Young supports SpeechNow.org's mission and believes that calling for the election or defeat of candidates based on their support for First Amendment rights is an ideal way both to affect policy—by affecting the political futures of those who make it—and to promote the importance of free speech. Young Decl. at ¶ 3. However, Mr. Young is not a political activist and lacks the time and experience to do things like produce television advertisements that can reach a wide segment of the population. *Id.* at ¶ 4. Thus, the best way for him to do speak effectively against candidates who support restrictions on free speech is to associate with other like-minded individuals and a group like SpeechNow.org. *Id.*

FEC RESPONSE: To the extent that the last sentence is not phrased as an opinion of Mr. Young's, it is unsupported. Plaintiffs have not demonstrated that giving to a group like SpeechNow is the "best way to speak effectively against candidates." Plaintiffs do not compare the effect of such a contribution with, for example, volunteering for a campaign, contributing to a candidate, contributing to a political party, emailing friends, or espousing views on a website.

Since Fred Young is willing to spend \$110,000, he could easily finance his own independent expenditures. Mr. Young could hire someone to prepare advertisements for

him, much like he hopes to “hire SpeechNow to do that sort of thing.” (Young Dep. at 92-32.) It is not difficult for individuals who are capable of making large contributions to hire consultants to create advertisements. (FEC Facts ¶ 351.)

40. Two other individuals, Plaintiffs Brad Russo and Scott Burkhardt, would like to make immediate donations to SpeechNow.org of \$100 each. Keating Decl. at ¶¶ 50-51.

FEC RESPONSE: Nothing in the Act precludes their proposed contributions to SpeechNow. Collectively, these \$100 contributions are also less than the \$1,000 threshold for triggering political committee status under 2 U.S.C. § 431(17).

41. Brad Russo first heard about SpeechNow.org from an acquaintance who works for the Institute for Justice. Declaration of Brad Russo in Support of Plaintiffs’ Proposed Findings of Fact (hereinafter, “Russo Decl.”) at ¶ 2. Because he believes strongly in free speech and opposes many campaign finance laws, Mr. Russo would like to be able to support SpeechNow.org and its mission. *Id.* at ¶ 3.

FEC RESPONSE: No additional specific response.

42. Scott Burkhardt first heard about SpeechNow.org in a news story and located the association’s website through an internet search. Declaration of Scott Burkhardt in Support of Plaintiffs’ Proposed Findings of Fact (hereinafter, “Burkhardt Decl.”) at ¶ 2; Simpson Decl. Ex. 5, Excerpts from the Deposition Transcript of Scott Burkhardt, taken September 16, 2008 at 9:4-6. Mr. Burkhardt has supported various libertarian and conservative causes through the years and wanted to donate money to SpeechNow.org. Burkhardt Decl. at ¶ 2; Simpson Decl. Ex. 5 at 9:10-16. He wrote an email to SpeechNow.org inquiring about how to donate money to the association, but Mr. Keating wrote back indicating that SpeechNow.org was not accepting donations. Keating Decl. at ¶ 50.

FEC RESPONSE: No additional specific response.

43. Both Mr. Russo and Mr. Burkhardt support SpeechNow.org’s mission and believe that calling for the election or defeat of candidates based on their support of First Amendment rights is an ideal way both to affect policy—by affecting who serves in Congress, which makes significant policy regarding those rights—and to promote the importance of free speech. Russo Decl. at ¶ 3; Burkhardt Decl. at ¶ 3.

FEC RESPONSE: No additional specific response.

44. Even though Plaintiffs Russo and Burkhardt could not themselves finance the production and broadcast of SpeechNow.org's ads, they wish to associate with SpeechNow.org's other supporters in order to amplify their voices and reach an audience far greater than they would be able to achieve without SpeechNow.org. Russo Decl. at ¶ 4; Burkhardt Decl. at ¶ 4.

FEC RESPONSE: Plaintiffs Russo and Burkhardt can finance the production and broadcast of advertisements. Individuals can finance advertisements for as little as \$50 without SpeechNow. (FEC Resp. Mem. § II.)

45. All of the individual Plaintiffs have read, understood, and will abide by SpeechNow.org's bylaws, in particular, sections 9 and 10 of Article X of those bylaws. Keating Decl. at ¶¶ 8, 9; Crane Decl. at ¶ 5; Young Decl. at ¶ 5; Russo Decl. at ¶ 5; Burkhardt Decl. at ¶ 5. They further understand that their donations will be used to fund speech, including advertisements that will advocate the election and/or defeat of candidates to federal office based upon their positions on freedom of speech and campaign finance laws, and they understand that SpeechNow.org is an independent group that will not make any contributions to candidates, political committees or political parties (or any of their agents) and will not coordinate its activities with candidates, candidate committees or political party committees. Keating Decl. at ¶ 9; Crane Decl. at ¶ 5; Young Decl. at ¶ 5; Russo Decl. at ¶ 5; Burkhardt Decl. at ¶ 5.

FEC RESPONSE: No additional specific response.

“III. SpeechNow.org's Advisory Opinion Request”

46. Mr. Keating set up SpeechNow.org specifically to avoid any concerns about corruption under the campaign finance laws. Keating Decl. at ¶¶ 6, 38. However, he understood when he created the association that it would be necessary to seek approval from the FEC to operate without becoming a political committee and being subjected to the contribution limits and organizational, administrative, and continuous reporting obligations for political committees. *Id.* at ¶ 38. He also recognized that it might be necessary to challenge the application of these provisions to SpeechNow.org in court. *Id.*

FEC RESPONSE: David Keating's views and motivation for creating SpeechNow are irrelevant to the determination of constitutionality of the provisions challenged by plaintiffs. The Commission objects to the assertion that SpeechNow was “set up . . . specifically to avoid any concerns about corruption under the campaign finance laws” to the extent that it includes a legal conclusion. Regarding Mr. Keating's

expressed desire to create an organization “specifically to avoid any concerns about corruption,” the FECA’s limit on contributions to political committees of \$5000 per year lawfully furthers that goal. Mr. Keating did not just know that he “might” need to challenge the rules; SpeechNow was created to serve as a test case. (FEC Resp. Mem. at § 1.)

47. Accordingly, on November 19, 2007, SpeechNow.org filed a request for an advisory opinion (AOR) with the FEC pursuant to 2 U.S.C. § 437f. The request presented, in essence, three questions: (1) Must SpeechNow.org register as a political committee as defined in 2 U.S.C. § 431(4), and, if so, when? (2) Are donations to SpeechNow.org “contributions” (as defined in 2 U.S.C. § 431(8)) subject to the limits described in 2 U.S.C. § 441a(a)(1)(C)? (3) Must an individual donor to SpeechNow.org count his donations to SpeechNow.org among the contributions applicable to his biennial aggregate contribution limit described in 2 U.S.C. § 441a(a)(3)? *See* Simpson Decl. Exh. 3A, Advisory Opinion Request, at 4-5.

FEC RESPONSE: No additional specific response.

48. Under FEC rules, the Commission is required to issue a written advisory opinion within sixty days of accepting a request. 11 C.F.R. § 112.4(a). If it is unable to render an advisory opinion within that time, the rules state that the FEC “shall issue a written response stating that the Commission was unable to approve” the request by a required vote of four commissioners. *Id.* The FEC issued its response to SpeechNow.org’s AOR on January 28, 2008. Because the FEC at the time was without a full complement of commissioners, it lacked a quorum and thus could not issue an advisory opinion in response to SpeechNow.org’s request. Accordingly, under FEC rules, SpeechNow.org’s request was not approved. *See* Simpson Decl. Ex. 6, Letter from the Federal Election Commission to Bradley A. Smith and Stephen M. Hoersting from the Center for Competitive Politics and William H. Mellor, Steven Simpson, and Paul Sherman from the Institute for Justice, dated January 28, 2008.

FEC RESPONSE: No additional specific response.

49. However, the general counsel’s office of the FEC issued a draft advisory opinion in response to SpeechNow.org’s AOR. Simpson Decl. Ex. 7, Draft Advisory Opinion 2007-32 from the Federal Election Commission, dated January 25, 2008. The draft advisory opinion concluded that, among other things, SpeechNow.org’s planned advertisements constitute “express advocacy,” *id.* at 9:9-12; the donations that Richard Marder and Plaintiffs Keating, Crane, and Young wish to make to SpeechNow.org would be “contributions” under 2 U.S.C. § 431(8), *id.* at 4:26-28; expenditures by SpeechNow.org on advertisements calling for the election or defeat of candidates for federal office would be “expenditures” under 2 U.S.C. § 431(9), *id.* at 4:26-28;

SpeechNow.org has a “major purpose” of campaign activity; accepting the contributions noted above to fund its advertisements would make SpeechNow.org a “political committee” under § 431(4), *id.* at 12:13-20; as a political committee, SpeechNow.org would be subject to the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) and the registration, administrative and reporting requirements for political committees contained in 2 U.S.C. §§ 432, 433, and 434, *id.* at 12:13-20, 13:19-14:5; and SpeechNow.org would be required to register as a political committee once it received contributions of more than \$1,000 regardless of whether it had made any expenditures, *id.* at 12:13-20. In short, the draft advisory opinion concluded that the campaign finance laws prohibit SpeechNow.org from accepting donations that exceed the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) to fund its advertisements. *Id.* at 14:6-12.

FEC RESPONSE: The views of the General Counsel are irrelevant. It is well settled that “[t]he Commissioners are appointed by the President to administer the agency, the agency’s staff is not.” *San Luis Obispo Mothers For Peace v. NRC*, 751 F.2d 1287, 1327, *aff’d en banc in relevant part*, 789 F.2d at 33, 34 (D.C. Cir. 1984). The D.C. Circuit rejected as a “rather silly suggestion” the argument that an NLRB decision should be found unreasonable because it conflicted with the General Counsel’s advice. “It is of no moment . . . what was the General Counsel’s understanding of the case law before the present decision issued, and the court will take no note of it.” *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002).

50. The draft advisory opinion was consistent with the FEC’s position on other groups that make independent expenditures. The FEC has required such groups both to register as political committees and to abide by contribution limits. See Simpson Decl., Exs. 8-13, FEC Conciliation Agreements.

FEC RESPONSE: The draft advisory opinion is irrelevant. *See supra* FEC Resp. to SN Fact ¶ 49. Objection to the vagueness of “such groups” and “groups that make independent expenditures.” The Act requires registration and contribution limits for some but not every group that makes independent expenditures, and the Commission has so enforced the Act.

51. The FEC's current position with respect to SpeechNow.org does not differ from the positions stated in the draft Advisory Opinion. Thus, according to the FEC, SpeechNow.org's planned advertisements constitute "express advocacy," Simpson Decl. Exs. 7 at 9:9-14, and 14, Excerpts from FEC Responses to Plaintiffs' First Set of Discovery Requests, dated August 25, 2008; the donations that Richard Marder and Plaintiffs Keating, Crane, Young, Burkhardt and Russo wish to make to SpeechNow.org would be "contributions" under 2 U.S.C. § 431(8) and the expenditures by SpeechNow.org on its proposed advertisements "expenditures" under 2 U.S.C. § 431(9), *id.* (FEC Response to Request for Admission No. 3); SpeechNow.org has a "major purpose" of campaign activity; accepting the contributions noted above to fund its advertisements would make SpeechNow.org a "political committee" under § 431(4), *id.* (FEC Response to Request for Admission No. 1); as a political committee, SpeechNow.org would be subject to the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) and the registration, administrative, and reporting requirements for political committees contained in 2 U.S.C. §§ 432, 433, and 434, *id.* (FEC Responses to Requests for Admission Nos. 5-12).

FEC RESPONSE: The draft Advisory Opinion is irrelevant. (*See supra* FEC Resp. Mem ¶ 49.) No specific additional response to the statements regarding the FEC's current position.

52. The FEC's then-chairman, David Mason, issued his own opinion in response to the draft advisory opinion issued by the FEC office of general counsel. Simpson Decl. Ex. 15, Dissenting Opinion of FEC Chairman Mason to Draft Advisory Opinion 2007-32. Chairman Mason concluded that SpeechNow.org ought to be permitted to operate without contribution limits, although he believed that SpeechNow.org should have to register as a political committee and comply with the **administrative, organizational, and reporting obligations for PACs. *Id.* at 5-6.**

FEC RESPONSE: Irrelevant. Chairman Mason was not speaking for the Commission. The Commission cannot exercise its duties and powers without a majority vote of its six Commissioners. *See* 2 U.S.C. § 437c(c); 2 U.S.C. § 437f(b) ("No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.")

53. David Keating, as treasurer of SpeechNow.org, is directly responsible for complying with the reporting requirements that apply to SpeechNow.org and signing all reports. Keating Decl. at ¶ 14; Bylaws, Art. V, § 8.

FEC RESPONSE: No additional specific response.

54. Under 2 U.S.C. § 437g(d) and the FEC's practices and policies, David Keating, as treasurer of SpeechNow.org, would be liable in his official capacity for any violations of the contribution limits or reporting obligations that apply to SpeechNow.org. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 10 & 11).

FEC RESPONSE: The Commission's policies are as follows:

A committee "treasurer will typically be subject to Commission action only in his or her official capacity." *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005). In this regard, a "probable cause finding against a treasurer in his or her official capacity makes clear to the district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the Commission to obtain a civil penalty from the committee." *Id.* at 4-5.

See FEC Response to Plaintiffs' Requests for Admission 10-11, FEC Responses to Plaintiffs' First Set of Discovery Requests (Aug. 25, 2008) at 27-28, FEC Exh. 160; Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005.)

55. Under 2 U.S.C. § 437g(d) and the FEC's practices and policies, David Keating, as treasurer of SpeechNow.org, would be liable in his personal capacity for any knowing and willful violations of the contribution limits or reporting obligations that apply to SpeechNow.org. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 10 & 11).

FEC RESPONSE: As treasurer, David Keating is responsible for violations by the committee under the following circumstances:

"[W]hen information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the treasurer to have acted in a personal capacity and make findings (and pursue conciliation)

accordingly.” *Id.* at 1, 5, 6. In addition, “[i]f a past or present treasurer violates a prohibition that applies generally to individuals, the treasurer may be named as a respondent in his or her personal capacity, and findings may be made against the treasurer in that capacity. In this way, a treasurer would be treated no differently than any other individual who violates a provision of the Act.” *Id.* at 5 n.7, 6. “Should the Commission file suit in district court following a finding of probable cause against a treasurer in his or her personal capacity, judicial relief, including an injunction and payment of a civil penalty, could be obtained against the treasurer personally.” *Id.* at 5 (citation omitted).

See FEC Response to Plaintiffs’ Requests for Admission 10-11, FEC Responses to Plaintiffs’ First Set of Discovery Requests (Aug. 25, 2008) at 27-28, FEC Exh. 190.

56. The FEC believes that the plaintiffs in this case are aware of the contribution limits, registration requirements, and disclosure requirements that will apply to them if SpeechNow.org engages in the activities described in its AOR and its Amended Complaint. *Id.* (FEC Response to Request for Admission No. 2).

FEC RESPONSE: No additional specific response.

57. If David Keating, Ed Crane, Fred Young, or Richard Marder made contributions to SpeechNow.org in the amounts and for the purposes stated in their declarations, their contributions would violate the law because they exceed the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). Simpson Decl. Ex. 14 (FEC Response to Request for Admission No. 12).

FEC RESPONSE: No additional specific response.

58. If SpeechNow.org were able to accept the contributions of the individual plaintiffs and Richard Marder, SpeechNow.org would have enough money to fund advertisements in at least two election contests. Keating Decl. at ¶ 22; Simpson Decl. Ex. 2 at 4; *see* Keating Decl. Ex. K, Traz Group Bid for Burton and Landrieu Advertisements.

FEC RESPONSE: This proposed fact incorrectly suggests that SpeechNow is unable to accept contributions up to the legal limits. In fact, plaintiffs could accept contributions of up to \$5,000 from each of the five individual plaintiffs and from Richard Marder, subject only to the possible application of the aggregate contribution limit on Mr. Young’s contribution. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(3).

59. Without those contributions, however, SpeechNow.org lacks the funds to run such advertisements. *Id.* at ¶ 40.

FEC RESPONSE: Evidence in the record suggests that had SpeechNow engaged in a modicum of fundraising within the contribution limits, possibly just by accepting donations from those who had expressed an interest, it would have had the funds to run advertisements comparable in scope to the ad buys for the Burton and Landrieu races that Mr. Keating selected. (FEC Facts ¶¶ 392-394.)

“IV. The Effect of Contribution Limits on the Plaintiffs”

60. The contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) prevent plaintiffs Keating, Crane, and Young and Richard Marder from making the donations to SpeechNow.org that they currently wish to make. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13); Advisory Opinion Request at 6-8 (Declaration of Richard Marder in Support of SpeechNow.org Advisory Opinion Request); Keating Decl. at ¶ 39; Crane Decl. at ¶ 6; Young Decl. at ¶ 6.

FEC RESPONSE: Like other proposed facts, this proposed fact incorrectly suggests that SpeechNow is unable to accept contributions up to the legal limits. In fact, plaintiffs could accept contributions of up to \$5,000 from each of the five individual plaintiffs and from Richard Marder, subject only to the possible application of aggregate contribution limit on Mr. Young’s contribution. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(3).

61. Both SpeechNow.org and David Keating as its treasurer face a credible threat of prosecution if SpeechNow.org accepts contributions over the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), and David Keating, Ed Crane, Fred Young and Richard Marder face a credible threat of prosecution if they make contributions to SpeechNow.org above those limits. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13).

FEC RESPONSE: No additional specific response.

62. The laws and the FEC’s regulations contained in 2 U.S.C. § 441a(a)(1)(C) and 11 CFR § 110.1(d) prevent SpeechNow.org and/or David Keating from accepting

additional donations above the contribution limits. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13); Keating Decl. at ¶ 39.

FEC RESPONSE: No additional specific response.

63. Based on the cost estimates for SpeechNow.org's ads targeted at the elections of Representative Burton and Senator Landrieu, to run ads in only two elections in the future would cost SpeechNow.org at least \$120,000. Keating Decl. at ¶ 31. Thus, without the donations that David Keating, Ed Crane, Fred Young, and Richard Marder wish to make to SpeechNow.org, or other donations of the same amount, SpeechNow.org will not have sufficient funds to pay for the advertisements it wishes to produce and broadcast in the future. *Id.* at ¶ 40.

FEC RESPONSE: Evidence in the record suggests that had SpeechNow engaged in a modicum of fundraising within the contribution limits, possibly just by accepting donations from those who had expressed an interest, it would have had the funds to run advertisements comparable in scope to the ad buys for the Burton and Landrieu races that Mr. Keating selected. (FEC Facts ¶¶ 392-394.)

“A. Contribution Limits Increase the Cost and Burden of Raising Money.”

64. Raising money under contribution limits is more difficult than raising money outside of those limits. Simpson Decl. Ex. 16, *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) at 768; Simpson Decl. Ex. 17, Excerpt of District Court Findings of Fact in *Mariani v. United States*, 80 F. Supp. 2d 352 (M.D. Pa. 1999) at 370.

FEC RESPONSE: It is no doubt true that for some organizations raising funds through unlimited contributions is easier than raising funds within contribution limits. The particular findings by both courts in *Mariani* were, however, premised in part on the fact that soft money could be raised from entities that could not otherwise make contributions, corporations and labor organizations. SpeechNow, on the other hand, asserts that it will not accept contributions from corporations and labor organizations. (SN Facts ¶ 5.)

65. During the 1999-2000 election cycle, approximately 3.5 million

Americans made a political contribution at the federal level. Declaration of Rodney Smith in Support of Plaintiffs' Proposed Findings of Fact (hereinafter, "Smith Decl.") at ¶ 24. This figure represents only about 1.2% of the total voting age population. *Id.* Eighty percent of those donors, or roughly 2.7 million people, gave less than \$200. *Id.*

FEC RESPONSE: The Court should decline to enter this fact because it is outdated and contradicted by other, more reliable sources. Smith's report contains information from only one election cycle, 1999-2000, regarding the number of federal donors. The number of donors from one election cycle, without any comparison to other more recent cycles, sheds little to no light on the ability of fundraising organizations to raise additional funds by, for example, recruiting additional donors. Much more probative and material are the facts which demonstrate that the national political parties successfully recruited new donors when they were no longer permitted to receive unlimited contributions (*see* FEC Facts ¶¶ 385-91). According to reports of actual donor numbers from the national party committees themselves, the parties have added millions of new donors this decade, and the total number of federal donors is now dramatically different from the estimate done by Smith from the 2000 election cycle. (*See* FEC Resp. Mem. at 7-8.)

In addition, Smith did not disclose all the sources for this portion of his report, as required by Rule 26(a)(2)(B). At his deposition, Smith erroneously claimed to have obtained his number of total donors from FEC reports, which is impossible since contributors giving \$200 or less in calendar year are not itemized in FEC reports. He later admitted that the total number of donors had been derived from a national poll. The footnote explaining the source was contained in an amicus brief he submitted to the district court in *McConnell v. FEC*, but not in the identical chart in his expert report. (*See*

Smith Dep. at 136-37 & Dep. Exh. 5 at 1a.) Finally, Smith altered his report to covert it into a declaration after the deadline for disclosing reports. (*See infra* FEC Response to Plaintiffs' Proposed Fact ¶ 76.)

Smith's report also failed to comply with other requirements of Rule 26. Rule 26(a)(2)(B) provides that that expert reports must contain, among other disclosures, a list of all publications authored by the expert in the previous ten years, a list of all cases during the previous four years in which the witness testified at trial or was deposed as an expert, and the compensation paid to the expert for study and testimony in the case. Under Rule 37(c)(1), a party that fails to make these disclosures cannot use that witness's testimony unless its failure was substantially justified or harmless, or if the court decides that other sanctions are more appropriate. Other sanctions may include reasonable expenses, including attorney's fees, caused by the failure. *See Pell v. E.I. Dupont De Nemours & Co., Inc.*, 231 F.R.D. 186, 193-94 (D. Del. 1986) (explaining that remedies for failure to make Rule 26(a)(2)(B) expert disclosures can include precluding use of expert's report and re-deposition of witness); *Dunkin Donuts, Inc. v. Patel*, 174 F. Supp. 2d 202, 213-14 (D.N.J. 2001) (recommending that expert report which failed to include Rule 26(a)(2)(B) disclosures, including compensation and previous testimony, be struck). SpeechNow failed to disclose a list of all publications authored by expert Rodney Smith in the previous 10 years, a list of all cases during the previous four years in which he testified at trial or was deposed as an expert, and any compensation he received.

Furthermore, the Commission notes that Plaintiffs did not produce an earlier draft of Rodney Smith's report that had been submitted by Smith to plaintiffs' counsel (attached hereto as Exh. 155) until the day of his deposition. Without it, the Commission

was deprived of an opportunity to pursue lines of questioning that would have tested Smith's credibility.

For example, Smith's final report, used to cross-examine him at deposition (attached hereto as FEC Exh. 156), includes a statement that "the contribution limits mandated by campaign finance reform severely cripple [the ability of challengers and startup advocacy groups] to accumulate enough cash reserves to effectively finance their growth" (*id.* at 6). The early draft did not include this statement. Having not timely received a copy of the draft report, the Commission did not know that this statement had been inserted into the final report after it had been reviewed by counsel. If aware, counsel for the Commission could have asked about the statement's genesis, and further probed its evidentiary support.

Similarly, Smith's final report includes a statement, not included in the draft report, which asserts that due to campaign finance limits, "most non-wealthy challenger candidates and start-up advocacy groups are out of business before they ever get started." Without the draft report, the Commission was unaware that it had been inserted late in the process after interactions with plaintiffs' counsel, and was deprived of an opportunity to ask about the subject.

The late production of this draft report adversely affected the Commission's deposition of Smith, an opportunity to create doubt about his credibility. *See Elm Grove Coal Co. v. Director, O.W.C.P.*, 480 F.3d 278 (4th Cir. 2007) ("[W]e are unable, in these circumstances, to agree that [defendant's] expert witnesses could be properly and fully cross-examined in the absence of the draft reports [T]he disclosure to [plaintiff] of the pertinent draft reports . . . was potentially important to a full and fair cross-

examination and to the truth-seeking process.”); *EEOC v. United Parcel Servs., Inc.*, 149 F. Supp. 2d 1115, 1139-40 (N.D. Cal. 2000) (noting critical effect that late-produced draft reports and ensuing re-deposition had on expert’s credibility); *Bowers v. Nat’l Collegiate Athletic Ass’n*, 564 F. Supp. 2d 322, 342 (D.N.J. 2008) (imposing sanctions on plaintiff’s counsel where “[p]laintiff’s belated disclosure of draft expert reports deprived Defendants of the opportunity to test the independence and reliability of [the expert’s] opinion”).

66. In terms of donors who give more than \$200, there is roughly one donor for every 350 people or one donor out of every 200 households in the average congressional district. Smith Decl. at ¶ 25.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 65. In addition, by relying only on donors who give more than \$200, this statistic is especially divorced from reality due to the surge in new donors below \$200 in the intervening years since 2000. (*See* FEC Resp. Mem. at 7-8.)

67. There is an inverse functional relationship between a group’s fundraising costs and its average contribution. The higher the average contribution, the lower fundraising costs will be as a percentage of gross receipts. The reverse is also true. The lower the average contribution, the higher the fundraising cost will be. Smith Decl. at ¶ 32.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

68. Due to contribution limits, political fundraising has shifted from a low-volume, high-dollar process to a low-dollar, high-volume process. Smith Decl. at ¶ 9.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

69. When the average contribution amount decreases and the number of contributions received increases, the cost of generating additional contributions increases. Smith Decl. at ¶ 32. To make up for lost revenue resulting from the imposition of contribution limits, the volume of smaller contributions must increase as the average contribution amount declines. *Id.*

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

70. Thus, contribution limits result in unavoidably higher fundraising costs. Smith Decl. at ¶ 32.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

71. Every fundraising operation must spend money to acquire new donors. Smith Decl. at ¶ 35. The goal of this process, commonly referred to as “prospecting,” is to avoid losing money. *Id.*

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

72. The cost of acquiring a new donor is often higher than the amount actually received from that donor. Smith Decl. at ¶ 37.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at

9-10.) Moreover, Smith admits that his report contains no data that supports this specific proposition. (Smith Dep. at 83-84, FEC Exh. 15.)

73. If an organization breaks even in the prospecting process, it is using the first contribution it receives from a new donor to finance the cost of acquiring that new donor. Smith Decl. at ¶ 35. But if an organization cannot break even in its prospecting, then its growth must be partially funded out of general operating funds. *Id.*

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

74. There are only two ways a fundraising operation can grow. The first is by increasing the average contribution. Smith Decl. at ¶ 37. The other is by prospecting for more donors. Because contribution limits limit every group's ability to increase its average contribution amount, the only alternative is to acquire more donors. *Id.*

FEC RESPONSE: The Court should decline to enter this proposed fact, which is unsupported by any evidence regarding the burdens or actual cost of fundraising (*see* FEC Mem. at 9-10) and contradicted by the witness's own testimony. Smith admits that average contribution amounts can increase without a change in the contribution limits by convincing donors who have not given the legal maximum to contribute more. (Smith Dep. at 145-46, FEC Exh. 15.)

75. Acquiring more donors is extremely difficult if not virtually impossible without adequate cash reserves or a donor-acquisition program that can be operated on a break-even basis. Smith Decl. at ¶ 37.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

“B. Contribution Limits Inhibit the Ability of Groups Like SpeechNow.org to get Started.”

76. The data on average contributions to the top 10 non-party, federally focused 527 organizations in 2004 demonstrate that newly formed 527 political organizations tend to raise funds from a few large contributors, compared to more established 527 organizations. Declaration of Jeffrey Milyo, Ph.D., in Support of Plaintiffs’ Proposed Findings of Fact (hereinafter, “Milyo Decl.”) at ¶ 87.

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any findings of fact concerning Jeffery Milyo’s discussion of the “top non-party, federally focused 527 organization in 2004” because such groups are not representative of independent political committees generally, Milyo’s analysis of such groups is rife with misstatements and errors, and Milyo’s narrow data do not support his broad conclusions. (*See* FEC Resp. Mem. at 15-18.)

In submitting their proposed findings of fact, plaintiffs did not cite their previously disclosed expert reports from Jeffery Milyo and Rodney Smith; instead, plaintiffs relied on new “declarations” from both of their experts, documents the Commission saw for the first time when briefs were filed on October 28, 2008. Plaintiffs, in effect, have submitted supplemental expert reports contrary to the Federal Rules of Civil Procedure and the Joint Scheduling Order in this case. These new declarations create logistical difficulties for the parties, and in the case of Milyo’s declaration, include new substantive argument and deletions of required information.

When a party relies on an expert witness, Rule 26(a)(2) of the Federal Rules of Civil Procedure requires an expert report to include a complete statement of all the expert’s opinions, the witness’s qualifications, a list of other cases in which the witness was involved, and the compensation that witness will receive for his study and testimony. (*See also supra* Response to SN Facts ¶ 65.) The Joint Scheduling Report in this case

required all primary expert reports to be produced by August 15, 2008. After that date, expert reports may only be supplemented until 30 days before trial (*see* Fed. R. Civ. P 26(e)(2), 26(a)(3)), but “only when a party discovers the information it has disclosed is incomplete or incorrect.” *Coles v. Perry*, 217 F.R.D. 1, 4 (D.D.C. 2003). “Fed. R. Civ. P 26(e) does not grant a license to supplement a previously filed expert report because a party wants to” *Id.* Here, plaintiffs can offer no justification for the new declarations. As stated in *Coles*, the purpose of requiring the disclosure of expert reports “is to prevent unfair surprise at trial and to permit the opposing party to prepare for the expert’s cross examination.” 217 F.R.D. at 4. Conversely, “when the expert supplements her report by addressing a new matter after discovery has ended, the very purpose of the rule is nullified.” *Id.* Plaintiffs’ reliance on their experts’ new declarations is thus inappropriate.

While large portions of the new declarations merely restate the expert reports, and thus do not significantly prejudice the Commission, even those sections unnecessarily create logistical headaches for the parties and the Court. When the Commission took the depositions of Smith and Milyo, a significant portion of their testimony commented on specific sections and paragraphs of their reports. Now, to discuss deposition testimony referencing the reports, additional citations to the declarations may also be needed.

In addition to the unnecessary citation complications introduced by plaintiffs’ new expert declarations, Milyo’s declaration also includes new substantive argument and conceals important information. For example, in his new declaration, Milyo has largely rewritten the portion of his expert report concerning the “Equi-Marginal Principle.” (*Compare* Milyo Decl. at ¶¶ 34-39 *with* “Report on *SpeechNow.org et al. v. FEC*” by

Jeffery Milyo, (“Milyo Report”) § 4.2, Milyo Dep. Exh. 1, FEC Exh. 157.) Paragraph 36 of the new declaration contains completely new argument and paragraphs 37 through 39 also contain substantive additions. Plaintiffs’ proposed findings of fact paragraphs 99-101 rely directly on these new sections. Milyo’s application of the Equi-Marginal Principle was discussed at length during his deposition, and it appears that plaintiffs believe that it needs additional support. (See FEC’s Response to SN Facts 19-20; Milyo Dep. at 193-204, FEC Exh. 12.) Paragraph 44 of Milyo’s declaration, discussing both the “equi-marginal principle” and the concept of “revealed preference,” is also a new addition to his report. (Compare Milyo Decl. at ¶ 44 with Milyo Report § 4.3, FEC Exh. 157.) When discussing the Equi-Marginal principle, plaintiffs should be required to rely on Milyo’s original report rather than his new declaration.

Milyo’s new declaration also omits several pieces of information required by the Federal Rules of Civil Procedure to appear in expert reports. For example, the declaration removes information about how much Milyo is being paid to be a witness in this case. Milyo’s declaration also removes information about expert reports and testimony he has given in previous cases. Notably, in 2007, Milyo was hired by the Institute for Justice, counsel for plaintiffs in this case, to produce a different report concerning “a regulatory burden associated with campaign finance disclosure” in *Sampson v. Coffman*. (Milyo Dep. at 25, FEC Exh. 12; Milyo Report at 4, Milyo Dep. Exh. 1, FEC Exh. 157.) In addition to preparing an expert report in *Sampson v. Coffman*, Milyo was paid \$30,000 by the Institute for Justice to write a report entitled “Measuring Campaign Finance Disclosure Costs” in 2007. (Milyo Report, Curriculum Vitae, FEC Exh. 157.) These are the kinds of matters that courts often examine when probing for

bias. Milyo is also a “senior fellow” at, and recently received a stipend from, the Cato Institute, a think-tank at which Edward Crane, a plaintiff in this case, is the President. (Milyo Report, Curriculum Vitae, FEC Exh. 157; Milyo Dep. at 41, FEC Exh. 157.) Similarly, Milyo serves as an academic advisor for the Center for Competitive Politics, also counsel for plaintiffs in this case. (Milyo Report, Curriculum Vitae, FEC Exh. 157.) Given that Milyo removes information from his declaration related to his potential bias, the Court should enter a finding of fact detailing his relevant past work and associations.

77. With the exception of Swift Vets and POWs for Truth, those 527s with the smallest average contributions (and most numerous contributors) were all either established prior to 2003, or are associated with a well-established organization. Milyo Decl. at ¶ 88. Newer groups such as America Coming Together, the Joint Victory Fund, the Media Fund, Progress for America, and Citizens for a Strong Senate all relied on relatively few large contributors. *Id.*

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any findings of fact concerning Milyo’s discussion of the “top non-party, federally focused 527 organization is 2004” because such groups are not representative of independent political committees generally, Milyo’s analysis is rife with misstatements and errors, and Milyo’s narrow data do not support his broad conclusions. (*See* FEC Mem. at 15-18.)

78. America Coming Together received seed funding from four individuals, in the amount of \$ 2.025 million, before there was a public announcement of its existence. It then received additional seed funding—including \$ 2 million apiece from George Soros and Peter Lewis—that was widely reported in the media and served the purpose of quickly and effectively assuring political donors of the credibility and competence of this new organization, while at the same time signaling that among the many competing groups that would be working to support progressive ideas and candidates, this was one that political contributors should focus on. Milyo Decl. at ¶ 89. Swift Vets & POWs for Truth received nearly all of its seed funding from just three donors. *Id.* at ¶ 90.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact in that it relies on Milyo's unsupported conjecture regarding the effect of large contributions. As discussed in the Commission's brief, Milyo presents no evidence whatsoever regarding the role of "seed funding" in the formation of political organizations or what significance large contributions to an independent group have for potential donors. (*See* FEC Mem. at 15-16, 18.)

79. Without large initial contributions, new political organizations, especially those that are issue-oriented and do not benefit from an association with some pre-existing trade association or labor union, are less effective participants in the public debate. Milyo Decl. at ¶ 92. Limits on contributions to political groups are likely to be particularly harmful to new and independent political organizations. *Id.* at ¶ 93.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact in that it relies on Milyo's unsupported conjecture regarding the effect of large contributions. As discussed in the Commission's brief, Milyo presents no evidence regarding the role of "seed funding" in the formation of political organizations or what significance large contributions to an independent group have for potential donors. (*See* FEC Mem. at 15-16.) Importantly, Milyo fails to consider or even attempt to account for the thousands of registered non-connected political action committees that operate successfully. (*See* FEC Facts ¶¶ 376-79, 383).

80. Under contribution limits, unless a start-up group happens to be advocating or opposing a high-profile issue that is receiving tens of millions of dollars of free publicity via the national media, or the group has some special connection to a corporation or labor union, that group will not be able to raise enough money to have a meaningful impact on any election. Smith Decl. at ¶ 11.

FEC RESPONSE: SpeechNow's proposed facts claim that the Act's contribution limits prevent it from raising the "seed money" necessary to "get started." (*See* SN Facts

¶¶ 83, 85, 87, 88.) SpeechNow nowhere specifies how much money is necessary to meet this elusive threshold, and the Commission is aware of no Court that has ever held a contribution limit unconstitutional simply because a would-be political actor claims it cannot raise enough “seed money,” or of any Court that has otherwise invoked the concept. (See FEC Mem. at III.C.)

Nevertheless, SpeechNow appears indeed capable of raising whatever “seed money” it purports to need. SpeechNow has received a considerable amount of free publicity (FEC Facts at ¶¶ 403–08), and attracted a significant number of supporters and potential contributors (*id.* at ¶¶ 396–401), but has chosen not to accept any contributions during the pendency of this litigation, and declined any of the contributions offered to date (*id.* at ¶¶ 398-400.) (*See also* FEC Resp. Mem. at 15-16.) In any event, because the Constitution does not grant competing political actors any rights to equal publicity, equal resources, or equal political influence, this fact is irrelevant, and the Court should not enter it. (*See id.* at 14)

81. Most of the big money raised via the Internet has been the direct result of a candidate and/or cause benefitting from a huge amount of free publicity. Smith Decl. at ¶ 42. This makes raising money via the Internet out of reach for the vast majority of non-wealthy candidates and start-up organizations. *Id.*

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 80.

82. Because the cost of acquiring new donors is often greater than the amount received from a new donor, small groups usually start at a loss and remain there until they go into debt and/or cease to exist. Smith Decl. at ¶ 10.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.) In fact, Smith admits (1) that his report contains no data that supports this specific

proposition (Smith Dep. at 83-84, FEC Exh. 15) and (2) that in his report he fails to identify a single group that went “out of business” due to contribution limits (*id.* at 123).

83. As a result, it is crucial for new organizations to have seed money that allows them to begin to advance their mission before a successful program of larger-scale fundraising can take place. Smith Decl. at ¶ 35. This is particularly true when an organization is working on an issue for which there is not an overwhelming and sustained amount of outrage throughout all quarters of the public and the media that generates a strong demand for the change favored by the organization. *Id.* at ¶ 11; Keating Decl. at ¶ 41; Crane Decl. at ¶ 10.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶¶ 80, 82.

84. Right now, the issue of restrictions on free speech from campaign finance laws is not such an issue. Keating Decl. at ¶ 41.

FEC RESPONSE: The Constitution does not grant competing political actors any rights to equal publicity, equal resources, or equal political influence. (*See* FEC Resp. Mem. at III.C.) Consequently, the publicity garnered by campaign finance issues in general, or by SpeechNow in particular, is irrelevant, and the Court should decline to enter this fact.

85. SpeechNow.org will need to spend substantial funds on advertisements in order to raise the profile of this issue and thus add more donors, both large and small, to the cause. Keating Decl. at ¶ 41. However, without initial seed funding, SpeechNow.org lacks the funds necessary to convince donors that it is a viable going concern that has already produced advertisements consistent with its mission. *Id.*; Crane Decl. at ¶ 10.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 80.

86. Convincing donors that SpeechNow.org is a viable going concern—which SpeechNow.org can only do by producing and running advertisements—is a prerequisite to the success of any larger-scale fundraising effort. Keating Decl. at ¶ 41; Crane Decl. at ¶ 10; Smith Decl. at ¶ 22.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 80.

87. Because of the contribution limits, SpeechNow.org and groups like it cannot receive the seed funding, in the form of large donations over the limits,

that they need to get started and have an effective impact on elections. Keating Decl. at ¶ 41; Smith Decl. at ¶ 22.

FEC RESPONSE: *See* FEC Response to Plaintiffs' Proposed Fact ¶ 80.

88. The longer SpeechNow.org has to go without seed funding, the more it will be delayed in producing and running its political advertisements and thus in undertaking larger-scale fundraising based on a reputation for taking actions that advance its mission in the real world. Keating Decl. at ¶ 43.

FEC RESPONSE: *See* FEC Response to Plaintiffs' Proposed Fact ¶ 80.

89. Even assuming that SpeechNow.org could somehow raise enough money in increments of \$5,000 or less per donor to pay for its advertisements, the contribution limits applicable to political committees would, by making it harder to gather funds, still greatly limit the number of times it could run those ads. Keating Decl. at ¶ 44. The limits would also restrict SpeechNow.org's ability to run additional advertisements concerning other federal candidates in other races. *Id.*

FEC RESPONSE: Evidence in the record suggests that more money can be raised by seeking out new donors. (*See* FEC Resp. Mem. at III.A.) SpeechNow has not even attempted any fundraising. The Court thus should not enter a finding of fact based on Mr. Keating's speculative and conclusory testimony.

90. Contribution limits not only deprive groups like SpeechNow.org of the large donations necessary to get off the ground, but they also deprive such groups of the signal that a large donation sends to potential donors: that the new organization has the potential to be effective. Milyo Decl. at ¶ 54. Large donations also resolve the uncertainty of potential donors who would otherwise either not contribute or would be forced to "play it safe" and donate to other, more established groups, even when those groups do not represent the donors' most favored cause. *Id.*

FEC RESPONSE: The Court should decline to enter Plaintiffs proposed finding of fact in that it relies on Milyo's unsupported conjecture regarding the effect of large contributions. As discussed in the Commission's brief, Milyo presents no evidence regarding the role of "seed funding" in the formation of political organizations or what significance large contributions to an independent group have for potential donors. (*See*

FEC Mem. at 18.) Specifically, Milyo presents no empirical nor anecdotal evidence of even a single donor being forced to “play it safe” or donate to “groups that do not represent the donors’ most favored cause.” (Milyo Decl. ¶ 54.)

“C. Contribution Limits Make it Harder for the Individual Plaintiffs to Associate for the Purpose of Speaking Effectively.”

91. The basic economic concepts of specialization and division of labor apply in the setting of groups that engage in any sort of advocacy, including independent express advocacy: some individuals have a comparative advantage in funding a cause, some in articulating a message for a cause, and some in developing a strategy for disseminating that message. For this reason, individuals who come together as political groups do so because such a voluntary association makes them more effective in their cause. Milyo Decl. at ¶ 50.

FEC RESPONSE: The Plaintiffs’ proposed finding of fact is irrelevant because registering as a political committee would not prevent them from coming together to take advantage of any specialization or division of labor; the only constraint is on how *much* money any one individual can contribute to a political committee. (See FEC Mem. at 19.) Additionally, Milyo’s claims about why individuals come together to form political groups are unsupported conjecture. (See Milyo Decl. ¶ 50.) Milyo has not conducted any investigations, nor does he cite any investigations concerning why individuals forms political groups or what makes a political group “effective.” *Id.*

92. The individual plaintiffs wish to join together and associate with each other and with SpeechNow.org in order to take advantage of the specialization, division of labor, and economies of scale that association affords them. For example, David Keating possesses the knowledge and experience to produce and broadcast advertisements and to operate a group like SpeechNow.org, but, alone, he lacks the financial resources. Keating Decl. at ¶ 48. Ed Crane has a relatively large donation to offer SpeechNow.org, but he lacks the time to operate the group or to produce and broadcast ads. Crane Decl. at ¶ 4. Fred Young has the financial resources to fund some of SpeechNow.org’s advertisements, but he lacks the time, knowledge, and experience to produce ads or operate a group like SpeechNow.org. Young Decl. at ¶ 4. Brad Russo and Scott Burkhardt lack both the time and experience and the resources to fund or operate SpeechNow.org, but by donating to SpeechNow.org and associating with its supporters and members,

they are able to amplify their voices beyond what they would be able to achieve on their own. Russo Decl. at ¶ 4; Burkhardt Decl. at ¶ 4.

FEC RESPONSE: Plaintiffs are free to come together to take advantage of any specialization, economies of scale or advantageous division of labor in operating SpeechNow; they are merely limited in how much money they can each contribute to the group. (*See* FEC Resp. Mem. at § III.E).

93. However, contribution limits make it impossible for individuals to take full and effective advantage of the specialization, economies of scale, and division of labor that group association affords. The effect of a contribution limit on SpeechNow.org and groups like it is to punish individuals, such as the individual Plaintiffs in this case, who associate in groups for the purpose of advocating for or against political causes by limiting the funds they can devote to such causes. Milyo Decl. at ¶¶ 49-51.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because the contribution limits that apply to political committees in no way "punish" individuals who seek to associate for the purpose of making political speech. Plaintiffs are free to come together to take advantage of any specialization, economies of scale or advantageous division of labor in operating SpeechNow; they are merely limited in how much money they can contribute to the group. (*See* FEC Mem. at 19.)

94. This, in turn, will dissuade some individuals from participating in political groups at all. Instead, such individuals must "go it alone" or even abandon their desire for political expression, when in the absence of contribution limits they would have been more effective as part of a group. Milyo Decl. at ¶¶ 49-51.; Keating Decl. at ¶ 52; Young Decl. at ¶¶ 4, 6; Crane Decl. at ¶¶ 4, 6, 10; Russo Decl. at ¶¶ 4, 6; Burkhardt Decl. at ¶¶ 4, 6.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because, as discussed in the Commission's brief, Milyo offers no evidence whatsoever that anyone has ever been dissuaded from participating in political groups or compelled to go it alone or abandon a desire for political expression because of contribution limits. (*See* Milyo Dep. at 240-241, 244-45, 246, FEC Exh. 12.)

Additionally, none of the Plaintiffs claim that limiting their contribution to \$5000 per

year will have unduly burdensome implications for them. (See SN Facts ¶ 94; Keating Decl. ¶ 52; Young Decl. ¶¶ 4,6; Crane Decl. ¶¶ 4, 6, 10; Russo Decl. ¶¶ 4, 6; Burkhardt Decl. ¶¶ 4,6.)

95. Contribution limits also inhibit the information that large contributions convey about which groups are more or less desirable from the donors' standpoint. Milyo Decl. at ¶¶ 52-57. Economies of scale in political communication mean that one large group with a mission can be more effective than many small groups with the same mission. Potential donors know this and would prefer to focus their giving on one group, but they must determine which group is best. *Id.* at ¶ 55. A political patron's large initial contribution to a group sends an unambiguous signal to other political contributors as to which group to focus their giving on. This facilitates the ability of individuals to associate more efficiently and to articulate their political opinion more effectively. *Id.* at ¶¶ 53-56.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because it is based solely on Milyo's unsupported conjecture. He offers no evidence whatsoever to support his claim that "one large group with a mission can be more effective than many small groups with the same mission," or that any potential political donors believe this to be the case. (See Milyo Decl. ¶¶ 52-57.) Indeed Milyo's commentary is strictly theoretical; he presents no evidence, does no investigation, nor does he cite to any investigation of the role that "political patrons" play within political committees. *Id.* In his deposition, Milyo conceded that he did not present any empirical, analytical, or systematic evidence for his claims regarding the role or effect of large "political patrons." He explained, "in terms of identifying the systematic treatment effect on prohibitions on contributions of a certain size on the formation of groups, I did not present that sort of systematic estimate of the treatment effect." (Milyo Dep. at 256-257, FEC Exh. 12). He does not know how large contributions from "political patrons" actually affect political groups. Additionally, Milyo simply does not consider the thousands of independent PACs that do raise money and communicate effectively

without “political patrons.” (See FEC Facts ¶¶ 376-79, 383). Finally, any proposed findings of fact regarding “political patrons” are irrelevant because there is no constitutional right to such “patronage.”

96. Limits on contributions to groups like SpeechNow.org prevent political patrons from either seeding new groups or helping to organize individuals into joining and supporting more effective political groups. Milyo Decl. at ¶ 57.

FEC RESPONSE: The Court should decline to enter Plaintiffs’ proposed finding of fact because, as above, Milyo presents no evidence, does no investigation, nor does he cite to any investigation of the role that “political patrons” play within political committees or what determines whether or not a political group is effective. (See Milyo Decl. ¶¶ 52-57.) Additionally, any proposed findings of fact regarding “political patrons” are irrelevant because there is no constitutional right to such “patronage.”

97. In sum, limits on contributions to political groups restrict the amount and effectiveness of political expression by these groups, as well as the amount and effectiveness of political expression by individuals that wish to contribute to such groups. Milyo Decl. at ¶ 58.

FEC RESPONSE: The Court should decline to enter Plaintiffs’ conclusory proposed finding of fact because their contention is based solely on Milyo’s unsupported conjecture. (See SN Facts ¶¶ 91-97; Milyo Decl. ¶¶ 50-58.) Milyo presents no evidence or support for his contention that contribution limits reduce the effectiveness of political expression, or even what determines whether or not a political group is effective in the real world of national political discourse. *Id.* Additionally, neither Plaintiffs nor Milyo presents any evidence in this section that contribution limits actually reduce the “amount” of political expression that a group is able to make. *Id.*

“D. Contribution Limits Restrict the Amount of Funds Available to Groups Like SpeechNow.org for Independent Expenditures.”

98. Communicating a political message to a large group of voters is an expensive proposition that requires a significant amount of money for the message to be heard. Smith Decl. at ¶ 8; Keating Decl. at ¶¶ 22-24.

FEC Response: The evidentiary support for this proposed fact consists of a conclusory, unsupported statement by SpeechNow's expert Rodney Smith and David Keating's notions of "ideal" advertising buys. Keating posits that an ideal advertising buy would garner at least 1,000 gross ratings points, enough to allow its "message to sink in." Keating declares that in a competitive election environment, such as "in a statewide [Senate] race . . . it is important to reach as many people in the state as possible." (Keating Decl. ¶ 23.) While it is often true that communicating to large groups of voters requires significant amounts of money -- with the Internet creating more exceptions than ever (*c.f.* FEC Resp. Mem. at III.B.) -- this proposed fact is premised on the notion that there is a threshold level of political influence that contribution limits must accommodate. But as the Commission has explained (*See* FEC Mem. at III.C), the Constitution does not grant competing political actors any rights to equal political influence and the Court should decline to enter this proposed fact.

99. As a result, any group that wants to speak out effectively will want to raise money in the most efficient way possible—that is, at the lowest cost per contributed dollar—in order to allow it to raise sufficient funds quickly enough to have an impact on the election. Smith Decl. at ¶ 26; Milyo Decl. at ¶ 37. Put another way, the more money that a group spends to raise its funds, the less money it will have to spend on its independent expenditures. Milyo Decl. at ¶¶ 37-39.

FEC RESPONSE: Plaintiffs assert that "the more money that a group spends to raise its funds, the less money it will have to spend on its independent expenditures." The only support for this assertion is several paragraphs of Milyo's new declaration. (SN Facts ¶ 99; Milyo Decl. ¶¶ 37-39.) However, Plaintiffs' statement is an inaccurate oversimplification of Milyo's claims—regardless of their other flaws. *Id.* Milyo's

contentions speak to the point that if a group is compelled to raise money in an inefficient manner, it will not be able to raise the highest conceivable amount of funds. *Id.* This is not, however, what Plaintiffs' proposed finding of fact states. Indeed, it is quite possible that the more money that a group spends on fundraising, the more contributions that it will gather, and thus, the more money it would have to spend on independent expenditures.

100. A number of basic economic principles support this conclusion. First, under the "equi-marginal principle," a group will pursue contributions from that donor pool that involves the lower marginal cost of raising funds per donor dollar. Milyo Decl. at ¶ 37. Groups are limited in the amount of time, effort, and resources that they may devote to fundraising and are thus forced to make choices about how to allocate their scarce resources in order to maximize the amount of money that they have. Thus, if given the opportunity to pursue funds from large donors or small donors, a group seeking to maximize its funds available for independent expenditures will allocate its efforts to the group of donors that involve the lowest cost per donor dollar raised. *Id.* If the costs are higher for one group of donors—small donors, for example—the organization can still reallocate resources to raising money from the group of large donors in order to be able to raise enough funds to finance its independent expenditures. *Id.* at ¶ 38.

FEC RESPONSE: As discussed in detail in the Commission's brief, the Court should decline to enter any of the Plaintiffs' proposed findings of fact regarding Milyo's application of the "equi-marginal principle" because his theoretical discussion is undercut by the factual history of "soft money" and political party fundraising. He does not consider any of the realities of political fundraising (including what counts as a "large" or "small" contribution, what the marginal costs of raising additional large and small contributions are, or the relative burdens of raising specific amounts of money for independent expenditures), and indeed, Milyo concedes that the effect of the "equi-marginal principle" could be that SpeechNow raises a penny less under contribution limits than it would have in an "unconstrained" environment. (*See* FEC Mem. at 19-20.)

101. Under contribution limits, however, an organization is forced to raise funds from one group—small donors—because large donors are prohibited from contributing

money to the group. Milyo Decl. at ¶ 39. According to the “law of increasing opportunity costs,” (also known as “the law of diminishing returns”) the cost of raising funds from two pools of donors—one of small donors and one of large donors—will increase with the amount of money already raised from either pool of donors. *Id.* at ¶ 37. Put another way, by restricting the donor pool, contribution limits make donor dollars more scarce, requiring groups trying to raise funds to pursue greater numbers of donors—at a greater marginal cost per dollar raised—for the money they need to fund their independent expenditures. *Id.* at ¶ 39. Thus, the equi-marginal principle implies that any constraint on fundraising will lower a group’s total funds received, and therefore also lower its ability to make independent expenditures. *Id.*

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any of the Plaintiffs’ proposed findings of fact regarding Milyo’s application of the “equi-marginal principle” because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising. He does not consider any of the realities of political fundraising, and indeed, Milyo concedes that the effect of the “equi-marginal principle” could be that SpeechNow raises a penny less under contribution limits that it would have in an “unconstrained” environment. (*See* FEC Mem. at 19-20.)

102. Second, the concept of “Revealed Preference” also implies that any constraint on fundraising, such as contribution limits, will restrict a group’s ability to make independent expenditures. Milyo Decl. at ¶ 40. In an unconstrained environment, a group’s mix of donations from small and large contributors represents the group’s maximal ability to raise funds for independent expenditures. *Id.* at ¶ 41. In other words, the mix reveals the group’s best effort at maximizing the funds it has available for independent expenditures. *Id.* Any contribution limit will cause a deviation from the mix of donations that would have occurred in the unconstrained environment, and will yield a less preferred outcome for the group and its ability to make independent expenditures. *Id.* at ¶ 43.

FEC RESPONSE: As in the case of Milyo’s discussion of the “equi-marginal” concept, and as discussed in the Commission’s brief, the Court should decline to enter any of the Plaintiffs’ proposed findings of fact regarding Milyo’s application of the “revealed preference” principle because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising. He does not consider any

of the realities of political fundraising (such as whether or not a group is able to determine what kinds of contributions it should pursue in order to maximize its fundraising, the comparative burdens of seeking large or small contributions, or the extent to which external circumstances could affect how a group raises political contributions), and he makes no claims about the actual extent to which contribution limits would affect a group's fundraising in the real world. (*See* FEC Mem. at 20-22.)

103. In sum, any contribution limit that generates a deviation from the pattern of contributions that would be observed in an unconstrained environment must be an actual impediment to a group's ability to raise and spend funds, and so must yield a less preferred outcome for the group—that is, lower independent expenditures. Milyo Decl. at ¶ 43. Consequently, if evidence shows that political groups raise money from large contributors when permitted to do so, “revealed preference” would indicate that contribution limits do in fact harm the groups and result in less spending on independent expenditures. *Id.*

FEC RESPONSE: The Court should decline to enter any of the Plaintiffs' proposed findings of fact regarding Milyo's application of the “revealed preference” principle because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising, he does not consider any of the realities of political fundraising, and he makes no claims about the actual extent to which contribution limits would affect a group's fundraising in the real world. (*See* FEC Mem. at 20-22.)

104. An analysis of data from the 2004 election cycle demonstrates that, in fact, groups do reveal a preference for larger over smaller contributions. Milyo Decl. at ¶ 76.

FEC RESPONSE: The Court should decline to enter any of plaintiffs' proposed findings of fact based on Milyo's application of the “revealed preference” principle because he mistakenly claims that the fundraising habits of unregistered 527 groups in 2004 are representative of the preferences of all independent political groups. As

discussed in the Commission's brief, Milyo's focus on the 2004 527 groups is not applicable to all political committees because (i) it ignores the many unconnected committees that chose to register with the FEC and collect contributions within the limits, (ii) the amount of large donations that many of the 527s received is skewed because contributions within the limits were more likely to be given to their associated PACs or other political entities, and, (iii) as Milyo concedes, the 527s he discusses may not even be representative of other 527s. (*See* FEC Mem. at 17, 20-22.)

105. Plaintiffs' expert, Dr. Jeffrey Milyo, compared the pattern of individual contributions in the 2004 election cycle to the top (in terms of total receipts) non-party, federally focused 527 organizations and to their associated federal PACs. Milyo Decl. at ¶¶ 76-79. At the time, those 527 organizations were not subject to contribution limits, while the PACs were. As a result, the comparison demonstrates the impact of contribution limits on PACs as opposed to 527s. *Id.* at ¶¶ 75, 79.

FEC RESPONSE: As discussed in the Commission's brief, Milyo's focus on the 2004 527 groups is not applicable to all political committees because (i) it ignores the many nonconnected committees that chose to register with the FEC and collect contributions within the limits, (ii) the amount of large donations that many of the 527s received is skewed because contributions within the limits were more likely to be given to their associated PACs or other groups, and, (iii) as Milyo concedes, the 527s he discusses may not even be representative of other 527s. (*See* FEC Mem. at 15-17.) Furthermore, as Milyo notes in his declaration, "only contributions totaling more than \$200 in a given year must be itemized and reported to the IRS." (Milyo Decl. ¶ 74.) Accordingly, Milyo's data regarding the fundraising of 527s in 2004 may ignore numerous contributions less than \$5,000.

106. Half of the 527 groups received average contributions that are well above the \$5,000 limit for PACs, including several groups with average contributions of \$100,000 to more than \$500,000. Milyo Decl. at ¶ 76.

FEC RESPONSE: (*See* Resp. to SN Fact ¶ 105.)

107. For several of the groups, contributions above the \$5,000 limit accounted for the vast majority of funds they raised. Milyo Decl. at ¶ 80. For example, large individual contributions (those over \$5,000) accounted for 98.3% of the funds from individual contributors to America Coming Together, 79.7% of the contributions to MoveOn.org, 88.6% of contributions to the New Democrat Network, and 76.5% of contributions to the Club for Growth. *Id.* In addition, between 48% and 82% of the individual contributions to these groups were in amounts of \$100,000 or more. *Id.* Thus, most of the funds raised by these organizations were in amounts that would have exceeded the annual limit on individual donor contributions to political committees, as well as the biennial aggregate limit on individual donors. *Id.*

FEC RESPONSE: (*See* Resp. to SN Fact ¶ 105.)

108. Five hundred and fifty-five persons made contributions of \$5,000 to the PACs associated with these groups. Milyo Decl. at ¶ 82. Given the distribution of contributions to the associated 527 organizations—that is, many people contributed more than \$5,000 to 527s—it is reasonable to assume that many of the donors to PACs would have given larger amounts to the PACs had they been allowed to do so. *Id.*

FEC RESPONSE: (*See* Resp. to SN Fact ¶ 105.)

109. For example, had the top 271 maximum contributions to the America Coming Together PAC exhibited a similar distribution across contribution amounts as did the large contributions to the America Coming Together 527, then the PAC would have raised over \$22 million more dollars than it did in 2003-2004 (or about a 66% increase). Milyo Decl. at ¶ 79.

FEC RESPONSE: The Court should decline to enter plaintiff's proposed fact because donors to a PAC like ACT's would be extremely unlikely to replicate the amount of money raised for ACT itself if they were free to give as much as they wanted to ACT PAC. Donors are usually directed to first give to a PAC, and then, if they are interested in providing additional funds, to give to the connected 527. (*See* Wilcox Rept. at 6, FEC Exh. 1; Rozen Decl. ¶ 11, FEC Exh. 3; *McConnell v. FEC*, 540 U.S. 93, 125 n.15.) Contributors to ACT PAC thus would not contribute in the same ratio to ACT PAC if its

limits were lifted: if contributors, wanted to give more, they likely would already have done so to the connected 527.

110. For the top 527 political organizations without PACs (Joint Victory Campaign 2004, Media Fund, Progress for America, Swift Vets & POW for Truth, College Republican National Committee, Citizens for a Strong Senate), four of these six groups raised more than 99% of their funds from individual contributors in amounts greater than \$5,000; in fact, all but one of these groups raised most of its funds from individual contributors in amounts of \$100,000 or more. Milyo Decl. at ¶ 83.

FEC RESPONSE: (See FEC Resp. to SN Fact ¶ 105.)

111. A random sample of 527 organizations outside the top ten 527s (Marijuana Policy Project, International Brotherhood of Electrical Workers, League of Conservation Voters, Young Democrats, Ocean Champions Voter Education Fund, Justice for America) shows that, in most cases, 80-99% of the individual contributions to these groups were in amounts greater than \$5,000, and a majority of these funds were contributed in amounts of \$100,000 or more. Milyo Decl. at ¶ 84.

FEC RESPONSE: A random sample of 527 organizations outside the top ten 527s (Marijuana Policy Project, International Brotherhood of Electrical Workers, League of Conservation Voters, Young Democrats, Ocean Champions Voter Education Fund, Justice for America) shows that, in most cases, 80-99% of the individual contributions to these groups were in amounts greater than \$5,000, and a majority of these funds were contributed in amounts of \$100,000 or more. Milyo Decl. at ¶ 84.

FEC RESPONSE: The Court should decline to enter SpeechNow's proposed finding of fact because Milyo's further sample of 527 groups is not "random" or representative of political committees. Accordingly, his analysis does not elucidate the nature of independent political groups' fundraising practices.

Although Milyo concedes in his declaration that the top 527 groups from 2004 may be "unrepresentative," he attempts to shore up his claims by examining "six more 527 political organizations [selected] in a manner that generates an essentially random sample." (Milyo Decl. ¶ 84.) At his deposition, Milyo explained how he decided to examine these particular six groups, as follows:

[T]he way in which data on disclosure reports from the 527 organizations is organized by the Center for Public Integrity is that there's a set of alphabetical links, And one can click on an alphabetical letter, which will then bring up groups which are 527 organizations. And so what I did is selected ... letters corresponding to my last name and first initial. You'll see it's M-I-L-Y-O-J. Originally, I was only going to do M-I-L-Y-O, but it left an ugly hole in the table ... [a]nd that what I did, once I selected that letter, was I looked for the first example of a 527 group which had some nontrivial individual contributions.

(See Milyo Dep. at 318.) When questioned about the validity of his methodology, whether he did any "statistical analysis of any kind to determine whether the information about these six groups would be statistically representative or relevant about the whole realm of 527s," Milyo conceded that he "did not" and added that "Here's some other groups. Here's the method by which they were selected, and I'm not really representing more than that about these groups." (Milyo Dep. at 319-320.) Further admitting that he made no claim about whether or not these six groups were a representative sample, Milyo concluded that "if you don't like it, you can feel free to throw out that." (Milyo Dep. at 320.)

Milyo's discussion of these six additional groups purported to address a major concern regarding his analysis of 527s generally, namely, that they were "unrepresentative." (Milyo Decl. ¶ 84.) However, Milyo's attempt to bolster his conclusions fails for the same reasons and renders his analysis unreliable. Accordingly, all of SpeechNow's proposed findings of fact relying on Milyo's analysis of 527 fundraising in 2004 should be discounted. (See SN Facts ¶¶ 104-112).

112. In sum, data on the size distribution of contributions to prominent 527 organizations and PACs confirm that limits on contributions to political groups reduce the funds available to those groups and impose significant burdens on their ability to speak effectively. Milyo Decl. at ¶¶ 83, 85, 86.

FEC RESPONSE: For all of the reasons stated above, the Court should decline to enter the plaintiffs' conclusory proposed facts regarding the alleged burden of contribution limits based on the past fundraising practices of 527 groups. The 2004 527 groups are not representative of independent political groups generally; Milyo's analysis of the 527 groups is rife with errors, sloppy analysis, and mischaracterization; and Milyo's theoretical discussion of economic "principle" does not contain any relevant factual information about how fundraising works for actual political groups. (*See* FEC Mem. at 15-22.)

113. According to the California Fair Political Practices Commission, "If the top 25 independent expenditure committees in California had to adhere to the same contribution committee limits as candidate controlled committees, there would have been a reduction of \$61,705,519 in special interest money from 2001 through 2006." Simpson Decl. Ex. 18, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, a report of the California Fair Political Practices Commission, dated June 2008 at 4; Simpson Decl. Ex. 19, Excerpts from the Deposition Transcript of Susan Swatt, taken October 1, 2008 at 41:23-42:20; Simpson Decl. Ex. 20, Excerpts from the Deposition Transcript of Ross Johnson, taken October 1, 2008 at 59:760:5, 71:22-73:18 ("If at some time, hypothetically in the past or hypothetically in the future, a limit had been placed on the size of their independent expenditures—I'm sorry, on the contributions that they could receive—these groups at least would not have been able to spend the kinds of money that they did."); Milyo Decl. at ¶ 71.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because it mischaracterizes the California Fair Political Practices Commission's ("FPPC") report, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, and the deposition testimony of the FPPC Chairman, Ross Johnson. The report does contain the sentence quoted by the plaintiffs, but the import is that many millions of dollars were given to independent expenditure committees in amounts far greater than the current contribution limits to candidates, not that independent expenditure committees would necessarily raise tens of millions of dollars less if forced to seek money under

contribution limits themselves. The following exchange from Chairman Johnson's deposition makes this clear:

Q. Correct me if I'm misstating your prior testimony, but you were saying that if we limited the amount of money that an individual could give to independent expenditure committees, that that would reduce the total amount of independent expenditures in California.

A. No, I don't think I said that. I think I said – if I did, then that was not what I intended. What I intended to say was that I think an imposition of a limit on the amount a person could contribute to an independent expenditure committee would be a significant step in the right direction. And I believe that the sum of these enormous independent expenditures from a handful of large special interest contributors would be impacted by that, and so it would be a positive step.

If a contribution limit were in place in terms of what you could contribute to an independent expenditure committee ... nothing to keep you from having hundreds of thousands of people.

(*See* Johnson Dep. at 61-62.) The total amount of money that independent groups would not necessarily decrease because they could still seek contributions from “hundreds of thousands of people.” When asked directly about the quoted passage from the report and whether “there really would have been \$61,705,919 less money spent in the form of independent expenditures from 2001 and 2006,” Chairman Johnson responded as follows:

A. There's no way that one could know what would have happened. What one can know with absolute certainty is that \$61,705,919 was spent above what these contributors could have given directly to the candidates they supported. That is a fact. Now, if –

Q. Sir –

A. If contribution limits had been in place in terms of what could be given to an independent expenditure committee, other factors might have come into play. So obviously, I can't say

absolutely no, but that is an undeniable fact.

(*See* Johnson Dep. at 66-67.) Despite Chairman Johnson's clear answer, counsel for Plaintiffs continued to ask essentially the same question again and again over numerous objections from the Commission. (*See* Johnson Dep. at 67-72.) Repeatedly, Chairman Johnson made the point that trying to say what independent expenditure committees would do under contribution limits would be "speculative," that he didn't "have a crystal ball" and that "in [his] experience, predictions are very difficult, particularly when they talk about the future." (*See* Johnson Dep. at 67, 69, 70.) The statement quoted by SpeechNow in their proposed finding of fact came after the following exchange:

Q. If they had to adhere to the candidate contribution limits going forward, isn't it true that they would not be able to spend as much money in independent expenditures as they were able to do from 2001 through 2006?

Mr. Wilson: Objection. Asked and answered and answered and calls for speculation.

Mr. Gall: And I will move on once I get a good answer. Any answer.

Mr. Wilson: He's answered your question a number of times, sir.

Mr. Gall: He's not answered this question.

The Witness: I think I have. Repeatedly. You know with all respect, sir, I think I've answered the question repeatedly.

(*See* Johnson Dep. at 71-72.) Accordingly, the Commission objects to the statement being entered as a finding of fact. Plaintiffs should not be permitted to harass a witness until they get an answer that they like. The passage quoted by SpeechNow simply does not mean that groups will raise less money if compelled to operate under contribution limits.

114. State legislative candidates spend significantly less on their campaigns in states with contribution limits. Milyo Decl. at ¶ 65.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because it relies on Milyo's mischaracterization of an academic source. Milyo asserts that "Recent empirical work by Stratmann (2006) confirms that state legislative candidates spend significantly less on their campaigns in states with contribution limits, all else constant." (Milyo Decl. ¶ 65.) However, the paper (Thomas Stratmann, *Contribution limits and the effectiveness of campaign spending*, Public Choice (2006) 129: 461-474, FEC Exh. 152) is really about a different issue. As Stratmann explains, "this study tests whether campaign expenditures by state House candidates are more productive when candidates are subject to contribution limits. The results show that campaign expenditures by incumbents and challengers are more productive when candidates run in states with campaign contribution limits, as opposed to states without limits. In states with contribution limits, incumbent spending and challenger spending are equally productive, and spending by both candidates is quantitatively important in increasing their vote shares." *Id.* Furthermore, it is important to note that the study concerns *candidate* spending and direct contribution limits; it doesn't have anything to do with independent expenditures or groups like SpeechNow.

"V. SpeechNow.org Poses No Threat of Corruption"

115. SpeechNow.org's mission and purpose is to expressly advocate the election or defeat of candidates based on those candidates' positions on issues affecting free speech; its mission and purpose is not to allow individuals to gain access to or obtain gratitude of any candidates. Keating Decl. at ¶¶ 2-3, 10; *Bylaws*, Art. II.

FEC RESPONSE: Whether or not SpeechNow's "mission and purpose" is to "allow individuals to gain access to or gratitude of any candidates" is irrelevant to the

determination of the constitutionality of the statutory provisions challenged by plaintiffs. The Supreme Court has already recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), when it upheld the Act's individual contribution limit to candidates and candidate committees, that it is the potential for corruption that is relevant, not the motives of potential contributors. (*See* FEC Resp. Mem. § IV.)

116. The individual plaintiffs wish to donate money to SpeechNow.org to support its speech-related mission, not to use their contributions to obtain access to or gratitude of candidates or officeholders. Keating Decl. at ¶ 52; Young Decl. at ¶ 9; Crane Decl. at ¶ 9; Russo Decl. at ¶ 7; Burkhardt Decl. at ¶ 7.

FEC RESPONSE: (*See* Resp. to SN ¶ 115.)

117. The individual plaintiffs either do not care whether any candidates or officeholders know about contributions they intend to make to SpeechNow.org or they would prefer that candidates not know about such contributions. Keating Decl. at ¶ 52; Young Decl. at ¶ 9; Crane Decl. at ¶ 9; Russo Decl. at ¶ 7; Burkhardt Decl. at ¶ 7.

FEC RESPONSE: SpeechNow.org's bylaws would not prevent SpeechNow.org and its members, officers, agents, employees and donors from making candidates aware of their contributions to SpeechNow and expenditures by it. Not all candidates are aware of the identities of those who contribute funds to organizations to finance independent expenditures that support the candidate or oppose the candidate's opponents, but candidates generally are aware of the identities of the donors. Candidates likely are more aware of the identity of donors who give donations in excess of the Act's contribution limits than the identity of donors who give less than the contribution limits.

118. Based on the research by Clyde Wilcox, the FEC's expert in this case, most individuals who donate money to political candidates and committees do so for ideological reasons. Simpson Decl. Exs. 21, Excerpts from the Deposition Transcript of Clyde Wilcox, taken September 22, 2008 at 145:6-17, 157:10-14, 219:10-13, 226, 229, and 22, Excerpts from Wilcox et al., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES AND INTIMATES* (2003) at 45, 48-49, 67.

FEC RESPONSE: In support of this proposed fact, SpeechNow cites to fragments of Professor Wilcox's past research and his deposition testimony. But SpeechNow ignores parts of Wilcox's book and testimony which suggest that "investors," donors who contribute seeking tangible personal gain, account for a significant percentage of those who make contributions. His research showed that "a combined 60 percent admitted that it was always or sometimes important whether a candidate was friendly to their industry, and more than half said that it was at least sometimes important to give so that their business was treated fairly." (Peter L. Francia, *et al.*, *The Financiers of Congressional Elections: Investors, Ideologues and Intimates* 45 (2003)).

119. Individuals are legally able to make unlimited independent expenditures as long as they are not coordinated with candidates or political party committees. Thus, for instance, the FEC admits that Fred Young could spend his own money to produce and broadcast the advertisements that SpeechNow.org wants to run as long as he follows the FEC's rules concerning coordination. FEC's Mem. in Opp'n to Pls.' Mot. Prelim. Inj. 34 (Mar. 5, 2008, Docket No. 13) ("Thus Mr. Young, who allegedly is willing to contribute \$110,000, could finance these or similar advertisements himself.").

FEC RESPONSE: No additional specific response.

120. According to the FEC, Fred Young could hire consultants to produce and broadcast advertisements like those SpeechNow.org wants to run without having to register as a political committee and be subject to contribution limits. Simpson Decl. Ex. 4, Excerpts from the Deposition Transcript of Fred M. Young, Jr., taken October 3, 2008 at 92:11-93:4. However, Fred Young would like to associate with SpeechNow.org and its supporters for that purpose. *Id.* ("Q: Could you hire someone with the time and expertise? THE WITNESS: Well, I'm hoping that I can quote/unquote hire SpeechNow.org to do that sort of thing.").

FEC RESPONSE: No additional specific response.

121. Individuals may make independent expenditures in aggregate amounts of greater than \$1,000 and may coordinate their efforts with other individuals who make independent expenditures in aggregate amounts of greater than \$1,000, without having to register as a political committee as long as they do not have a “major purpose” of nominating or electing a candidate for office. Simpson Decl. Ex. 23, Excerpts from FEC Responses to Plaintiffs’ Second Set of Discovery Requests, dated September 25, 2008 (FEC Response to Request for Admission No. 24).

FEC RESPONSE: No additional specific response.

122. Whatever concerns about corruption may be raised by a group’s independent expenditures would also be raised by an individual’s independent expenditures. Simpson Decl. Exs. 23 (FEC Response to Request for Admission No. 26) and 21 (Wilcox Deposition Excerpts) at 178:7-179:2; *see also* Milyo Decl. at ¶¶ 26-28.

FEC RESPONSE: Irrelevant. The Supreme Court analyzes expenditure limits, such as a cap on the amount of money an individual could spend on an independent expenditure, differently from contribution limits. *See Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). An expenditure cap is not at issue in this case.

In addition, one of the cited sources does not support plaintiffs’ proposed fact.

The Commission actually stated:

[I]ndependent expenditures by individuals raise many of the same concerns about corruption as individual expenditures by groups, but DENY that independent expenditures by groups raise the exact same concerns. For example, independent expenditures by individuals do not raise the concern regarding undue access or influence over officeholders to the same extent as independent expenditures by groups.

Simpson Decl. Exs. 23 (FEC Response to Request for Admission No. 26.) Similarly, in the sections of Milyo’s deposition cited by plaintiffs, he does not discuss what risks of corruption arise from an individual making independent expenditures.

123. If SpeechNow.org’s bylaws are followed by SpeechNow.org and its members, officers, agents, employees and donors, SpeechNow.org will not make

coordinated communications. Simpson Decl. Ex. 23 (FEC Response to Request for Admission No. 32).

FEC RESPONSE: As the Commission explained, “SpeechNow.org’s bylaws would not prevent SpeechNow.org and its members, officers, agents, employees and donors from making candidates aware of their expenditures. *Id.*”

124. The FEC effectively utilizes its rules against coordination, 11 C.F.R. § 109.21, to handle allegations of coordination. Simpson Decl. Ex. 23 (FEC Response to Request for Admission No. 31).

FEC RESPONSE: Plaintiffs’ proposed fact is partially unsupported. The Commission is an agency of limited jurisdiction. The Commission responded to plaintiffs’ request for admission as follows:

The Commission effectively utilizes its rules to handle coordination allegations when complaints are filed with the Commission or when information regarding coordination comes to the Commission’s attention “on the basis of information ascertained in the ordinary course of carrying out its supervisory responsibilities” pursuant to 2 U.S.C. § 437g(a)(1) and (2).

(Simpson Decl. Exh. 23 (FEC Response to Request for Admission No. 31).) The Commission’s response did not address other allegations of coordination.

125. It is a well-established result in game theory and human subject experiments that collusive behavior is, in general, *less* likely to occur when the number of persons involved in the potentially-collusive arrangement increases. Milyo Decl. at ¶ 26.

FEC RESPONSE: The Court should decline to enter any of Plaintiffs’ proposed findings of facts concerning Milyo’s discussion of “game theory” because Milyo’s claims are unsupported and irrelevant. First, Milyo claims that collusive behavior is generally less likely to occur when the number of persons involved in the potentially-collusive arrangement increases. His support for this claim is a 1980 literature review by Robyn Dawes entitled *Social Dilemmas*. The claim is unsupported, however, because a

potentially cooperative relationship between the members of or donors to SpeechNow and an office-holder do not appear to fit the pattern of a social dilemma. According to Dawes, “Social dilemmas are characterized by two properties: (a) the social payoff to each individual for defecting behavior is higher than the payoff for cooperative behavior, regardless of what the other society members do, yet (b) all individuals in the society receive a lower payoff if all defect than if you all cooperate.” (Robyn Dawes, *Social Dilemmas*, Ann. Rev. Psychology, Volume 31:169-93 (1980), FEC Exh. 154.) After repeated questioning, Milyo was unable to explain how collusive behavior between an officeholder and SpeechNow would fit within this system of payoffs, conceded that he “did not endeavor to model the activities of SpeechNow,” and furthermore, stated that he was not aware of any modeling that has been done about independent expenditures and implicit relationships with officeholders.” (See Milyo Dep. at 159-170, 167, and 171.) Milyo’s broad conjecture, parroted by the Plaintiffs, does not consider any of the relevant characteristics of a group like SpeechNow and is thus inapplicable.

126. Thus, while research has found that implicit cooperation can occur even without explicit contracting mechanisms in relationships involving two people, where the number of people involved in the relationship is increased, implicit cooperation becomes much less feasible. The reason is that in group settings, it is harder to know how much control or influence any one individual or sub-group of individuals has over the group as a whole. Milyo Decl. at ¶ 28. Further, any political favors directed by an office holder to some members of the group may not be equally valued by all members of the group, or even recognized by all members of the group. *Id.* In other words, there is less reason to be concerned that a political candidate and a group will establish and maintain a collusive relationship than there is for a political candidate and a single person. *Id.* at ¶ 26.

FEC RESPONSE: In addition to the reasons stated above (Resp to SN Facts ¶ 125), the Court should decline to enter Plaintiffs’ proposed findings of fact based on Milyo’s discussion of game theory because he misunderstands how corruption (or its appearance) can occur between an officeholder and a contributor to a group that makes

independent expenditures. There does not need to be any cooperation among the group. If a group is spending its resources to support a candidate (or defeat her opponent), an individual could use a large contribution to the group to seek a favor from the candidate whether all of the other members of the group were cooperating or not. Similarly, where a single individual functionally controls all of the activities of a group, like in the case of SpeechNow, the cooperation and shared “values” of other donors or contributors, is irrelevant. Plaintiffs’ proposed finding of fact should not be entered because it wrongly assumes that there needs to be coordination between a candidate and every member or donor to a group working together for the candidate to be corrupted or appear to be corrupted by an independent expenditure.

127. SpeechNow.org will spend contributions it receives according to the sole discretion of the association. Keating Decl. at ¶¶ 25, 36; *Bylaws*, Art. VI § 11. Accordingly, individual donors will not be able to direct their contributions to particular advertisements or particular candidates’ races. Keating Decl. at ¶ 36.

FEC RESPONSE: No additional specific response.

128. Political candidates do not necessarily approve of independent expenditures made in support of their campaigns or in opposition to their opponent’s campaigns. For instance, both presidential candidates in this year’s election, as well as other candidates, have asked donors to their campaigns not to contribute to independent groups. Simpson Decl. Exs. 14 (FEC Response to Request for Admission No. 14), 23 (FEC Responses to Requests for Admission Nos. 28-30), and 24, News Articles concerning Candidate Disapproval of Independent Expenditures.

FEC RESPONSE: Campaigns may at various times have publicly discouraged donors from contributing to independent groups, including the statements in the referenced article. However, campaigns have not consistently discouraged such activity. *See, e.g.*, Marc Ambinder, Quietly Obama Campaign Calls In the Cavalry, *TheAtlantic.com*, Sept. 9, 2008; Jim Rutenberg and Michael Luo, Interest Groups Step Up Efforts In A Tight Race, *New York Times*, Sept. 16, 2008. In fact, in virtually every

campaign, independent groups frequently run negative ads and allow candidate campaigns to disavow them and say “with a wink” that they were unaware of the ads and condemn them. Wilcox Rept. at 15. Candidate disavowals are consistent with this phenomenon.

129. There is no scientific empirical evidence to support the contention that limits on contributions to groups like SpeechNow.org have any impact whatsoever on either corruption or the appearance of corruption. Milyo Decl. at ¶ 62.

FEC RESPONSE: Professor Milyo is also, however, not aware of a study, one way or the other, that even “attempts to explore the relationship between independent expenditures and public policy, let alone any undue or corrupt influence on policy.” (Milyo Dep. at 274.) Second, with regard to the appearance of corruption, Professor Milyo published a study which found evidence that “public disclosure and restrictions on contributions from organizations improve perceived political efficacy.” (Milyo Dep. at 283; Milyo Dep. Ex. 10; David M. Primo and Jeffery Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, Elec. L. J. Vol. 5:1 (2006).) Large contributions to groups making independent expenditures can be conceived of as indirect contributions to candidates (FEC Facts ¶ 165), and plaintiffs’ own expert has found that contribution limitations improve individuals’ views of government. Finally, SpeechNow’s proposed finding of fact regarding the lack of evidence of corruption and the appearance of corruption should be disregarded as it is in direct conflict with such evidence offered by the Commission including academic studies, expert analysis, sworn testimony by political officeholders and insiders, and numerous actual examples of such corruption taking place. (See FEC Facts ¶¶ 132-344.)

130. In the last six election cycles, numerous groups and individuals have reported making independent expenditures but no contributions or coordinated

expenditures. Simpson Decl. Exs. 14 (FEC Response to Interrogatory No. 3), 23 (FEC Response to Request for Admission 33), and 33, Attachment I03 to FEC Responses to Plaintiffs' First Set of Discovery Requests, dated August 25, 2008. In non-presidential elections during that time period, the number of groups and individuals reporting independent expenditures but no contributions or coordinated expenditures grew from 65 (1997-1998 election cycle) to 93 (2001-2002 election cycle) to 128 (2005-2006 election cycle). Simpson Decl. Ex. 33. In presidential elections the number grew from 126 in the 1999-2000 election cycle to 169 in the 2003-2004 election cycle. *Id.* Through August 22, 2008 of the 2007-2008 election cycle, 167 groups or individuals had reported making independent expenditures but no contributions or coordinated expenditures. Simpson Decl. Exs. 14 and 33.

FEC RESPONSE: No specific additional response.

“VI. The Administrative, Organizational, and Continuous Reporting Requirements for Political Committees.”

131. A political committee must organize, register, and report according to FECA and BCRA and applicable Commission regulations. Scott Dep. at 78:17-79:5; Simpson Decl. Ex. 7 at 10:5-13. Failure to follow these regulations could result in civil penalties for the committee and for the treasurer in his official and even personal capacity. Scott Dep. at 116:15-117:19.

FEC RESPONSE: Civil penalties are available against treasurers in their personal capacity in only very limited circumstances. (*See supra* Response to SN Fact 54.)

132. If SpeechNow.org begins accepting donations that, in the aggregate, are in excess of \$1,000, it will have to register as a political committee and be subject to the administrative, organizational, and continuous reporting requirements for political committees. Keating Decl. at 45; Simpson Decl. Ex. 14 (FEC Response to Request to Admit No. 1); Scott Dep. at 93:3-14.

FEC RESPONSE: No specific additional response.

133. SpeechNow.org does not want to be identified as a PAC because the term would imply that the association gives to and works with candidates, political parties, or both. Keating Decl. at ¶ 49. Mr. Keating believes that many people, including those in the media, donors, and voters, have a negative view of PACs because of the reputation of PACs as colluding with elected officials, political parties, and candidates. *Id.*

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

134. Mr. Keating also does not want SpeechNow.org to have to register as a political committee or have to refer to it as a political committee, because that will make it more difficult to raise funds. Keating Decl. at ¶ 49. Donors are aware of the contribution limits that apply to political committees and parties, and many of them will be reluctant to contribute more than \$5,000 or they will conclude that their contributions will count towards their biennial aggregate limits if SpeechNow.org is subject to contribution limits. *Id.*

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

135. If SpeechNow.org were deemed to be a political committee, it would be classified as a “non-connected” committee. Scott Dep. at 17:14-18:2.

FEC RESPONSE: No additional specific response.

136. When an organization becomes a political committee, it must obtain a tax identification number from the IRS and establish a bank account in a federally insured institution. Scott Dep. at 108:16-109:3, 123:18-21.

FEC RESPONSE: This proposed fact erroneously implies that the Act requires political committees to obtain a tax identification number from the Internal Revenue Service. While the Act requires political committees to maintain depository accounts at federally insured financial institutions (2 U.S.C. § 432(h)), the Act or Commission regulations do not require a tax identification number for such accounts. However, Commission staff have been informed that banks require a tax identification number. The Commission’s Information Division therefore recommends that committees obtain a tax identification number. Scott Dep. at 114-116, FEC Exh. 14.

137. Non-connected committees must register with the FEC using a “Statement of Organization,” or FEC Form 1. Among other things, the four-page form requires committees to list the committee name and address, to designate a treasurer and custodian

of records, and to list all bank accounts in which committee funds are deposited. Simpson Decl. Ex. 26, FEC Form 1, Statement of Organization; Scott Dep. at 122:15-123:14. Any changes to the Statement of Registration must be made within 10 days. Scott Dep. at 123:22-124:6. The form comes with an additional five pages of instructions. Simpson Decl. Ex. 27, Instructions for FEC Form 1.

FEC RESPONSE: No additional specific response.

138. Non-connected committees must periodically disclose all contributions and expenditures using a "Report of Receipts and Disbursements," or FEC Form 3X. Simpson Decl. Ex. 28, FEC Form 3X, Report of Receipts and Disbursements for Other than an Authorized Committee, and associated schedules; Scott Dep. at 124:7-16. The form includes five pages for summary information concerning receipts and disbursements and an additional 16 pages of "schedules" on which committees are required to disclose detailed information on all contributors and the amounts they donate (schedule A); all disbursements and to whom they are made (schedule B); any loans the committee receives (schedule C); any loans and lines of credit the committee receives from lending institutions (schedule C-1); all debts and obligations of the committee (schedule D); any itemized independent expenditures the committee makes (schedule E); any itemized coordinated party expenditures the committee makes (schedule F); the committee's activities relating to state or local elections (schedule H1-H6); and the committee's "Levin" funds (schedules L, L-A, and L-B). Simpson Decl. Ex. 28; Scott Dep. at 125:22-127:5. Form 3X and the various schedules are accompanied by 31 pages of instructions. Simpson Decl. Ex. 29, Instructions for FEC Form 3X and Related Schedules.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

139. A non-connected committee must file Form 3X and the various schedules that go along with it four times in an election year, and must file two semiannual reports in a nonelection year. It must file a 12-day pre-primary report in any state in which it participates. Additionally, it must file a pre-general election report and a 30-day post-general election report if it participates in any general election. A non-connected committee must also file these pre- and post-reports for any special election in which it participates. Alternatively, it can choose to file monthly rather than quarterly, and thus avoid pre- and post-election reports. It may change its filing schedule only once per year and only after giving the FEC written notice. After the 20th day before an election, it must file an independent expenditure report within 24 hours each time it spends more than \$1,000. Before that, it must file a report within 48 hours each time it spends more than \$10,000 on an election. *See* 11 CFR §§ 104.5(c) and (g); Scott Dep. at 131:3-132:14.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

140. Mr. Keating currently operates SpeechNow.org out of his home. Keating Decl. at ¶ 47.

FEC RESPONSE: No additional specific response at this time.

141. If an individual administers a non-connected committee from his home and is being paid for his services by the committee, that individual must allocate costs for the use of his home to the committee, lest the expense be treated as in-kind contribution from the individual to the committee. Scott Dep. at 136:8-137:8. The costs are to be determined by assessing the usual and normal charge for, or fair market value of, that portion of the home. *Id.* at 138:7-16. The same is true for expenses associated with using the home computer, telephone, or personal internet connection. *Id.* at 139:6-20. These cost allocations—based on the individual’s determination of their fair market value—have to be reported on Form 3X. *Id.* at 123:7-16; Simpson Decl. Ex. 29 at 10-11 (Instructions for Schedule A, Itemized Receipts).

FEC RESPONSE: Objection, irrelevant. SpeechNow does not pay anyone to work out of his or her home and has not alleged an intention to do so.

142. All costs associated with a fundraiser for a non-connected committee, even in a person’s home, must be treated as expenses to be paid by the committee lest any costs for the event—including the costs associated with using the home, or the costs of food or invitations—be treated as an in-kind contribution attributable to the committee. Scott Dep. at 142:1-143:7. The costs are to be determined by assessing the usual and normal charge for, or fair market value of, that portion of the home, invitations and food. *Id.* at 143:8-14. These costs must be reported on Form 3X. *Id.* at 123:7-16; Simpson Decl. Ex. 29 at 10-11 (Instructions for Schedule A, Itemized Receipts).

FEC RESPONSE: No additional specific response.

143. If a non-connected committee also made independent expenditures in state or local elections, it would have to allocate its costs for fundraising and communications according to regulations at 11 CFR Part 106. Scott Dep. at 143:15-144:5. The committee would also report the allocations using various Schedules H, which are accompanied by seven pages of instructions. Scott Dep. at 146:12-148:9; Simpson Decl. Ex. 29 at 23-30.

FEC RESPONSE: No additional specific response.

144. The FEC has an entire division, the Information Division, a large part of whose resources are devoted to providing information to those who must comply with the laws. Scott Dep. at 11:3-21:11, 53:16-54:20. The Division answers telephone and email inquiries, it publishes manuals and guides, and it conducts training sessions. *Id.* at 11:12-12:1, 13:10-14:13, 56:1-12. The Information Division recommends that those complying with the campaign finance laws always consult its guides, instructions for forms, and other publications. *Id.* at 37:11-22.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

145. However, reliance on the information provided by the FEC is not a shield to liability. Scott Dep. at 158:17-20. In fact, the information division “always caution[s]” and advises those complying with the obligations for political committees to

consult the statutes and applicable regulations and not rely solely on information provided by the FEC. *Id.* at 34:19-35:7.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

146. Political committees often hire accountants and attorneys to assist them in complying with the federal campaign finance laws and regulations. Scott Dep. at 87:4-20. There are also hundreds of experts, professionals, and specialists who make their livings by aiding organizations to comply with the requirements for political committees. *Id.* at 84:17-22, 88:15- 89:2.

FEC RESPONSE: This proposed fact is irrelevant to the determination of the constitutionality of the provisions challenged by plaintiffs. Furthermore, as noted previously, the Act's registration and reporting requirements are not unduly burdensome. While some requirements are more complicated than others, generally the requirements that apply to nonconnected political committees are not complicated. Scott Dep. at 156, FEC Exh. 54. The professionals alluded to work not just for nonconnected committees, but also state and national party committees, corporate and union PACs, and candidate committees.

147. The FEC's Information Division has 14 employees, ten of whom answer questions from the general public on matters of campaign finance law and compliance. Scott Dep. at 12:3-9. While the number of calls has declined since the Commission provided information over the Internet, the division still receives thousands of calls each year from the general public and political committee administrators in the regulated community. *Id.* at 29:13- 30:6.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

148. The FEC publishes several documents to explain and provide information concerning the laws and regulations with which political committees must comply. The Campaign Guide for Non-Connected Committees, which is 134 pages long, is periodically updated to include additional rules and interpretations by the Commission. Scott Dep. at 18:3- 20:3; FEC Campaign Guide: Nonconnected Committees, May 2008, available at <http://www.fec.gov/pdf/nongui.pdf> (last visited October 28, 2008). Between updates to the Guide, the FEC issues a series of brochures and monthly supplements containing any new rules, interpretations or policies of the Commission that are pertinent to political committees. *Id.* at 18:3-19:2, 22:1-23:3. Committee treasurers must keep

abreast of these supplements in order to keep their knowledge of FEC rules, policies, and interpretations current. *Id.* at 34:8-18.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

149. However, reliance on this information is not a shield to liability. *Id.* at 158:17-20. Treasurers may be personally liable for violations in political committee reporting. 2 U.S.C. §§ 432(c), 434(a)(1); see also Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (January 3, 2005). SpeechNow.org's bylaws provide that the Treasurer is responsible for compliance with statutory reporting requirements. Bylaws, Art. V, § 8.

FEC RESPONSE: Civil penalties are available against treasurers in their personal capacity in only very limited circumstances. (*See supra* Resp. to SN Fact 54.)

150. The FEC holds training conferences for the administrators of political committees and other employees of or consultants to political committees three to four times per year. Scott Dep. at 56:13-57:1, 59:12-17. The conferences typically last two days and consist of approximately six hours of substance per day. *Id.* at 56:13-57:13. The FEC also provides periodic training seminars and workshops. *Id.* at 57:21-59:7, 62:10-22. All of these training sessions cover topics related to the obligations of administering political committees. *Id.* at 63:1- 7. Like its publications, training sessions must periodically be updated to reflect new rules, interpretations, and policies. *Id.* at 65:19-67:3.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

151. Non-connected committees that receive or intend to spend over \$50,000 of contributions in a calendar year must report electronically. Scott Dep. at 38:18-39:4. The FEC publishes an introductory manual for its electronic filing system called "Getting Started with FECfile," which is 50 pages long. *See* Getting Started with FECFile (For PAC and Party Committees), http://www.fec.gov/support/GettingStartedManual_U.doc (last visited Oct. 20, 2008). The primary manual for using the electronic filing system is 351 pages long. *See* FECFile User Manual for PACs & Party Committees, http://www.fec.gov/electfil/unauthorized_manual/entireUNAUTHmanual.pdf (last visited Oct. 20, 2008).

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

152. Non-connected committees are subject to audits for cause, which exists when the committee's reports demonstrate compliance, accounting, or reporting problems. Scott Dep. at 150:1-151:9. During an audit, the FEC must access and review the committee's records. *Id.* at 154:13-18. Audits can trigger enforcement actions against a committee that can lead to civil penalties. *Id.* at 156:8-12. As a result, some

committees employ accountants and lawyers to represent them in audits. *Id.* at 154:19-155:6.

FEC RESPONSE: Objection, relevance and vagueness as to “some committees,” as plaintiffs do not establish whether nonconnected committees like SpeechNow have employed accountants and lawyers.

153. The Commission has a Reports Analysis Division (RAD) whose purpose is to analyze reports filed by committees and other entities and to determine whether they are in compliance with campaign finance laws and regulations. Scott Dep. at 67:7-11. Employees of RAD often send committee treasurers Requests for Additional Information (RFAI) that seek information necessary for the Commission to determine whether a committee is complying with the law. Scott Dep. at 71:13-72:1. A failure of a political committee to answer an RFAI can result in an investigation and a recommendation that the Commission seek a conciliation agreement with the committee that results in a civil penalty. *Id.* at 73:7-20.

FEC RESPONSE: No additional specific response.

154. The Commission sends out approximately 5,000 RFAs in a calendar year, all of which are related to administering and reporting of political committees. Scott Dep. at 75:16-76:7. There are approximately 8,000 political committees registered with the Commission, not all of which are active. *Id.* at 76:8-16.

FEC RESPONSE: Objection, relevance and vagueness. Plaintiffs do not establish whether any or a significant portion of the RFAs are sent to nonconnected committees, which have more straightforward reporting obligations, or whether most of the RFAs are sent to state and national party committees, corporate and union PACs, and candidate committees.

155. All administrative fines issued by the Commission relate to the failure to properly report the activities of a political committee. Scott Dep. at 80:19-81:6. The Commission resolves approximately 100 administrative fine matters per year, and the amount of fines collected is \$201,963 from the Administrative Fines Program alone. Simpson Decl. Ex. 30, Federal Election Commission 2006 Annual Report, at 7. This is an average civil penalty of at least \$2,000. Still other civil penalties for failing to properly administer or report the activities of political committees are collected through the Commission's standard enforcement process, and alternative dispute resolution programs. Scott Dep. at 82:3-12.

FEC RESPONSE: No additional specific response.

156. The FEC can investigate alleged violations of the campaign finance laws that are brought to its attention through administrative complaints filed under 11 CFR § 111.4 or that its staff discovers and has "reason to believe" that a violation has occurred. Simpson Decl. Ex. 14 (FEC Response to Interrogatory No. 6). Alleged violations discovered in this manner are assigned a "Matter Under Review" number. *Id.*

FEC RESPONSE: No additional specific response.

157. Since October 1, 1999, the FEC has found reason to believe that one or more violations have occurred in 427 Matters Under Review and it has conducted an investigation in 118 of these MURs. Simpson Decl. Ex. 14 (FEC Response to Interrogatory No. 6). Of those 118 investigations, matters were pending an average of 544 days from the date the MUR was opened until it was closed with respect to the last respondent. *Id.* (FEC Response to Interrogatory No. 8).

FEC RESPONSE: No additional specific response.

158. Complying with the administrative and continuous reporting requirements for political committees would be burdensome for SpeechNow.org. Keating Decl. at ¶ 47. Mr. Keating operates SpeechNow.org alone in his spare time. He has no employees nor anyone else working with him, and complying with the obligations for political committees would be time consuming and difficult. *Id.*

FEC RESPONSE: This proposed fact ignores contrary testimony.

The Commission's Deputy Staff Director for the Information Division Greg Scott testified that the Act's registration and reporting requirements are not difficult.

(Scott Dep. at 156, FEC Exh. 14.) Further, plaintiff David Keating testified that he had prior experience with reporting and could fulfill the requirement of treasurer.

Furthermore, Mr. Keating testified that his desire to avoid registration and reporting by

SpeechNow was based on his desire to spend time on family and leisure activities.

(FEC Facts ¶¶ 451-52, 449-50.)

159. It would be particularly burdensome for David Keating to shoulder these obligations before SpeechNow.org can spend money on political advertisements or other activities that advance its mission. Keating Decl. at ¶ 47. In such a situation, Mr. Keating would be spending a great deal of time ensuring that SpeechNow.org complied with above-mentioned obligations, but he would be unable to spend that time advancing SpeechNow.org's mission. *Id.* at ¶ 47; Simpson Decl. Ex. 34, Excerpts from the Deposition Transcript of David Keating, taken September 25, 2008.

FEC RESPONSE: Plaintiffs have provided no support, other than the self-serving testimony of David Keating, that it would be "burdensome" for SpeechNow to comply with "obligations" (presumably referring to the "administrative" and "reporting" requirements referred to in the preceding paragraph) prior to the date that SpeechNow first spends money on "advertisements or other activities that advance its mission." In particular, plaintiffs have provided no support for the statement that compliance with the Act's requirements would prevent David Keating from spending any significant amount of time "advancing SpeechNow.org's mission."

160. SpeechNow.org cannot accept donations under \$1,000 even though David Keating has been contacted through the website and other means by potential donors who want to make such donations. Keating Decl. at ¶ 50. This is because such donations would inch SpeechNow.org closer to being a "political committee," but they would not give it nearly enough money to produce and run advertisements, which are a necessary precondition to a successful fundraising effort. *Id.* Accepting even small donations could expose SpeechNow.org to the administrative and reporting requirements for political committees without providing it enough money to speak out through advertisements in support of its mission and become a going concern. *Id.* Thus, SpeechNow.org cannot accept the \$100 donations that Brad Russo and Scott Burkhardt are ready, willing, and able to make. *Id.*

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

“VII. Reporting Requirements for Independent Expenditures.”

161. SpeechNow.org will report its contributions and expenditures under the reporting requirements for those who make independent expenditures. Keating Decl. at ¶ 35. Complying with these reporting requirements is less burdensome than complying with the obligations for political committees. *Id.* at ¶ 48.

FEC RESPONSE: No additional specific response.

162. Groups “other than political committees” that make independent expenditures must report their activities pursuant to the FEC regulations at 11 CFR §§ 104.4(a), (e) and (f), and § 109.10. Scott Dep. at 95:7-98:14.

FEC RESPONSE: No additional specific response.

163. To report its independent expenditures, a group like SpeechNow.org that was not a political committee would use the “Report of Independent Expenditures Made and Contributions Received,” or FEC Form 5. Simpson Decl. Ex. 31, FEC Form 5, Report of Independent Expenditures Made and Contributions Received; Scott Dep. at 101:6-102:1. This form requires the filer to list the total contributions received and the total expenditures made during the period on a one-page form, and then to list those who contributed to the independent expenditure and the payees for the independent expenditures. It is accompanied by three pages of instructions. Simpson Decl. Ex. 32, Instructions for FEC Form 5 and Related Schedules.

FEC RESPONSE: No additional specific response.

164. The FEC requires that all costs associated with the independent expenditure must be disclosed. This would include costs for airtime for broadcast communications; production costs for broadcast communications; postage and printing costs for communications made by mail; research costs to determine the most optimal form of communication; fees for the media buyer or direct mail vendor; costs associated with producing newspaper ads; the costs of newspaper space; and the costs associated with producing and distributing internet banner ads. Scott Dep. at 102:4-105:1.

FEC RESPONSE: SpeechNow’s proposed facts repeatedly state that the group will disclose its contributions and expenditures under the Act’s disclosure and disclaimer provisions that apply to independent expenditures. *See* SN Facts ¶¶ 25-26, 161.

Mr. Keating has, however, given mixed signals on this issue. Should SpeechNow prevail, it is not entirely clear whether such disclosure will include all contributions it receives, including those whose funds were used solely for purposes such as candidate

research and polling, *see* SN Facts ¶ 24, or only those contributions that were solicited for, and will be directly used to purchase air time for independent expenditures.

At deposition Mr. Keating indicated that he personally agreed with the position of his employer, Club for Growth, that disclosure of contributions for candidate research and polling was not required. (Keating Dep. at 82-84, FEC Exh. 11). *See* FEC Facts ¶ 375. Similarly, at a public forum about the case, Mr. Keating said “(t)he only thing people won’t know is how much money we’re receiving or spending on administrative stuff until we make uh, or I guess they’ll never know until they look at the IRS how we’re spending on administrative stuff.” (“Freeing SpeechNow: Free Speech and Association vs. Campaign Finance Regulation,” Mar. 5, 2008, FEC Exh. 103 at 4.) Since Mr. Keating has been inconsistent, plaintiffs have provided inadequate assurance to the Court to permit a finding that SpeechNow’s disclosures would be exhaustive. The Court, therefore, should not accept SpeechNow’s assurances or make the finding plaintiffs suggest.

165. If an organization like SpeechNow.org that was not a political committee decided to make independent expenditures against candidates for State or local office, its reporting obligations to the FEC would not change or increase. Scott Dep. at 107:7-108:5.

FEC RESPONSE: No additional specific response.

Respectfully submitted,

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Dated: November 21, 2008

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

SPEECHNOW.ORG, <i>et al.</i> ,)	
)	
Plaintiffs,)	
	)	Civ. No. 08-248 (JR)
v.)	
	)	FEC Response to Plaintiffs'
FEDERAL ELECTION COMMISSION,	)	Proposed Findings of Fact
)	
Defendant.)	
)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S RESPONSE
TO PLAINTIFFS’ PROPOSED FINDINGS OF FACT**

The Federal Election Commission (“Commission”) hereby submits the following response to the Proposed Findings of Fact filed by plaintiffs SpeechNow.org (“SpeechNow”), David Keating, Edward Crane, Fred Young, Brad Russo and Scott Burkhardt (collectively “plaintiffs”). The Commission incorporates by reference its Memorandum In Support of Response to Plaintiffs’ Proposed Findings of Fact (“FEC Resp. Mem.”). Set forth below are additional specific objections and responses, as well as references to the Memorandum in order to note the portions of the Memorandum that are particularly responsive to specific facts.

“I. SpeechNow.org”

1. Plaintiff SpeechNow.org is an independent group of citizens whose mission is to engage in express advocacy in favor of candidates who support the First Amendment and against those who do not. Declaration of David Keating in Support of Proposed Findings of Fact (hereinafter, “Keating Decl.”) at ¶¶ 2, 3; Keating Decl. Ex. H, Bylaws of SpeechNow.org (hereinafter, “Bylaws”), Art. II. Toward that end, SpeechNow.org planned to run television advertisements during the 2008 election cycle in the states and districts of political candidates whose records demonstrate that they do not support full protections for First Amendment rights. Keating Decl. at ¶ 15. While it

appears that SpeechNow.org will not be able to run advertisements in this election, it would like to run advertisements in future elections, including the 2010 election, similar to those it intended to run during the 2008 election season. *Id.* at ¶¶ 15, 30.

FEC RESPONSE: Objection to the use of “independent” as vague and objection to the extent it contains legal conclusions, including the notion that SpeechNow was not “able” to run advertisements during the 2008 election cycle. SpeechNow could have accepted contributions up to the legal limits, but chose not to. (*See* FEC Facts ¶¶ 51-52, 395-401.)

2. Plaintiff David Keating created SpeechNow.org because he believes that the issue of free speech and the threats posed to it by campaign finance laws are vital to the future of the nation. Keating Decl. at ¶ 3. He wants individuals who share this concern to be able pool their funds so they can speak out as loudly and effectively in favor of First Amendment rights as possible. *Id.* Because federal elections provide a rare opportunity both to impact public policy—by affecting the political futures of the candidates who make it—and to influence public debate, Mr. Keating believes that running advertisements calling for the election or defeat of candidates based on their support for free speech and association is the most effective way for private citizens to protect those rights. *Id.* In his view, if an individual is permitted to spend unlimited amounts of money advocating the election or defeat of candidates for office, there is no reason why groups of individuals should be prevented from doing so. He created SpeechNow.org to give ordinary Americans the ability to band together to achieve these purposes. *Id.*

FEC RESPONSE: Objection, relevance, as David Keating’s political opinions and motivation for founding SpeechNow are not relevant to the constitutionality of the challenged provisions. While this paragraph may reflect David Keating’s views, the portion of Mr. Keating’s declaration cited by plaintiffs, Keating Decl. (Doc-39) ¶ 3, only supports the first sentence and part of the second and third sentences of this fact. The cited portion of Mr. Keating’s declaration provides no support for the fourth and fifth sentences of this proposed fact. *Inter alia*, the alleged opinion regarding “the most effective way” and the fourth sentence regarding individuals and groups are unsupported. Objection to the extent it contains legal conclusion, particularly the inaccurate contention

that groups are prevented from spending unlimited amounts of money advocating the election or defeat of candidates.

“A. Structure and Operations of SpeechNow.org”

3. SpeechNow.org is an unincorporated nonprofit association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29- 971.01 et seq., and registered as a “political organization” under section 527 of the Internal Revenue Code. Keating Decl. Ex. G, SpeechNow.org Internal Revenue Form 8871.

FEC RESPONSE: No additional specific response.

4. The general powers of SpeechNow.org lie with five voting “Members.” Bylaws, Art. I, § 5; Art. III, §§ 1, 2. They are David Keating, Jon Coupal, Edward Crane, Daniel Shapiro, and Richard Marder. *Id.* The bylaws also designate four officers of the association: President, Vice President, Secretary, and Treasurer. *Id.*, Art. V, § 1. David Keating is the President and Treasurer of SpeechNow.org, and he administers all of the association’s affairs. Keating Decl. at ¶ 2. Jon Coupal is the Vice President and Secretary. Keating Decl. Ex. D, Member Action by Written Consent in Lieu of an Organizational Meeting of SpeechNow.org.

FEC RESPONSE: No additional specific response.

5. SpeechNow.org will operate solely on private donations from individuals. Keating Decl. at ¶ 8; Bylaws, Art. II. Under its bylaws, SpeechNow.org cannot accept, directly or indirectly, any donations or anything of value from business corporations, labor organizations, national banks, federal government contractors, foreign nationals, political parties, or political committees. Keating Decl. at ¶ 8; Bylaws, Art. VI, § 9; Art X, § 1.

FEC RESPONSE: No additional specific response.

6. Under its bylaws, SpeechNow.org cannot engage in business activities, including the provision of any goods or services that results in income to SpeechNow.org or any advertising or promotional activity that results in income to SpeechNow.org, other than in the form of membership dues or donations. Keating Decl. at ¶ 12. Similarly, SpeechNow.org cannot offer to any donors or members any benefit that is a disincentive for them to disassociate themselves with SpeechNow.org on the basis of the organization’s position on a political issue, and it cannot offer its donors or members credit cards, insurance policies or savings plans, training, education, business information, or any other benefits other than those that are necessary to enable recipients to engage in promotion of SpeechNow.org’s political ideas. *Id.*; Bylaws, Art. VI, §§ 6, 8.

FEC RESPONSE: No additional specific response.

7. SpeechNow.org is independent of any political candidates, political committees, and political party committees, and its bylaws require it to operate wholly independently of any of these entities. Keating Decl. at ¶ 9; Bylaws, Art. VI, § 9; Art. X, §§ 2-10. SpeechNow.org cannot make contributions or donations of any kind directly or indirectly to any FEC-regulated candidate or political committee, and it cannot coordinate its activities, as defined in 2 U.S.C. §§ 441a(a)(7)(B) & (C) and 11 C.F.R. Part 109, with any candidates, national, state, district or local political party committees, or their agents. *Id.*, Art. VI § 10; Art. X §§ 2-10.

FEC RESPONSE: Objection to the use of “wholly independently” as vague and objection to the extent the use of “wholly independently” as it purports to contain a legal conclusion.

8. SpeechNow.org’s bylaws prohibit it from using any vendors for services in producing or distributing its communications featuring a candidate for federal office if that vendor was also engaged during the same election cycle by the candidate featured in the communication. Bylaws, Art. X, § 2. The bylaws similarly prohibit SpeechNow.org from employing any individuals who were employed during the same election cycle by any candidate featured in any of SpeechNow.org’s communications. *Id.*, Art. X, § 3.

FEC RESPONSE: No additional specific response.

9. SpeechNow.org’s bylaws also ensure the independence of the association’s speech by, among other things, requiring members, officers, employees, and agents of the association to read and understand the FEC’s rules concerning coordination, 11 C.F.R. § 109.21, Bylaws, Art. X, § 4, and by prohibiting them from engaging in activities that might lead to coordination with candidates. *Id.*, Art. X, §§ 5-10.

FEC RESPONSE: No additional specific response.

10. Under SpeechNow.org’s bylaws, all of the obligations in the previous two paragraphs must be communicated to all members, officers, employees, agents, and donors of SpeechNow.org and employees and agents must sign an acknowledgement of these obligations as a condition of participating in any association activities. Bylaws, Art. X, § 11. SpeechNow.org’s members and officers have each signed such an acknowledgment. Keating Decl. Ex. I, SpeechNow.org Affirmation.

FEC RESPONSE: No additional specific response.

11. SpeechNow.org will solicit donations from individuals for funds to cover operating expenses and to buy public, political advertising to promote the election or defeat of candidates based on their positions on free speech and associational rights. Keating Decl. at ¶ 11. Some of SpeechNow.org’s solicitations will refer to particular candidates for federal office by name. *Id.*; Declaration of Steven M. Simpson in Support

of Plaintiffs' Proposed Findings of Fact (hereinafter, "Simpson Decl.") Ex. 1, Supplement to AOR 2007-32 (Sample SpeechNow.org Solicitation).

FEC RESPONSE: No additional specific response.

12. SpeechNow.org's solicitations will inform potential donors that their donations may be used for political advertising that will advocate the election or defeat of candidates to federal office based on their support for First Amendment rights. Keating Decl. at ¶ 11. Under its bylaws, SpeechNow.org must also advise donors that their donations are not tax deductible and that they will be spent according to the sole discretion of SpeechNow.org. Id. at ¶ 13; Bylaws, Art. VI, § 11.

FEC RESPONSE: No additional specific response.

"B. SpeechNow.org's Planned Political Advertisements"

13. SpeechNow.org plans to run advertisements on television and in other media during the 2008 election cycle and other future election cycles. Keating Decl. at ¶¶ 15-20, 30. SpeechNow.org has prepared television scripts for four such advertisements. Keating Decl. Ex. J, SpeechNow.org Television Scripts. Two of the advertisements call for the defeat of Dan Burton, a Republican Congressman currently running for reelection in the fifth district of Indiana. Both ads criticize Representative Burton for voting for a bill that would restrict the speech of many public interest groups. The first urges voters to "Say no to Burton for Congress." The second states that "Dan Burton voted to restrict our rights. Don't let him do it again." Id.; Keating Decl. at ¶ 18. SpeechNow.org would like to broadcast these advertisements in the fifth district of Indiana, where Representative Burton is running for office. Id. at ¶¶ 20-24.

FEC RESPONSE: No additional specific response.

14. The other two advertisements call for the defeat of Mary Landrieu, a Democratic Senator currently running for reelection in Louisiana. Keating Decl. at ¶ 19. Both ads criticize Landrieu for voting for a law to restrict the speech of public interest groups. The first urges voters to "Say no to Landrieu for Senate." The second concludes by saying that "Our founding fathers made free speech the First Amendment to the Constitution. Mary Landrieu is taking that right away. Don't let her do it again." Id.; Keating Decl. Ex. J. SpeechNow.org would like to broadcast these advertisements in Louisiana, where Senator Landrieu is running for office. Keating Decl. at ¶¶ 20-24.

FEC RESPONSE: No additional specific response.

15. The production costs for these advertisements would be approximately \$12,000. Keating Decl. at ¶ 21; Simpson Decl. Ex. 2, Declaration of Ed Traz in Support of Plaintiffs' Motion for Preliminary Injunction with Exhibits, dated February 8, 2008 at ¶¶ 3-5.

FEC RESPONSE: No additional specific response.

16. The cost to air the advertisements depends on the number of times they are run and the size of the audience SpeechNow.org wants to reach. Keating Decl. at ¶¶ 21-24; Simpson Decl. Ex. 2 at ¶¶ 3-5.

FEC RESPONSE: No additional specific response.

17. Ideally, Mr. Keating would like to be able to run the ads enough times so that the target audience could view the ads at least ten times, but that would cost roughly \$400,000. Keating Decl. at ¶ 24. A less expensive option is simply to run the ads fewer times. *Id.* at ¶¶ 21-24. In either event, the total costs to produce and run advertisements in Indianapolis and either Baton Rouge or New Orleans would exceed \$120,000. *Id.* at ¶ 22.

FEC RESPONSE: No additional specific response.

18. Mr. Keating made and will in the future make the decisions about where and in what races to run SpeechNow.org's advertisements, although he expects to keep the other members of SpeechNow.org apprised of his decisions. Keating Decl. at ¶ 25. Mr. Keating will base his decisions primarily on two factors: (1) the candidates' records on freedom of speech and/or campaign finance laws; and (2) whether the race is close enough that SpeechNow.org's ads might have an impact on the outcome. *Id.* at ¶ 26.

FEC RESPONSE: No additional specific response.

19. Thus, Mr. Keating decided that SpeechNow.org should run ads in Congressman Burton's primary because the Congressman voted for H.R. 513, a bill that restricted the free speech rights of certain nonprofits, as did the majority of House Republicans, and Mr. Keating felt that he was vulnerable to defeat. Keating Decl. at ¶ 27. Mr. Keating spoke to Congressman Burton's opponent, John McGoff, and discovered that he supported freedom of speech and opposed campaign finance laws that infringed on freedom of speech. *Id.* As a result, Mr. Keating concluded that running ads highlighting Congressman Burton's record on campaign finance laws would be a good way to convey to Republicans that they should support freedom of speech and oppose campaign finance laws that would infringe on rights to free speech. *Id.*

FEC RESPONSE: No additional specific response.

20. In his conversation with Mr. McGoff, Mr. Keating discussed only Mr. McGoff's position on issues. Mr. Keating understands that in order to avoid any

questions about coordination and to comply with the FEC's coordination rules, he cannot speak to candidates, campaigns, or political party committees about their plans, projects, or needs. Keating Decl. at ¶ 27.

FEC RESPONSE: Objection to the extent contains legal conclusions. Indeed, the relevant content standards of current coordination regulations permit involvement that is not "material" and discussion that is not "substantial." 11 C.F.R. § 109.21(d)(2),(3).¹

21. Mr. Keating decided that SpeechNow.org should run ads against Mary Landrieu because her election is a high-profile race, and she has consistently supported campaign finance legislation that infringed on freedom of speech. Keating Decl. at ¶ 28. As a result, Mr. Keating concluded that her opponent could not be worse than she is and that running ads in her race would increase the chances of her defeat and garner attention for SpeechNow.org and its message and mission. *Id.*

FEC RESPONSE: Contemporaneous records show that Senator Landrieu was selected only after SpeechNow's consultant took too long preparing the submission of SpeechNow's advisory opinion request. Mr. Keating's conclusion about Senator Landrieu is unsupported and speculative. (*See* FEC Facts ¶¶ 55-57, FEC Resp. Mem. at 3.)

22. SpeechNow.org would run ads in additional races during this election cycle if it were able to do so. Candidates in whose elections SpeechNow.org would consider broadcasting advertisements include any candidate who has voted for or against the Bipartisan Campaign Reform Act; any candidate who voted for or sponsored or opposed H.R. 513 as passed by the House of Representatives in 2006 or similar legislation; any candidate who supports or opposes legislation to create a Federal Election Administration such as that proposed by H.R. 421 in the current Congress. Keating Decl. at ¶ 29. More specifically, for this election cycle, SpeechNow.org would like to run advertisements opposing Democratic congressional candidate Paul Kanjorski in the 11th district of Pennsylvania. *Id.*

FEC RESPONSE: Objections to the extent contains a legal conclusion and suggests that SpeechNow was not able to run ads in additional races. (*See* FEC Facts ¶¶ 51-52, 395-401.)

¹ The coordination regulation is expected to be the subject of a new rulemaking as a result of *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

23. If it is able to, SpeechNow.org will run ads in future election cycles as well. For instance, in the 2010 election cycle, SpeechNow.org would like to run advertisements opposing North Dakota Democratic Senator Byron Dorgan and Colorado Democratic Senator Ken Salazar. Keating Decl. at ¶ 30. SpeechNow.org would consider running advertisements opposing Alaska Republican Senator Lisa Murkowski as well, if she has a credible primary opponent. *Id.*

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to run ads in future election cycles. (*See* FEC Facts ¶¶ 51-52, 395-401.)

24. Assuming SpeechNow.org is able to function and run ads in future elections, it will make decisions about where to run such ads consistent with the general approach described above. Keating Decl. at ¶ 26. If SpeechNow.org is able to raise enough funds, it intends to use methods such as candidate research to determine the past statements and positions of candidates on free speech as well as public opinion polling to obtain more information about the viability of particular candidates in particular races. *Id.* at ¶ 32.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to run ads in future election cycles. (*See* FEC Facts ¶¶ 51-52, 395-401.)

25. SpeechNow.org will disclose its activities under the disclosure and disclaimer provisions in the Federal Election Campaign Act that apply to independent expenditures. Keating Decl. at ¶¶ 6, 33-36.

FEC RESPONSE: Objection, vague, and objection to the extent contains legal conclusions. FECA requires disclosure for independent expenditures by political committees and others, but the disclosure provisions vary depending upon what kind of entity is making the expenditure. 2 U.S.C. § 434 (b)-(d), (g).

26. Accordingly, pursuant to 2 U.S.C. § 434(c), SpeechNow.org will file statements with the FEC reporting the identities of those who contributed to its advertisements and other communications that are independent expenditures under FECA along with the amounts contributed and the other information required by this provision. Keating Decl. at ¶ 35.

FEC RESPONSE: Objection to the extent contains legal conclusions. While SpeechNow and David Keating have agreed to disclose the identities of at least certain contributors as “required by” 2 U.S.C. § 434(c), they have created some ambiguity as to whether they will disclose the identities of contributors when contributions are used for purposes such as candidate research and polling, *see* SN Facts ¶ 24, rather than directly purchasing advertising time. David Keating’s agreement with a decision not to disclose some donors calls into question whether SpeechNow will disclose its donors.

(*See* FEC Facts ¶ 373; “Freeing SpeechNow: Free Speech and Association vs. Campaign Finance Regulation,” Mar. 5, 2008, FEC Exh. 103 at 4.)

27. SpeechNow.org will not accept any targeted or “earmarked” funds, and, as a result, it will disclose all of its contributors in its independent expenditure disclosures. Keating Decl. at ¶ 36. Thus, for each independent expenditure SpeechNow.org makes, Mr. Keating will disclose all donors whose contributions have been used to fund any portion of the independent expenditure at issue. *Id.* All donors to SpeechNow.org will thus be disclosed in the association’s independent expenditure disclosures. *Id.*

FEC RESPONSE: *See supra* Fact 26. Even if SpeechNow and David Keating were interpreted as agreeing to identify all contributors on the independent expenditure reports they file pursuant to 2 U.S.C. § 434(c), those reports are submitted on different forms than those used by political committees, on a different schedule (independent expenditure reports are filed only once, whereas political committees file periodic reports of their financial activity), and independent expenditure reports provide less information to the Commission and the public. (*See* FEC Facts ¶ 372-373, 442-443.)

28. Pursuant to 2 U.S.C. § 441d(d)(2), SpeechNow.org's advertisements will include a statement indicating that SpeechNow.org is responsible for the content of the advertisement. Keating Decl. at ¶ 34.

FEC RESPONSE: Objection to the extent contains legal conclusions.

29. Pursuant to 2 U.S.C. § 441d(a), all of SpeechNow.org's advertisements and other communications will include its name, address, and telephone number or World Wide Web address, along with a statement indicating that the communication was paid for by SpeechNow.org and was not authorized by any candidate or candidate's committee. Keating Decl. at ¶ 33.

FEC RESPONSE: Objection to the extent contains legal conclusions.

30. In addition, as an association organized under section 527 of the Internal Revenue Code, SpeechNow.org must make regular disclosures of all contributions and expenditures. Keating Decl. at ¶ 37, Keating Decl. Ex. L, SpeechNow.org IRS Form 8872; Simpson Decl. Ex. 25, Deposition Transcript of Gregory Scott, taken September 24, 2008 (hereinafter, "Scott Dep.") at 105:2-106:3.

FEC RESPONSE: 527 organizations may choose to pay taxes to avoid disclosure. *See Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1360 (11th Cir. 2003). Disclosures filed by section 527 organizations are not filed on the same schedule, with the same frequency or in the same level of detail as disclosures by political committees under the Act. (*Compare* 2 U.S.C. §§ 433-434 *with* 26 U.S.C. § 527(j)). *See* FEC Exh. 127-128, 161-162).

C. SpeechNow.org's Other Activities

31. In addition to creating advertisements for the Burton and Landrieu races, Mr. Keating has also set up a website, www.speechnow.org, on which he has posted general information about the association, news stories and editorials about SpeechNow.org, and information about this lawsuit. Keating Decl. at ¶ 4; Keating Decl. Ex. A, Web Pages from www.speechnow.org (Home Page).

FEC RESPONSE: No additional specific response.

32. The website allows individuals interested in SpeechNow.org to sign up to receive more information about the association and to check a box if they might in the future consider making a donation to SpeechNow.org if it is legally able to accept donations. Keating Decl. Ex. A (Sign-up Page). Since the website was created late last year, about 180 individuals have signed up to receive more information and about 75 of them have indicated that they would consider making a donation to SpeechNow.org in the future. Keating Decl. at ¶ 5. Mr. Keating has sent articles and other information concerning SpeechNow.org to the individuals on this list. *Id.* at ¶ 4; Keating Decl. Ex. O, Information Sent to Interested Visitors of www.SpeechNow.org.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

33. Mr. Keating has also set up a PayPal account to allow individuals to donate money to SpeechNow.org in the event that the association is legally able to accept donations. Keating Decl. at ¶ 53; Keating Decl. Ex. M, Email from PayPal.com confirming SpeechNow.org account.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

II. The Individual Plaintiffs

34. In addition to being the President and Treasurer of SpeechNow.org, Mr. Keating would also like to donate money to the association to support its mission and activities. Keating Decl. at ¶ 39. If and when SpeechNow.org is legally able to accept donations, Mr. Keating will immediately donate \$5,500 to the group, and he would like to donate more in the future. *Id.* at ¶¶ 39, 51-52.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

35. Other individuals are also ready, willing, and able to immediately donate funds that would allow SpeechNow.org to produce and broadcast the ads it has created, or other similar ads, enough times to have an impact on the audience in the relevant markets. Keating Decl. at ¶ 39. Edward Crane is willing to donate \$6,000. Declaration of Edward Crane in Support of Proposed Findings of Fact (hereinafter, “Crane Decl.”) at ¶

6. Richard Marder is willing to donate \$5,500. Keating Decl. at ¶ 39; Simpson Decl. Ex. 3C, SpeechNow.org Request for Advisory Opinion and Supporting Materials, dated November 14, 2007 (hereinafter, “Advisory Opinion Request”) at 6-8 (Declaration of Richard Marder in Support of SpeechNow.org Advisory Opinion Request). Fred M. Young is willing to donate \$110,000. Declaration of Fred M. Young, Jr. in Support of Proposed Findings of Fact (hereinafter, “Young Decl.”) at ¶ 6.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow is not able to accept donations. (*See* FEC Facts ¶¶ 51-52, 395-401.)

36. Plaintiff Ed Crane is the President of the Cato Institute and a long-time supporter of free speech and opponent of campaign finance laws. Crane Decl. at ¶¶ 3, 10. Mr. Crane is an acquaintance of Mr. Keating’s who agreed both to serve as a member of SpeechNow.org and to contribute money to the association when Mr. Keating asked him during the summer of 2007. *Id.* at ¶ 2. Mr. Crane would like to be able to make additional contributions to SpeechNow.org in the future. *Id.* at ¶ 8.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow has not been able or will not be able to accept donations. (*See* FEC Facts ¶¶ 51-52, 395-401.)

37. Mr. Crane supports SpeechNow.org’s mission and believes that calling for the election or defeat of candidates based on their support for First Amendment rights is an ideal way both to affect policy—by affecting the political futures of those who make it—and to promote the importance of free speech. Crane Decl. at ¶ 3. However, Mr. Crane lacks the time or individual resources to do things like produce television advertisements about free speech and candidates that can reach a wide segment of the population. *Id.* at ¶ 4. Thus, the best way for him to speak effectively against candidates who support restrictions on free speech is to associate with other like-minded individuals and a group like SpeechNow.org. *Id.*

FEC RESPONSE: To the extent that the last sentence is not phrased as an opinion of Mr. Crane’s, it is unsupported. Plaintiffs have not demonstrated that giving to a group like SpeechNow is the “best way to speak effectively against candidates.” Plaintiffs do not compare the effect of such a contribution with, for example,

volunteering for a campaign, contributing to a candidate, contributing to a political party, emailing friends, or espousing views on a website.

38. Plaintiff Fred Young is the former CEO of Young Radiator Co. in Racine, Wisconsin. Simpson Decl. Ex. 4, Excerpts from the Deposition Transcript of Fred M. Young, Jr., taken October 3, 2008 at 22:1-4. Mr. Young has supported various libertarian and classical liberal causes through the years, including the Cato Institute and the Club for Growth. *Id.* at 32:5-7, 87:7-9. Mr. Keating knew Mr. Young through Mr. Keating's employment as the executive director of the Club for Growth. *Id.* at 32:14-33:1. Mr. Keating contacted Mr. Young and asked if he would agree to contribute money to SpeechNow.org during the summer of 2007. Young Decl. at ¶ 2. Mr. Young would like to be able to make additional contributions to SpeechNow.org in the future. Young Decl. at ¶ 8.

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

39. Mr. Young supports SpeechNow.org's mission and believes that calling for the election or defeat of candidates based on their support for First Amendment rights is an ideal way both to affect policy—by affecting the political futures of those who make it—and to promote the importance of free speech. Young Decl. at ¶ 3. However, Mr. Young is not a political activist and lacks the time and experience to do things like produce television advertisements that can reach a wide segment of the population. *Id.* at ¶ 4. Thus, the best way for him to do speak effectively against candidates who support restrictions on free speech is to associate with other like-minded individuals and a group like SpeechNow.org. *Id.*

FEC RESPONSE: To the extent that the last sentence is not phrased as an opinion of Mr. Young's, it is unsupported. Plaintiffs have not demonstrated that giving to a group like SpeechNow is the "best way to speak effectively against candidates." Plaintiffs do not compare the effect of such a contribution with, for example, volunteering for a campaign, contributing to a candidate, contributing to a political party, emailing friends, or espousing views on a website.

Since Fred Young is willing to spend \$110,000, he could easily finance his own independent expenditures. Mr. Young could hire someone to prepare advertisements for

him, much like he hopes to “hire SpeechNow to do that sort of thing.” (Young Dep. at 92-32.) It is not difficult for individuals who are capable of making large contributions to hire consultants to create advertisements. (FEC Facts ¶ 351.)

40. Two other individuals, Plaintiffs Brad Russo and Scott Burkhardt, would like to make immediate donations to SpeechNow.org of \$100 each. Keating Decl. at ¶¶ 50-51.

FEC RESPONSE: Nothing in the Act precludes their proposed contributions to SpeechNow. Collectively, these \$100 contributions are also less than the \$1,000 threshold for triggering political committee status under 2 U.S.C. § 431(17).

41. Brad Russo first heard about SpeechNow.org from an acquaintance who works for the Institute for Justice. Declaration of Brad Russo in Support of Plaintiffs’ Proposed Findings of Fact (hereinafter, “Russo Decl.”) at ¶ 2. Because he believes strongly in free speech and opposes many campaign finance laws, Mr. Russo would like to be able to support SpeechNow.org and its mission. *Id.* at ¶ 3.

FEC RESPONSE: No additional specific response.

42. Scott Burkhardt first heard about SpeechNow.org in a news story and located the association’s website through an internet search. Declaration of Scott Burkhardt in Support of Plaintiffs’ Proposed Findings of Fact (hereinafter, “Burkhardt Decl.”) at ¶ 2; Simpson Decl. Ex. 5, Excerpts from the Deposition Transcript of Scott Burkhardt, taken September 16, 2008 at 9:4-6. Mr. Burkhardt has supported various libertarian and conservative causes through the years and wanted to donate money to SpeechNow.org. Burkhardt Decl. at ¶ 2; Simpson Decl. Ex. 5 at 9:10-16. He wrote an email to SpeechNow.org inquiring about how to donate money to the association, but Mr. Keating wrote back indicating that SpeechNow.org was not accepting donations. Keating Decl. at ¶ 50.

FEC RESPONSE: No additional specific response.

43. Both Mr. Russo and Mr. Burkhardt support SpeechNow.org’s mission and believe that calling for the election or defeat of candidates based on their support of First Amendment rights is an ideal way both to affect policy—by affecting who serves in Congress, which makes significant policy regarding those rights—and to promote the importance of free speech. Russo Decl. at ¶ 3; Burkhardt Decl. at ¶ 3.

FEC RESPONSE: No additional specific response.

44. Even though Plaintiffs Russo and Burkhardt could not themselves finance the production and broadcast of SpeechNow.org's ads, they wish to associate with SpeechNow.org's other supporters in order to amplify their voices and reach an audience far greater than they would be able to achieve without SpeechNow.org. Russo Decl. at ¶ 4; Burkhardt Decl. at ¶ 4.

FEC RESPONSE: Plaintiffs Russo and Burkhardt can finance the production and broadcast of advertisements. Individuals can finance advertisements for as little as \$50 without SpeechNow. (FEC Resp. Mem. § II.)

45. All of the individual Plaintiffs have read, understood, and will abide by SpeechNow.org's bylaws, in particular, sections 9 and 10 of Article X of those bylaws. Keating Decl. at ¶¶ 8, 9; Crane Decl. at ¶ 5; Young Decl. at ¶ 5; Russo Decl. at ¶ 5; Burkhardt Decl. at ¶ 5. They further understand that their donations will be used to fund speech, including advertisements that will advocate the election and/or defeat of candidates to federal office based upon their positions on freedom of speech and campaign finance laws, and they understand that SpeechNow.org is an independent group that will not make any contributions to candidates, political committees or political parties (or any of their agents) and will not coordinate its activities with candidates, candidate committees or political party committees. Keating Decl. at ¶ 9; Crane Decl. at ¶ 5; Young Decl. at ¶ 5; Russo Decl. at ¶ 5; Burkhardt Decl. at ¶ 5.

FEC RESPONSE: No additional specific response.

“III. SpeechNow.org's Advisory Opinion Request”

46. Mr. Keating set up SpeechNow.org specifically to avoid any concerns about corruption under the campaign finance laws. Keating Decl. at ¶¶ 6, 38. However, he understood when he created the association that it would be necessary to seek approval from the FEC to operate without becoming a political committee and being subjected to the contribution limits and organizational, administrative, and continuous reporting obligations for political committees. *Id.* at ¶ 38. He also recognized that it might be necessary to challenge the application of these provisions to SpeechNow.org in court. *Id.*

FEC RESPONSE: David Keating's views and motivation for creating SpeechNow are irrelevant to the determination of constitutionality of the provisions challenged by plaintiffs. The Commission objects to the assertion that SpeechNow was “set up . . . specifically to avoid any concerns about corruption under the campaign finance laws” to the extent that it includes a legal conclusion. Regarding Mr. Keating's

expressed desire to create an organization “specifically to avoid any concerns about corruption,” the FECA’s limit on contributions to political committees of \$5000 per year lawfully furthers that goal. Mr. Keating did not just know that he “might” need to challenge the rules; SpeechNow was created to serve as a test case. (FEC Resp. Mem. at § 1.)

47. Accordingly, on November 19, 2007, SpeechNow.org filed a request for an advisory opinion (AOR) with the FEC pursuant to 2 U.S.C. § 437f. The request presented, in essence, three questions: (1) Must SpeechNow.org register as a political committee as defined in 2 U.S.C. § 431(4), and, if so, when? (2) Are donations to SpeechNow.org “contributions” (as defined in 2 U.S.C. § 431(8)) subject to the limits described in 2 U.S.C. § 441a(a)(1)(C)? (3) Must an individual donor to SpeechNow.org count his donations to SpeechNow.org among the contributions applicable to his biennial aggregate contribution limit described in 2 U.S.C. § 441a(a)(3)? *See* Simpson Decl. Exh. 3A, Advisory Opinion Request, at 4-5.

FEC RESPONSE: No additional specific response.

48. Under FEC rules, the Commission is required to issue a written advisory opinion within sixty days of accepting a request. 11 C.F.R. § 112.4(a). If it is unable to render an advisory opinion within that time, the rules state that the FEC “shall issue a written response stating that the Commission was unable to approve” the request by a required vote of four commissioners. *Id.* The FEC issued its response to SpeechNow.org’s AOR on January 28, 2008. Because the FEC at the time was without a full complement of commissioners, it lacked a quorum and thus could not issue an advisory opinion in response to SpeechNow.org’s request. Accordingly, under FEC rules, SpeechNow.org’s request was not approved. *See* Simpson Decl. Ex. 6, Letter from the Federal Election Commission to Bradley A. Smith and Stephen M. Hoersting from the Center for Competitive Politics and William H. Mellor, Steven Simpson, and Paul Sherman from the Institute for Justice, dated January 28, 2008.

FEC RESPONSE: No additional specific response.

49. However, the general counsel’s office of the FEC issued a draft advisory opinion in response to SpeechNow.org’s AOR. Simpson Decl. Ex. 7, Draft Advisory Opinion 2007-32 from the Federal Election Commission, dated January 25, 2008. The draft advisory opinion concluded that, among other things, SpeechNow.org’s planned advertisements constitute “express advocacy,” *id.* at 9:9-12; the donations that Richard Marder and Plaintiffs Keating, Crane, and Young wish to make to SpeechNow.org would be “contributions” under 2 U.S.C. § 431(8), *id.* at 4:26-28; expenditures by SpeechNow.org on advertisements calling for the election or defeat of candidates for federal office would be “expenditures” under 2 U.S.C. § 431(9), *id.* at 4:26-28;

SpeechNow.org has a “major purpose” of campaign activity; accepting the contributions noted above to fund its advertisements would make SpeechNow.org a “political committee” under § 431(4), *id.* at 12:13-20; as a political committee, SpeechNow.org would be subject to the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) and the registration, administrative and reporting requirements for political committees contained in 2 U.S.C. §§ 432, 433, and 434, *id.* at 12:13-20, 13:19-14:5; and SpeechNow.org would be required to register as a political committee once it received contributions of more than \$1,000 regardless of whether it had made any expenditures, *id.* at 12:13-20. In short, the draft advisory opinion concluded that the campaign finance laws prohibit SpeechNow.org from accepting donations that exceed the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) to fund its advertisements. *Id.* at 14:6-12.

FEC RESPONSE: The views of the General Counsel are irrelevant. It is well settled that “[t]he Commissioners are appointed by the President to administer the agency, the agency’s staff is not.” *San Luis Obispo Mothers For Peace v. NRC*, 751 F.2d 1287, 1327, *aff’d en banc in relevant part*, 789 F.2d at 33, 34 (D.C. Cir. 1984). The D.C. Circuit rejected as a “rather silly suggestion” the argument that an NLRB decision should be found unreasonable because it conflicted with the General Counsel’s advice. “It is of no moment . . . what was the General Counsel’s understanding of the case law before the present decision issued, and the court will take no note of it.” *Chelsea Industries, Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002).

50. The draft advisory opinion was consistent with the FEC’s position on other groups that make independent expenditures. The FEC has required such groups both to register as political committees and to abide by contribution limits. See Simpson Decl., Exs. 8-13, FEC Conciliation Agreements.

FEC RESPONSE: The draft advisory opinion is irrelevant. *See supra* FEC Resp. to SN Fact ¶ 49. Objection to the vagueness of “such groups” and “groups that make independent expenditures.” The Act requires registration and contribution limits for some but not every group that makes independent expenditures, and the Commission has so enforced the Act.

51. The FEC's current position with respect to SpeechNow.org does not differ from the positions stated in the draft Advisory Opinion. Thus, according to the FEC, SpeechNow.org's planned advertisements constitute "express advocacy," Simpson Decl. Exs. 7 at 9:9-14, and 14, Excerpts from FEC Responses to Plaintiffs' First Set of Discovery Requests, dated August 25, 2008; the donations that Richard Marder and Plaintiffs Keating, Crane, Young, Burkhardt and Russo wish to make to SpeechNow.org would be "contributions" under 2 U.S.C. § 431(8) and the expenditures by SpeechNow.org on its proposed advertisements "expenditures" under 2 U.S.C. § 431(9), *id.* (FEC Response to Request for Admission No. 3); SpeechNow.org has a "major purpose" of campaign activity; accepting the contributions noted above to fund its advertisements would make SpeechNow.org a "political committee" under § 431(4), *id.* (FEC Response to Request for Admission No. 1); as a political committee, SpeechNow.org would be subject to the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) and the registration, administrative, and reporting requirements for political committees contained in 2 U.S.C. §§ 432, 433, and 434, *id.* (FEC Responses to Requests for Admission Nos. 5-12).

FEC RESPONSE: The draft Advisory Opinion is irrelevant. (*See supra* FEC Resp. Mem ¶ 49.) No specific additional response to the statements regarding the FEC's current position.

52. The FEC's then-chairman, David Mason, issued his own opinion in response to the draft advisory opinion issued by the FEC office of general counsel. Simpson Decl. Ex. 15, Dissenting Opinion of FEC Chairman Mason to Draft Advisory Opinion 2007-32. Chairman Mason concluded that SpeechNow.org ought to be permitted to operate without contribution limits, although he believed that SpeechNow.org should have to register as a political committee and comply with the **administrative, organizational, and reporting obligations for PACs. *Id.* at 5-6.**

FEC RESPONSE: Irrelevant. Chairman Mason was not speaking for the Commission. The Commission cannot exercise its duties and powers without a majority vote of its six Commissioners. *See* 2 U.S.C. § 437c(c); 2 U.S.C. § 437f(b) ("No opinion of an advisory nature may be issued by the Commission or any of its employees except in accordance with the provisions of this section.")

53. David Keating, as treasurer of SpeechNow.org, is directly responsible for complying with the reporting requirements that apply to SpeechNow.org and signing all reports. Keating Decl. at ¶ 14; Bylaws, Art. V, § 8.

FEC RESPONSE: No additional specific response.

54. Under 2 U.S.C. § 437g(d) and the FEC's practices and policies, David Keating, as treasurer of SpeechNow.org, would be liable in his official capacity for any violations of the contribution limits or reporting obligations that apply to SpeechNow.org. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 10 & 11).

FEC RESPONSE: The Commission's policies are as follows:

A committee "treasurer will typically be subject to Commission action only in his or her official capacity." *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005). In this regard, a "probable cause finding against a treasurer in his or her official capacity makes clear to the district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the Commission to obtain a civil penalty from the committee." *Id.* at 4-5.

See FEC Response to Plaintiffs' Requests for Admission 10-11, FEC Responses to Plaintiffs' First Set of Discovery Requests (Aug. 25, 2008) at 27-28, FEC Exh. 160; Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005.)

55. Under 2 U.S.C. § 437g(d) and the FEC's practices and policies, David Keating, as treasurer of SpeechNow.org, would be liable in his personal capacity for any knowing and willful violations of the contribution limits or reporting obligations that apply to SpeechNow.org. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 10 & 11).

FEC RESPONSE: As treasurer, David Keating is responsible for violations by the committee under the following circumstances:

"[W]hen information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the treasurer to have acted in a personal capacity and make findings (and pursue conciliation)

accordingly.” *Id.* at 1, 5, 6. In addition, “[i]f a past or present treasurer violates a prohibition that applies generally to individuals, the treasurer may be named as a respondent in his or her personal capacity, and findings may be made against the treasurer in that capacity. In this way, a treasurer would be treated no differently than any other individual who violates a provision of the Act.” *Id.* at 5 n.7, 6. “Should the Commission file suit in district court following a finding of probable cause against a treasurer in his or her personal capacity, judicial relief, including an injunction and payment of a civil penalty, could be obtained against the treasurer personally.” *Id.* at 5 (citation omitted).

See FEC Response to Plaintiffs’ Requests for Admission 10-11, FEC Responses to Plaintiffs’ First Set of Discovery Requests (Aug. 25, 2008) at 27-28, FEC Exh. 190.

56. The FEC believes that the plaintiffs in this case are aware of the contribution limits, registration requirements, and disclosure requirements that will apply to them if SpeechNow.org engages in the activities described in its AOR and its Amended Complaint. *Id.* (FEC Response to Request for Admission No. 2).

FEC RESPONSE: No additional specific response.

57. If David Keating, Ed Crane, Fred Young, or Richard Marder made contributions to SpeechNow.org in the amounts and for the purposes stated in their declarations, their contributions would violate the law because they exceed the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). Simpson Decl. Ex. 14 (FEC Response to Request for Admission No. 12).

FEC RESPONSE: No additional specific response.

58. If SpeechNow.org were able to accept the contributions of the individual plaintiffs and Richard Marder, SpeechNow.org would have enough money to fund advertisements in at least two election contests. Keating Decl. at ¶ 22; Simpson Decl. Ex. 2 at 4; *see* Keating Decl. Ex. K, Traz Group Bid for Burton and Landrieu Advertisements.

FEC RESPONSE: This proposed fact incorrectly suggests that SpeechNow is unable to accept contributions up to the legal limits. In fact, plaintiffs could accept contributions of up to \$5,000 from each of the five individual plaintiffs and from Richard Marder, subject only to the possible application of the aggregate contribution limit on Mr. Young’s contribution. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(3).

59. Without those contributions, however, SpeechNow.org lacks the funds to run such advertisements. *Id.* at ¶ 40.

FEC RESPONSE: Evidence in the record suggests that had SpeechNow engaged in a modicum of fundraising within the contribution limits, possibly just by accepting donations from those who had expressed an interest, it would have had the funds to run advertisements comparable in scope to the ad buys for the Burton and Landrieu races that Mr. Keating selected. (FEC Facts ¶¶ 392-394.)

“IV. The Effect of Contribution Limits on the Plaintiffs”

60. The contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) prevent plaintiffs Keating, Crane, and Young and Richard Marder from making the donations to SpeechNow.org that they currently wish to make. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13); Advisory Opinion Request at 6-8 (Declaration of Richard Marder in Support of SpeechNow.org Advisory Opinion Request); Keating Decl. at ¶ 39; Crane Decl. at ¶ 6; Young Decl. at ¶ 6.

FEC RESPONSE: Like other proposed facts, this proposed fact incorrectly suggests that SpeechNow is unable to accept contributions up to the legal limits. In fact, plaintiffs could accept contributions of up to \$5,000 from each of the five individual plaintiffs and from Richard Marder, subject only to the possible application of aggregate contribution limit on Mr. Young’s contribution. *See* 2 U.S.C. §§ 441a(a)(1)(C), 441a(a)(3).

61. Both SpeechNow.org and David Keating as its treasurer face a credible threat of prosecution if SpeechNow.org accepts contributions over the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), and David Keating, Ed Crane, Fred Young and Richard Marder face a credible threat of prosecution if they make contributions to SpeechNow.org above those limits. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13).

FEC RESPONSE: No additional specific response.

62. The laws and the FEC’s regulations contained in 2 U.S.C. § 441a(a)(1)(C) and 11 CFR § 110.1(d) prevent SpeechNow.org and/or David Keating from accepting

additional donations above the contribution limits. Simpson Decl. Ex. 14 (FEC Responses to Requests for Admission Nos. 1-3, 5-13); Keating Decl. at ¶ 39.

FEC RESPONSE: No additional specific response.

63. Based on the cost estimates for SpeechNow.org's ads targeted at the elections of Representative Burton and Senator Landrieu, to run ads in only two elections in the future would cost SpeechNow.org at least \$120,000. Keating Decl. at ¶ 31. Thus, without the donations that David Keating, Ed Crane, Fred Young, and Richard Marder wish to make to SpeechNow.org, or other donations of the same amount, SpeechNow.org will not have sufficient funds to pay for the advertisements it wishes to produce and broadcast in the future. *Id.* at ¶ 40.

FEC RESPONSE: Evidence in the record suggests that had SpeechNow engaged in a modicum of fundraising within the contribution limits, possibly just by accepting donations from those who had expressed an interest, it would have had the funds to run advertisements comparable in scope to the ad buys for the Burton and Landrieu races that Mr. Keating selected. (FEC Facts ¶¶ 392-394.)

“A. Contribution Limits Increase the Cost and Burden of Raising Money.”

64. Raising money under contribution limits is more difficult than raising money outside of those limits. Simpson Decl. Ex. 16, *Mariani v. United States*, 212 F.3d 761 (3d Cir. 2000) at 768; Simpson Decl. Ex. 17, Excerpt of District Court Findings of Fact in *Mariani v. United States*, 80 F. Supp. 2d 352 (M.D. Pa. 1999) at 370.

FEC RESPONSE: It is no doubt true that for some organizations raising funds through unlimited contributions is easier than raising funds within contribution limits. The particular findings by both courts in *Mariani* were, however, premised in part on the fact that soft money could be raised from entities that could not otherwise make contributions, corporations and labor organizations. SpeechNow, on the other hand, asserts that it will not accept contributions from corporations and labor organizations. (SN Facts ¶ 5.)

65. During the 1999-2000 election cycle, approximately 3.5 million

Americans made a political contribution at the federal level. Declaration of Rodney Smith in Support of Plaintiffs' Proposed Findings of Fact (hereinafter, "Smith Decl.") at ¶ 24. This figure represents only about 1.2% of the total voting age population. *Id.* Eighty percent of those donors, or roughly 2.7 million people, gave less than \$200. *Id.*

FEC RESPONSE: The Court should decline to enter this fact because it is outdated and contradicted by other, more reliable sources. Smith's report contains information from only one election cycle, 1999-2000, regarding the number of federal donors. The number of donors from one election cycle, without any comparison to other more recent cycles, sheds little to no light on the ability of fundraising organizations to raise additional funds by, for example, recruiting additional donors. Much more probative and material are the facts which demonstrate that the national political parties successfully recruited new donors when they were no longer permitted to receive unlimited contributions (*see* FEC Facts ¶¶ 385-91). According to reports of actual donor numbers from the national party committees themselves, the parties have added millions of new donors this decade, and the total number of federal donors is now dramatically different from the estimate done by Smith from the 2000 election cycle. (*See* FEC Resp. Mem. at 7-8.)

In addition, Smith did not disclose all the sources for this portion of his report, as required by Rule 26(a)(2)(B). At his deposition, Smith erroneously claimed to have obtained his number of total donors from FEC reports, which is impossible since contributors giving \$200 or less in calendar year are not itemized in FEC reports. He later admitted that the total number of donors had been derived from a national poll. The footnote explaining the source was contained in an amicus brief he submitted to the district court in *McConnell v. FEC*, but not in the identical chart in his expert report. (*See*

Smith Dep. at 136-37 & Dep. Exh. 5 at 1a.) Finally, Smith altered his report to covert it into a declaration after the deadline for disclosing reports. (*See infra* FEC Response to Plaintiffs' Proposed Fact ¶ 76.)

Smith's report also failed to comply with other requirements of Rule 26. Rule 26(a)(2)(B) provides that that expert reports must contain, among other disclosures, a list of all publications authored by the expert in the previous ten years, a list of all cases during the previous four years in which the witness testified at trial or was deposed as an expert, and the compensation paid to the expert for study and testimony in the case. Under Rule 37(c)(1), a party that fails to make these disclosures cannot use that witness's testimony unless its failure was substantially justified or harmless, or if the court decides that other sanctions are more appropriate. Other sanctions may include reasonable expenses, including attorney's fees, caused by the failure. *See Pell v. E.I. Dupont De Nemours & Co., Inc.*, 231 F.R.D. 186, 193-94 (D. Del. 1986) (explaining that remedies for failure to make Rule 26(a)(2)(B) expert disclosures can include precluding use of expert's report and re-deposition of witness); *Dunkin Donuts, Inc. v. Patel*, 174 F. Supp. 2d 202, 213-14 (D.N.J. 2001) (recommending that expert report which failed to include Rule 26(a)(2)(B) disclosures, including compensation and previous testimony, be struck). SpeechNow failed to disclose a list of all publications authored by expert Rodney Smith in the previous 10 years, a list of all cases during the previous four years in which he testified at trial or was deposed as an expert, and any compensation he received.

Furthermore, the Commission notes that Plaintiffs did not produce an earlier draft of Rodney Smith's report that had been submitted by Smith to plaintiffs' counsel (attached hereto as Exh. 155) until the day of his deposition. Without it, the Commission

was deprived of an opportunity to pursue lines of questioning that would have tested Smith's credibility.

For example, Smith's final report, used to cross-examine him at deposition (attached hereto as FEC Exh. 156), includes a statement that "the contribution limits mandated by campaign finance reform severely cripple [the ability of challengers and startup advocacy groups] to accumulate enough cash reserves to effectively finance their growth" (*id.* at 6). The early draft did not include this statement. Having not timely received a copy of the draft report, the Commission did not know that this statement had been inserted into the final report after it had been reviewed by counsel. If aware, counsel for the Commission could have asked about the statement's genesis, and further probed its evidentiary support.

Similarly, Smith's final report includes a statement, not included in the draft report, which asserts that due to campaign finance limits, "most non-wealthy challenger candidates and start-up advocacy groups are out of business before they ever get started." Without the draft report, the Commission was unaware that it had been inserted late in the process after interactions with plaintiffs' counsel, and was deprived of an opportunity to ask about the subject.

The late production of this draft report adversely affected the Commission's deposition of Smith, an opportunity to create doubt about his credibility. *See Elm Grove Coal Co. v. Director, O.W.C.P.*, 480 F.3d 278 (4th Cir. 2007) ("[W]e are unable, in these circumstances, to agree that [defendant's] expert witnesses could be properly and fully cross-examined in the absence of the draft reports [T]he disclosure to [plaintiff] of the pertinent draft reports . . . was potentially important to a full and fair cross-

examination and to the truth-seeking process.”); *EEOC v. United Parcel Servs., Inc.*, 149 F. Supp. 2d 1115, 1139-40 (N.D. Cal. 2000) (noting critical effect that late-produced draft reports and ensuing re-deposition had on expert’s credibility); *Bowers v. Nat’l Collegiate Athletic Ass’n*, 564 F. Supp. 2d 322, 342 (D.N.J. 2008) (imposing sanctions on plaintiff’s counsel where “[p]laintiff’s belated disclosure of draft expert reports deprived Defendants of the opportunity to test the independence and reliability of [the expert’s] opinion”).

66. In terms of donors who give more than \$200, there is roughly one donor for every 350 people or one donor out of every 200 households in the average congressional district. Smith Decl. at ¶ 25.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 65. In addition, by relying only on donors who give more than \$200, this statistic is especially divorced from reality due to the surge in new donors below \$200 in the intervening years since 2000. (*See* FEC Resp. Mem. at 7-8.)

67. There is an inverse functional relationship between a group’s fundraising costs and its average contribution. The higher the average contribution, the lower fundraising costs will be as a percentage of gross receipts. The reverse is also true. The lower the average contribution, the higher the fundraising cost will be. Smith Decl. at ¶ 32.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

68. Due to contribution limits, political fundraising has shifted from a low-volume, high-dollar process to a low-dollar, high-volume process. Smith Decl. at ¶ 9.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

69. When the average contribution amount decreases and the number of contributions received increases, the cost of generating additional contributions increases. Smith Decl. at ¶ 32. To make up for lost revenue resulting from the imposition of contribution limits, the volume of smaller contributions must increase as the average contribution amount declines. *Id.*

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

70. Thus, contribution limits result in unavoidably higher fundraising costs. Smith Decl. at ¶ 32.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

71. Every fundraising operation must spend money to acquire new donors. Smith Decl. at ¶ 35. The goal of this process, commonly referred to as “prospecting,” is to avoid losing money. *Id.*

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

72. The cost of acquiring a new donor is often higher than the amount actually received from that donor. Smith Decl. at ¶ 37.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at

9-10.) Moreover, Smith admits that his report contains no data that supports this specific proposition. (Smith Dep. at 83-84, FEC Exh. 15.)

73. If an organization breaks even in the prospecting process, it is using the first contribution it receives from a new donor to finance the cost of acquiring that new donor. Smith Decl. at ¶ 35. But if an organization cannot break even in its prospecting, then its growth must be partially funded out of general operating funds. *Id.*

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

74. There are only two ways a fundraising operation can grow. The first is by increasing the average contribution. Smith Decl. at ¶ 37. The other is by prospecting for more donors. Because contribution limits limit every group's ability to increase its average contribution amount, the only alternative is to acquire more donors. *Id.*

FEC RESPONSE: The Court should decline to enter this proposed fact, which is unsupported by any evidence regarding the burdens or actual cost of fundraising (*see* FEC Mem. at 9-10) and contradicted by the witness's own testimony. Smith admits that average contribution amounts can increase without a change in the contribution limits by convincing donors who have not given the legal maximum to contribute more. (Smith Dep. at 145-46, FEC Exh. 15.)

75. Acquiring more donors is extremely difficult if not virtually impossible without adequate cash reserves or a donor-acquisition program that can be operated on a break-even basis. Smith Decl. at ¶ 37.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.)

“B. Contribution Limits Inhibit the Ability of Groups Like SpeechNow.org to get Started.”

76. The data on average contributions to the top 10 non-party, federally focused 527 organizations in 2004 demonstrate that newly formed 527 political organizations tend to raise funds from a few large contributors, compared to more established 527 organizations. Declaration of Jeffrey Milyo, Ph.D., in Support of Plaintiffs’ Proposed Findings of Fact (hereinafter, “Milyo Decl.”) at ¶ 87.

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any findings of fact concerning Jeffery Milyo’s discussion of the “top non-party, federally focused 527 organization in 2004” because such groups are not representative of independent political committees generally, Milyo’s analysis of such groups is rife with misstatements and errors, and Milyo’s narrow data do not support his broad conclusions. (*See* FEC Resp. Mem. at 15-18.)

In submitting their proposed findings of fact, plaintiffs did not cite their previously disclosed expert reports from Jeffery Milyo and Rodney Smith; instead, plaintiffs relied on new “declarations” from both of their experts, documents the Commission saw for the first time when briefs were filed on October 28, 2008. Plaintiffs, in effect, have submitted supplemental expert reports contrary to the Federal Rules of Civil Procedure and the Joint Scheduling Order in this case. These new declarations create logistical difficulties for the parties, and in the case of Milyo’s declaration, include new substantive argument and deletions of required information.

When a party relies on an expert witness, Rule 26(a)(2) of the Federal Rules of Civil Procedure requires an expert report to include a complete statement of all the expert’s opinions, the witness’s qualifications, a list of other cases in which the witness was involved, and the compensation that witness will receive for his study and testimony. (*See also supra* Response to SN Facts ¶ 65.) The Joint Scheduling Report in this case

required all primary expert reports to be produced by August 15, 2008. After that date, expert reports may only be supplemented until 30 days before trial (*see* Fed. R. Civ. P 26(e)(2), 26(a)(3)), but “only when a party discovers the information it has disclosed is incomplete or incorrect.” *Coles v. Perry*, 217 F.R.D. 1, 4 (D.D.C. 2003). “Fed. R. Civ. P 26(e) does not grant a license to supplement a previously filed expert report because a party wants to” *Id.* Here, plaintiffs can offer no justification for the new declarations. As stated in *Coles*, the purpose of requiring the disclosure of expert reports “is to prevent unfair surprise at trial and to permit the opposing party to prepare for the expert’s cross examination.” 217 F.R.D. at 4. Conversely, “when the expert supplements her report by addressing a new matter after discovery has ended, the very purpose of the rule is nullified.” *Id.* Plaintiffs’ reliance on their experts’ new declarations is thus inappropriate.

While large portions of the new declarations merely restate the expert reports, and thus do not significantly prejudice the Commission, even those sections unnecessarily create logistical headaches for the parties and the Court. When the Commission took the depositions of Smith and Milyo, a significant portion of their testimony commented on specific sections and paragraphs of their reports. Now, to discuss deposition testimony referencing the reports, additional citations to the declarations may also be needed.

In addition to the unnecessary citation complications introduced by plaintiffs’ new expert declarations, Milyo’s declaration also includes new substantive argument and conceals important information. For example, in his new declaration, Milyo has largely rewritten the portion of his expert report concerning the “Equi-Marginal Principle.” (*Compare* Milyo Decl. at ¶¶ 34-39 with “Report on *SpeechNow.org et al. v. FEC*” by

Jeffery Milyo, (“Milyo Report”) § 4.2, Milyo Dep. Exh. 1, FEC Exh. 157.) Paragraph 36 of the new declaration contains completely new argument and paragraphs 37 through 39 also contain substantive additions. Plaintiffs’ proposed findings of fact paragraphs 99-101 rely directly on these new sections. Milyo’s application of the Equi-Marginal Principle was discussed at length during his deposition, and it appears that plaintiffs believe that it needs additional support. (See FEC’s Response to SN Facts 19-20; Milyo Dep. at 193-204, FEC Exh. 12.) Paragraph 44 of Milyo’s declaration, discussing both the “equi-marginal principle” and the concept of “revealed preference,” is also a new addition to his report. (Compare Milyo Decl. at ¶ 44 with Milyo Report § 4.3, FEC Exh. 157.) When discussing the Equi-Marginal principle, plaintiffs should be required to rely on Milyo’s original report rather than his new declaration.

Milyo’s new declaration also omits several pieces of information required by the Federal Rules of Civil Procedure to appear in expert reports. For example, the declaration removes information about how much Milyo is being paid to be a witness in this case. Milyo’s declaration also removes information about expert reports and testimony he has given in previous cases. Notably, in 2007, Milyo was hired by the Institute for Justice, counsel for plaintiffs in this case, to produce a different report concerning “a regulatory burden associated with campaign finance disclosure” in *Sampson v. Coffman*. (Milyo Dep. at 25, FEC Exh. 12; Milyo Report at 4, Milyo Dep. Exh. 1, FEC Exh. 157.) In addition to preparing an expert report in *Sampson v. Coffman*, Milyo was paid \$30,000 by the Institute for Justice to write a report entitled “Measuring Campaign Finance Disclosure Costs” in 2007. (Milyo Report, Curriculum Vitae, FEC Exh. 157.) These are the kinds of matters that courts often examine when probing for

bias. Milyo is also a “senior fellow” at, and recently received a stipend from, the Cato Institute, a think-tank at which Edward Crane, a plaintiff in this case, is the President. (Milyo Report, Curriculum Vitae, FEC Exh. 157; Milyo Dep. at 41, FEC Exh. 157.) Similarly, Milyo serves as an academic advisor for the Center for Competitive Politics, also counsel for plaintiffs in this case. (Milyo Report, Curriculum Vitae, FEC Exh. 157.) Given that Milyo removes information from his declaration related to his potential bias, the Court should enter a finding of fact detailing his relevant past work and associations.

77. With the exception of Swift Vets and POWs for Truth, those 527s with the smallest average contributions (and most numerous contributors) were all either established prior to 2003, or are associated with a well-established organization. Milyo Decl. at ¶ 88. Newer groups such as America Coming Together, the Joint Victory Fund, the Media Fund, Progress for America, and Citizens for a Strong Senate all relied on relatively few large contributors. *Id.*

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any findings of fact concerning Milyo’s discussion of the “top non-party, federally focused 527 organization is 2004” because such groups are not representative of independent political committees generally, Milyo’s analysis is rife with misstatements and errors, and Milyo’s narrow data do not support his broad conclusions. (See FEC Mem. at 15-18.)

78. America Coming Together received seed funding from four individuals, in the amount of \$ 2.025 million, before there was a public announcement of its existence. It then received additional seed funding—including \$ 2 million apiece from George Soros and Peter Lewis—that was widely reported in the media and served the purpose of quickly and effectively assuring political donors of the credibility and competence of this new organization, while at the same time signaling that among the many competing groups that would be working to support progressive ideas and candidates, this was one that political contributors should focus on. Milyo Decl. at ¶ 89. Swift Vets & POWs for Truth received nearly all of its seed funding from just three donors. *Id.* at ¶ 90.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact in that it relies on Milyo's unsupported conjecture regarding the effect of large contributions. As discussed in the Commission's brief, Milyo presents no evidence whatsoever regarding the role of "seed funding" in the formation of political organizations or what significance large contributions to an independent group have for potential donors. (*See* FEC Mem. at 15-16, 18.)

79. Without large initial contributions, new political organizations, especially those that are issue-oriented and do not benefit from an association with some pre-existing trade association or labor union, are less effective participants in the public debate. Milyo Decl. at ¶ 92. Limits on contributions to political groups are likely to be particularly harmful to new and independent political organizations. *Id.* at ¶ 93.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact in that it relies on Milyo's unsupported conjecture regarding the effect of large contributions. As discussed in the Commission's brief, Milyo presents no evidence regarding the role of "seed funding" in the formation of political organizations or what significance large contributions to an independent group have for potential donors. (*See* FEC Mem. at 15-16.) Importantly, Milyo fails to consider or even attempt to account for the thousands of registered non-connected political action committees that operate successfully. (*See* FEC Facts ¶¶ 376-79, 383).

80. Under contribution limits, unless a start-up group happens to be advocating or opposing a high-profile issue that is receiving tens of millions of dollars of free publicity via the national media, or the group has some special connection to a corporation or labor union, that group will not be able to raise enough money to have a meaningful impact on any election. Smith Decl. at ¶ 11.

FEC RESPONSE: SpeechNow's proposed facts claim that the Act's contribution limits prevent it from raising the "seed money" necessary to "get started." (*See* SN Facts

¶¶ 83, 85, 87, 88.) SpeechNow nowhere specifies how much money is necessary to meet this elusive threshold, and the Commission is aware of no Court that has ever held a contribution limit unconstitutional simply because a would-be political actor claims it cannot raise enough “seed money,” or of any Court that has otherwise invoked the concept. (See FEC Mem. at III.C.)

Nevertheless, SpeechNow appears indeed capable of raising whatever “seed money” it purports to need. SpeechNow has received a considerable amount of free publicity (FEC Facts at ¶¶ 403–08), and attracted a significant number of supporters and potential contributors (*id.* at ¶¶ 396–401), but has chosen not to accept any contributions during the pendency of this litigation, and declined any of the contributions offered to date (*id.* at ¶¶ 398-400.) (*See also* FEC Resp. Mem. at 15-16.) In any event, because the Constitution does not grant competing political actors any rights to equal publicity, equal resources, or equal political influence, this fact is irrelevant, and the Court should not enter it. (*See id.* at 14)

81. Most of the big money raised via the Internet has been the direct result of a candidate and/or cause benefitting from a huge amount of free publicity. Smith Decl. at ¶ 42. This makes raising money via the Internet out of reach for the vast majority of non-wealthy candidates and start-up organizations. *Id.*

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 80.

82. Because the cost of acquiring new donors is often greater than the amount received from a new donor, small groups usually start at a loss and remain there until they go into debt and/or cease to exist. Smith Decl. at ¶ 10.

FEC RESPONSE: This proposed fact is unsupported by any evidence regarding the actual cost of fundraising, and the Court should decline to enter it. (*See* FEC Mem. at 9-10.) In fact, Smith admits (1) that his report contains no data that supports this specific

proposition (Smith Dep. at 83-84, FEC Exh. 15) and (2) that in his report he fails to identify a single group that went “out of business” due to contribution limits (*id.* at 123).

83. As a result, it is crucial for new organizations to have seed money that allows them to begin to advance their mission before a successful program of larger-scale fundraising can take place. Smith Decl. at ¶ 35. This is particularly true when an organization is working on an issue for which there is not an overwhelming and sustained amount of outrage throughout all quarters of the public and the media that generates a strong demand for the change favored by the organization. *Id.* at ¶ 11; Keating Decl. at ¶ 41; Crane Decl. at ¶ 10.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶¶ 80, 82.

84. Right now, the issue of restrictions on free speech from campaign finance laws is not such an issue. Keating Decl. at ¶ 41.

FEC RESPONSE: The Constitution does not grant competing political actors any rights to equal publicity, equal resources, or equal political influence. (*See* FEC Resp. Mem. at III.C.) Consequently, the publicity garnered by campaign finance issues in general, or by SpeechNow in particular, is irrelevant, and the Court should decline to enter this fact.

85. SpeechNow.org will need to spend substantial funds on advertisements in order to raise the profile of this issue and thus add more donors, both large and small, to the cause. Keating Decl. at ¶ 41. However, without initial seed funding, SpeechNow.org lacks the funds necessary to convince donors that it is a viable going concern that has already produced advertisements consistent with its mission. *Id.*; Crane Decl. at ¶ 10.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 80.

86. Convincing donors that SpeechNow.org is a viable going concern—which SpeechNow.org can only do by producing and running advertisements—is a prerequisite to the success of any larger-scale fundraising effort. Keating Decl. at ¶ 41; Crane Decl. at ¶ 10; Smith Decl. at ¶ 22.

FEC RESPONSE: *See* FEC Response to Plaintiffs’ Proposed Fact ¶ 80.

87. Because of the contribution limits, SpeechNow.org and groups like it cannot receive the seed funding, in the form of large donations over the limits,

that they need to get started and have an effective impact on elections. Keating Decl. at ¶ 41; Smith Decl. at ¶ 22.

FEC RESPONSE: *See* FEC Response to Plaintiffs' Proposed Fact ¶ 80.

88. The longer SpeechNow.org has to go without seed funding, the more it will be delayed in producing and running its political advertisements and thus in undertaking larger-scale fundraising based on a reputation for taking actions that advance its mission in the real world. Keating Decl. at ¶ 43.

FEC RESPONSE: *See* FEC Response to Plaintiffs' Proposed Fact ¶ 80.

89. Even assuming that SpeechNow.org could somehow raise enough money in increments of \$5,000 or less per donor to pay for its advertisements, the contribution limits applicable to political committees would, by making it harder to gather funds, still greatly limit the number of times it could run those ads. Keating Decl. at ¶ 44. The limits would also restrict SpeechNow.org's ability to run additional advertisements concerning other federal candidates in other races. *Id.*

FEC RESPONSE: Evidence in the record suggests that more money can be raised by seeking out new donors. (*See* FEC Resp. Mem. at III.A.) SpeechNow has not even attempted any fundraising. The Court thus should not enter a finding of fact based on Mr. Keating's speculative and conclusory testimony.

90. Contribution limits not only deprive groups like SpeechNow.org of the large donations necessary to get off the ground, but they also deprive such groups of the signal that a large donation sends to potential donors: that the new organization has the potential to be effective. Milyo Decl. at ¶ 54. Large donations also resolve the uncertainty of potential donors who would otherwise either not contribute or would be forced to "play it safe" and donate to other, more established groups, even when those groups do not represent the donors' most favored cause. *Id.*

FEC RESPONSE: The Court should decline to enter Plaintiffs proposed finding of fact in that it relies on Milyo's unsupported conjecture regarding the effect of large contributions. As discussed in the Commission's brief, Milyo presents no evidence regarding the role of "seed funding" in the formation of political organizations or what significance large contributions to an independent group have for potential donors. (*See*

FEC Mem. at 18.) Specifically, Milyo presents no empirical nor anecdotal evidence of even a single donor being forced to “play it safe” or donate to “groups that do not represent the donors’ most favored cause.” (Milyo Decl. ¶ 54.)

“C. Contribution Limits Make it Harder for the Individual Plaintiffs to Associate for the Purpose of Speaking Effectively.”

91. The basic economic concepts of specialization and division of labor apply in the setting of groups that engage in any sort of advocacy, including independent express advocacy: some individuals have a comparative advantage in funding a cause, some in articulating a message for a cause, and some in developing a strategy for disseminating that message. For this reason, individuals who come together as political groups do so because such a voluntary association makes them more effective in their cause. Milyo Decl. at ¶ 50.

FEC RESPONSE: The Plaintiffs’ proposed finding of fact is irrelevant because registering as a political committee would not prevent them from coming together to take advantage of any specialization or division of labor; the only constraint is on how *much* money any one individual can contribute to a political committee. (See FEC Mem. at 19.) Additionally, Milyo’s claims about why individuals come together to form political groups are unsupported conjecture. (See Milyo Decl. ¶ 50.) Milyo has not conducted any investigations, nor does he cite any investigations concerning why individuals forms political groups or what makes a political group “effective.” *Id.*

92. The individual plaintiffs wish to join together and associate with each other and with SpeechNow.org in order to take advantage of the specialization, division of labor, and economies of scale that association affords them. For example, David Keating possesses the knowledge and experience to produce and broadcast advertisements and to operate a group like SpeechNow.org, but, alone, he lacks the financial resources. Keating Decl. at ¶ 48. Ed Crane has a relatively large donation to offer SpeechNow.org, but he lacks the time to operate the group or to produce and broadcast ads. Crane Decl. at ¶ 4. Fred Young has the financial resources to fund some of SpeechNow.org’s advertisements, but he lacks the time, knowledge, and experience to produce ads or operate a group like SpeechNow.org. Young Decl. at ¶ 4. Brad Russo and Scott Burkhardt lack both the time and experience and the resources to fund or operate SpeechNow.org, but by donating to SpeechNow.org and associating with its supporters and members,

they are able to amplify their voices beyond what they would be able to achieve on their own. Russo Decl. at ¶ 4; Burkhardt Decl. at ¶ 4.

FEC RESPONSE: Plaintiffs are free to come together to take advantage of any specialization, economies of scale or advantageous division of labor in operating SpeechNow; they are merely limited in how much money they can each contribute to the group. (*See* FEC Resp. Mem. at § III.E).

93. However, contribution limits make it impossible for individuals to take full and effective advantage of the specialization, economies of scale, and division of labor that group association affords. The effect of a contribution limit on SpeechNow.org and groups like it is to punish individuals, such as the individual Plaintiffs in this case, who associate in groups for the purpose of advocating for or against political causes by limiting the funds they can devote to such causes. Milyo Decl. at ¶¶ 49-51.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because the contribution limits that apply to political committees in no way "punish" individuals who seek to associate for the purpose of making political speech. Plaintiffs are free to come together to take advantage of any specialization, economies of scale or advantageous division of labor in operating SpeechNow; they are merely limited in how much money they can contribute to the group. (*See* FEC Mem. at 19.)

94. This, in turn, will dissuade some individuals from participating in political groups at all. Instead, such individuals must "go it alone" or even abandon their desire for political expression, when in the absence of contribution limits they would have been more effective as part of a group. Milyo Decl. at ¶¶ 49-51.; Keating Decl. at ¶ 52; Young Decl. at ¶¶ 4, 6; Crane Decl. at ¶¶ 4, 6, 10; Russo Decl. at ¶¶ 4, 6; Burkhardt Decl. at ¶¶ 4, 6.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because, as discussed in the Commission's brief, Milyo offers no evidence whatsoever that anyone has ever been dissuaded from participating in political groups or compelled to go it alone or abandon a desire for political expression because of contribution limits. (*See* Milyo Dep. at 240-241, 244-45, 246, FEC Exh. 12.)

Additionally, none of the Plaintiffs claim that limiting their contribution to \$5000 per

year will have unduly burdensome implications for them. (See SN Facts ¶ 94; Keating Decl. ¶ 52; Young Decl. ¶¶ 4,6; Crane Decl. ¶¶ 4, 6, 10; Russo Decl. ¶¶ 4, 6; Burkhardt Decl. ¶¶ 4,6.)

95. Contribution limits also inhibit the information that large contributions convey about which groups are more or less desirable from the donors' standpoint. Milyo Decl. at ¶¶ 52-57. Economies of scale in political communication mean that one large group with a mission can be more effective than many small groups with the same mission. Potential donors know this and would prefer to focus their giving on one group, but they must determine which group is best. *Id.* at ¶ 55. A political patron's large initial contribution to a group sends an unambiguous signal to other political contributors as to which group to focus their giving on. This facilitates the ability of individuals to associate more efficiently and to articulate their political opinion more effectively. *Id.* at ¶¶ 53-56.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because it is based solely on Milyo's unsupported conjecture. He offers no evidence whatsoever to support his claim that "one large group with a mission can be more effective than many small groups with the same mission," or that any potential political donors believe this to be the case. (See Milyo Decl. ¶¶ 52-57.) Indeed Milyo's commentary is strictly theoretical; he presents no evidence, does no investigation, nor does he cite to any investigation of the role that "political patrons" play within political committees. *Id.* In his deposition, Milyo conceded that he did not present any empirical, analytical, or systematic evidence for his claims regarding the role or effect of large "political patrons." He explained, "in terms of identifying the systematic treatment effect on prohibitions on contributions of a certain size on the formation of groups, I did not present that sort of systematic estimate of the treatment effect." (Milyo Dep. at 256-257, FEC Exh. 12). He does not know how large contributions from "political patrons" actually affect political groups. Additionally, Milyo simply does not consider the thousands of independent PACs that do raise money and communicate effectively

without “political patrons.” (See FEC Facts ¶¶ 376-79, 383). Finally, any proposed findings of fact regarding “political patrons” are irrelevant because there is no constitutional right to such “patronage.”

96. Limits on contributions to groups like SpeechNow.org prevent political patrons from either seeding new groups or helping to organize individuals into joining and supporting more effective political groups. Milyo Decl. at ¶ 57.

FEC RESPONSE: The Court should decline to enter Plaintiffs’ proposed finding of fact because, as above, Milyo presents no evidence, does no investigation, nor does he cite to any investigation of the role that “political patrons” play within political committees or what determines whether or not a political group is effective. (See Milyo Decl. ¶¶ 52-57.) Additionally, any proposed findings of fact regarding “political patrons” are irrelevant because there is no constitutional right to such “patronage.”

97. In sum, limits on contributions to political groups restrict the amount and effectiveness of political expression by these groups, as well as the amount and effectiveness of political expression by individuals that wish to contribute to such groups. Milyo Decl. at ¶ 58.

FEC RESPONSE: The Court should decline to enter Plaintiffs’ conclusory proposed finding of fact because their contention is based solely on Milyo’s unsupported conjecture. (See SN Facts ¶¶ 91-97; Milyo Decl. ¶¶ 50-58.) Milyo presents no evidence or support for his contention that contribution limits reduce the effectiveness of political expression, or even what determines whether or not a political group is effective in the real world of national political discourse. *Id.* Additionally, neither Plaintiffs nor Milyo presents any evidence in this section that contribution limits actually reduce the “amount” of political expression that a group is able to make. *Id.*

“D. Contribution Limits Restrict the Amount of Funds Available to Groups Like SpeechNow.org for Independent Expenditures.”

98. Communicating a political message to a large group of voters is an expensive proposition that requires a significant amount of money for the message to be heard. Smith Decl. at ¶ 8; Keating Decl. at ¶¶ 22-24.

FEC Response: The evidentiary support for this proposed fact consists of a conclusory, unsupported statement by SpeechNow's expert Rodney Smith and David Keating's notions of "ideal" advertising buys. Keating posits that an ideal advertising buy would garner at least 1,000 gross ratings points, enough to allow its "message to sink in." Keating declares that in a competitive election environment, such as "in a statewide [Senate] race . . . it is important to reach as many people in the state as possible." (Keating Decl. ¶ 23.) While it is often true that communicating to large groups of voters requires significant amounts of money -- with the Internet creating more exceptions than ever (*c.f.* FEC Resp. Mem. at III.B.) -- this proposed fact is premised on the notion that there is a threshold level of political influence that contribution limits must accommodate. But as the Commission has explained (*See* FEC Mem. at III.C), the Constitution does not grant competing political actors any rights to equal political influence and the Court should decline to enter this proposed fact.

99. As a result, any group that wants to speak out effectively will want to raise money in the most efficient way possible—that is, at the lowest cost per contributed dollar—in order to allow it to raise sufficient funds quickly enough to have an impact on the election. Smith Decl. at ¶ 26; Milyo Decl. at ¶ 37. Put another way, the more money that a group spends to raise its funds, the less money it will have to spend on its independent expenditures. Milyo Decl. at ¶¶ 37-39.

FEC RESPONSE: Plaintiffs assert that "the more money that a group spends to raise its funds, the less money it will have to spend on its independent expenditures." The only support for this assertion is several paragraphs of Milyo's new declaration. (SN Facts ¶ 99; Milyo Decl. ¶¶ 37-39.) However, Plaintiffs' statement is an inaccurate oversimplification of Milyo's claims—regardless of their other flaws. *Id.* Milyo's

contentions speak to the point that if a group is compelled to raise money in an inefficient manner, it will not be able to raise the highest conceivable amount of funds. *Id.* This is not, however, what Plaintiffs’ proposed finding of fact states. Indeed, it is quite possible that the more money that a group spends on fundraising, the more contributions that it will gather, and thus, the more money it would have to spend on independent expenditures.

100. A number of basic economic principles support this conclusion. First, under the “equi-marginal principle,” a group will pursue contributions from that donor pool that involves the lower marginal cost of raising funds per donor dollar. Milyo Decl. at ¶ 37. Groups are limited in the amount of time, effort, and resources that they may devote to fundraising and are thus forced to make choices about how to allocate their scarce resources in order to maximize the amount of money that they have. Thus, if given the opportunity to pursue funds from large donors or small donors, a group seeking to maximize its funds available for independent expenditures will allocate its efforts to the group of donors that involve the lowest cost per donor dollar raised. *Id.* If the costs are higher for one group of donors—small donors, for example—the organization can still reallocate resources to raising money from the group of large donors in order to be able to raise enough funds to finance its independent expenditures. *Id.* at ¶ 38.

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any of the Plaintiffs’ proposed findings of fact regarding Milyo’s application of the “equi-marginal principle” because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising. He does not consider any of the realities of political fundraising (including what counts as a “large” or “small” contribution, what the marginal costs of raising additional large and small contributions are, or the relative burdens of raising specific amounts of money for independent expenditures), and indeed, Milyo concedes that the effect of the “equi-marginal principle” could be that SpeechNow raises a penny less under contribution limits than it would have in an “unconstrained” environment. (*See* FEC Mem. at 19-20.)

101. Under contribution limits, however, an organization is forced to raise funds from one group—small donors—because large donors are prohibited from contributing

money to the group. Milyo Decl. at ¶ 39. According to the “law of increasing opportunity costs,” (also known as “the law of diminishing returns”) the cost of raising funds from two pools of donors—one of small donors and one of large donors—will increase with the amount of money already raised from either pool of donors. *Id.* at ¶ 37. Put another way, by restricting the donor pool, contribution limits make donor dollars more scarce, requiring groups trying to raise funds to pursue greater numbers of donors—at a greater marginal cost per dollar raised—for the money they need to fund their independent expenditures. *Id.* at ¶ 39. Thus, the equi-marginal principle implies that any constraint on fundraising will lower a group’s total funds received, and therefore also lower its ability to make independent expenditures. *Id.*

FEC RESPONSE: As discussed in detail in the Commission’s brief, the Court should decline to enter any of the Plaintiffs’ proposed findings of fact regarding Milyo’s application of the “equi-marginal principle” because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising. He does not consider any of the realities of political fundraising, and indeed, Milyo concedes that the effect of the “equi-marginal principle” could be that SpeechNow raises a penny less under contribution limits that it would have in an “unconstrained” environment. (*See* FEC Mem. at 19-20.)

102. Second, the concept of “Revealed Preference” also implies that any constraint on fundraising, such as contribution limits, will restrict a group’s ability to make independent expenditures. Milyo Decl. at ¶ 40. In an unconstrained environment, a group’s mix of donations from small and large contributors represents the group’s maximal ability to raise funds for independent expenditures. *Id.* at ¶ 41. In other words, the mix reveals the group’s best effort at maximizing the funds it has available for independent expenditures. *Id.* Any contribution limit will cause a deviation from the mix of donations that would have occurred in the unconstrained environment, and will yield a less preferred outcome for the group and its ability to make independent expenditures. *Id.* at ¶ 43.

FEC RESPONSE: As in the case of Milyo’s discussion of the “equi-marginal” concept, and as discussed in the Commission’s brief, the Court should decline to enter any of the Plaintiffs’ proposed findings of fact regarding Milyo’s application of the “revealed preference” principle because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising. He does not consider any

of the realities of political fundraising (such as whether or not a group is able to determine what kinds of contributions it should pursue in order to maximize its fundraising, the comparative burdens of seeking large or small contributions, or the extent to which external circumstances could affect how a group raises political contributions), and he makes no claims about the actual extent to which contribution limits would affect a group's fundraising in the real world. (*See* FEC Mem. at 20-22.)

103. In sum, any contribution limit that generates a deviation from the pattern of contributions that would be observed in an unconstrained environment must be an actual impediment to a group's ability to raise and spend funds, and so must yield a less preferred outcome for the group—that is, lower independent expenditures. Milyo Decl. at ¶ 43. Consequently, if evidence shows that political groups raise money from large contributors when permitted to do so, “revealed preference” would indicate that contribution limits do in fact harm the groups and result in less spending on independent expenditures. *Id.*

FEC RESPONSE: The Court should decline to enter any of the Plaintiffs' proposed findings of fact regarding Milyo's application of the “revealed preference” principle because his theoretical discussion is undercut by the factual history of “soft money” and political party fundraising, he does not consider any of the realities of political fundraising, and he makes no claims about the actual extent to which contribution limits would affect a group's fundraising in the real world. (*See* FEC Mem. at 20-22.)

104. An analysis of data from the 2004 election cycle demonstrates that, in fact, groups do reveal a preference for larger over smaller contributions. Milyo Decl. at ¶ 76.

FEC RESPONSE: The Court should decline to enter any of plaintiffs' proposed findings of fact based on Milyo's application of the “revealed preference” principle because he mistakenly claims that the fundraising habits of unregistered 527 groups in 2004 are representative of the preferences of all independent political groups. As

discussed in the Commission's brief, Milyo's focus on the 2004 527 groups is not applicable to all political committees because (i) it ignores the many unconnected committees that chose to register with the FEC and collect contributions within the limits, (ii) the amount of large donations that many of the 527s received is skewed because contributions within the limits were more likely to be given to their associated PACs or other political entities, and, (iii) as Milyo concedes, the 527s he discusses may not even be representative of other 527s. (*See* FEC Mem. at 17, 20-22.)

105. Plaintiffs' expert, Dr. Jeffrey Milyo, compared the pattern of individual contributions in the 2004 election cycle to the top (in terms of total receipts) non-party, federally focused 527 organizations and to their associated federal PACs. Milyo Decl. at ¶¶ 76-79. At the time, those 527 organizations were not subject to contribution limits, while the PACs were. As a result, the comparison demonstrates the impact of contribution limits on PACs as opposed to 527s. *Id.* at ¶¶ 75, 79.

FEC RESPONSE: As discussed in the Commission's brief, Milyo's focus on the 2004 527 groups is not applicable to all political committees because (i) it ignores the many nonconnected committees that chose to register with the FEC and collect contributions within the limits, (ii) the amount of large donations that many of the 527s received is skewed because contributions within the limits were more likely to be given to their associated PACs or other groups, and, (iii) as Milyo concedes, the 527s he discusses may not even be representative of other 527s. (*See* FEC Mem. at 15-17.) Furthermore, as Milyo notes in his declaration, "only contributions totaling more than \$200 in a given year must be itemized and reported to the IRS." (Milyo Decl. ¶ 74.) Accordingly, Milyo's data regarding the fundraising of 527s in 2004 may ignore numerous contributions less than \$5,000.

106. Half of the 527 groups received average contributions that are well above the \$5,000 limit for PACs, including several groups with average contributions of \$100,000 to more than \$500,000. Milyo Decl. at ¶ 76.

FEC RESPONSE: (*See* Resp. to SN Fact ¶ 105.)

107. For several of the groups, contributions above the \$5,000 limit accounted for the vast majority of funds they raised. Milyo Decl. at ¶ 80. For example, large individual contributions (those over \$5,000) accounted for 98.3% of the funds from individual contributors to America Coming Together, 79.7% of the contributions to MoveOn.org, 88.6% of contributions to the New Democrat Network, and 76.5% of contributions to the Club for Growth. *Id.* In addition, between 48% and 82% of the individual contributions to these groups were in amounts of \$100,000 or more. *Id.* Thus, most of the funds raised by these organizations were in amounts that would have exceeded the annual limit on individual donor contributions to political committees, as well as the biennial aggregate limit on individual donors. *Id.*

FEC RESPONSE: (*See* Resp. to SN Fact ¶ 105.)

108. Five hundred and fifty-five persons made contributions of \$5,000 to the PACs associated with these groups. Milyo Decl. at ¶ 82. Given the distribution of contributions to the associated 527 organizations—that is, many people contributed more than \$5,000 to 527s—it is reasonable to assume that many of the donors to PACs would have given larger amounts to the PACs had they been allowed to do so. *Id.*

FEC RESPONSE: (*See* Resp. to SN Fact ¶ 105.)

109. For example, had the top 271 maximum contributions to the America Coming Together PAC exhibited a similar distribution across contribution amounts as did the large contributions to the America Coming Together 527, then the PAC would have raised over \$22 million more dollars than it did in 2003-2004 (or about a 66% increase). Milyo Decl. at ¶ 79.

FEC RESPONSE: The Court should decline to enter plaintiff's proposed fact because donors to a PAC like ACT's would be extremely unlikely to replicate the amount of money raised for ACT itself if they were free to give as much as they wanted to ACT PAC. Donors are usually directed to first give to a PAC, and then, if they are interested in providing additional funds, to give to the connected 527. (*See* Wilcox Rept. at 6, FEC Exh. 1; Rozen Decl. ¶ 11, FEC Exh. 3; *McConnell v. FEC*, 540 U.S. 93, 125 n.15.) Contributors to ACT PAC thus would not contribute in the same ratio to ACT PAC if its

limits were lifted: if contributors, wanted to give more, they likely would already have done so to the connected 527.

110. For the top 527 political organizations without PACs (Joint Victory Campaign 2004, Media Fund, Progress for America, Swift Vets & POW for Truth, College Republican National Committee, Citizens for a Strong Senate), four of these six groups raised more than 99% of their funds from individual contributors in amounts greater than \$5,000; in fact, all but one of these groups raised most of its funds from individual contributors in amounts of \$100,000 or more. Milyo Decl. at ¶ 83.

FEC RESPONSE: (See FEC Resp. to SN Fact ¶ 105.)

111. A random sample of 527 organizations outside the top ten 527s (Marijuana Policy Project, International Brotherhood of Electrical Workers, League of Conservation Voters, Young Democrats, Ocean Champions Voter Education Fund, Justice for America) shows that, in most cases, 80-99% of the individual contributions to these groups were in amounts greater than \$5,000, and a majority of these funds were contributed in amounts of \$100,000 or more. Milyo Decl. at ¶ 84.

FEC RESPONSE: A random sample of 527 organizations outside the top ten 527s (Marijuana Policy Project, International Brotherhood of Electrical Workers, League of Conservation Voters, Young Democrats, Ocean Champions Voter Education Fund, Justice for America) shows that, in most cases, 80-99% of the individual contributions to these groups were in amounts greater than \$5,000, and a majority of these funds were contributed in amounts of \$100,000 or more. Milyo Decl. at ¶ 84.

FEC RESPONSE: The Court should decline to enter SpeechNow's proposed finding of fact because Milyo's further sample of 527 groups is not "random" or representative of political committees. Accordingly, his analysis does not elucidate the nature of independent political groups' fundraising practices.

Although Milyo concedes in his declaration that the top 527 groups from 2004 may be "unrepresentative," he attempts to shore up his claims by examining "six more 527 political organizations [selected] in a manner that generates an essentially random sample." (Milyo Decl. ¶ 84.) At his deposition, Milyo explained how he decided to examine these particular six groups, as follows:

[T]he way in which data on disclosure reports from the 527 organizations is organized by the Center for Public Integrity is that there's a set of alphabetical links, And one can click on an alphabetical letter, which will then bring up groups which are 527 organizations. And so what I did is selected ... letters corresponding to my last name and first initial. You'll see it's M-I-L-Y-O-J. Originally, I was only going to do M-I-L-Y-O, but it left an ugly hole in the table ... [a]nd that what I did, once I selected that letter, was I looked for the first example of a 527 group which had some nontrivial individual contributions.

(See Milyo Dep. at 318.) When questioned about the validity of his methodology, whether he did any "statistical analysis of any kind to determine whether the information about these six groups would be statistically representative or relevant about the whole realm of 527s," Milyo conceded that he "did not" and added that "Here's some other groups. Here's the method by which they were selected, and I'm not really representing more than that about these groups." (Milyo Dep. at 319-320.) Further admitting that he made no claim about whether or not these six groups were a representative sample, Milyo concluded that "if you don't like it, you can feel free to throw out that." (Milyo Dep. at 320.)

Milyo's discussion of these six additional groups purported to address a major concern regarding his analysis of 527s generally, namely, that they were "unrepresentative." (Milyo Decl. ¶ 84.) However, Milyo's attempt to bolster his conclusions fails for the same reasons and renders his analysis unreliable. Accordingly, all of SpeechNow's proposed findings of fact relying on Milyo's analysis of 527 fundraising in 2004 should be discounted. (See SN Facts ¶¶ 104-112).

112. In sum, data on the size distribution of contributions to prominent 527 organizations and PACs confirm that limits on contributions to political groups reduce the funds available to those groups and impose significant burdens on their ability to speak effectively. Milyo Decl. at ¶¶ 83, 85, 86.

FEC RESPONSE: For all of the reasons stated above, the Court should decline to enter the plaintiffs' conclusory proposed facts regarding the alleged burden of contribution limits based on the past fundraising practices of 527 groups. The 2004 527 groups are not representative of independent political groups generally; Milyo's analysis of the 527 groups is rife with errors, sloppy analysis, and mischaracterization; and Milyo's theoretical discussion of economic "principle" does not contain any relevant factual information about how fundraising works for actual political groups. (*See* FEC Mem. at 15-22.)

113. According to the California Fair Political Practices Commission, "If the top 25 independent expenditure committees in California had to adhere to the same contribution committee limits as candidate controlled committees, there would have been a reduction of \$61,705,519 in special interest money from 2001 through 2006." Simpson Decl. Ex. 18, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, a report of the California Fair Political Practices Commission, dated June 2008 at 4; Simpson Decl. Ex. 19, Excerpts from the Deposition Transcript of Susan Swatt, taken October 1, 2008 at 41:23-42:20; Simpson Decl. Ex. 20, Excerpts from the Deposition Transcript of Ross Johnson, taken October 1, 2008 at 59:760:5, 71:22-73:18 ("If at some time, hypothetically in the past or hypothetically in the future, a limit had been placed on the size of their independent expenditures—I'm sorry, on the contributions that they could receive—these groups at least would not have been able to spend the kinds of money that they did."); Milyo Decl. at ¶ 71.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because it mischaracterizes the California Fair Political Practices Commission's ("FPPC") report, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, and the deposition testimony of the FPPC Chairman, Ross Johnson. The report does contain the sentence quoted by the plaintiffs, but the import is that many millions of dollars were given to independent expenditure committees in amounts far greater than the current contribution limits to candidates, not that independent expenditure committees would necessarily raise tens of millions of dollars less if forced to seek money under

contribution limits themselves. The following exchange from Chairman Johnson's deposition makes this clear:

Q. Correct me if I'm misstating your prior testimony, but you were saying that if we limited the amount of money that an individual could give to independent expenditure committees, that that would reduce the total amount of independent expenditures in California.

A. No, I don't think I said that. I think I said – if I did, then that was not what I intended. What I intended to say was that I think an imposition of a limit on the amount a person could contribute to an independent expenditure committee would be a significant step in the right direction. And I believe that the sum of these enormous independent expenditures from a handful of large special interest contributors would be impacted by that, and so it would be a positive step.

If a contribution limit were in place in terms of what you could contribute to an independent expenditure committee ... nothing to keep you from having hundreds of thousands of people.

(*See* Johnson Dep. at 61-62.) The total amount of money that independent groups would not necessarily decrease because they could still seek contributions from “hundreds of thousands of people.” When asked directly about the quoted passage from the report and whether “there really would have been \$61,705,919 less money spent in the form of independent expenditures from 2001 and 2006,” Chairman Johnson responded as follows:

A. There's no way that one could know what would have happened. What one can know with absolute certainty is that \$61,705,919 was spent above what these contributors could have given directly to the candidates they supported. That is a fact. Now, if –

Q. Sir –

A. If contribution limits had been in place in terms of what could be given to an independent expenditure committee, other factors might have come into play. So obviously, I can't say

absolutely no, but that is an undeniable fact.

(*See* Johnson Dep. at 66-67.) Despite Chairman Johnson's clear answer, counsel for Plaintiffs continued to ask essentially the same question again and again over numerous objections from the Commission. (*See* Johnson Dep. at 67-72.) Repeatedly, Chairman Johnson made the point that trying to say what independent expenditure committees would do under contribution limits would be "speculative," that he didn't "have a crystal ball" and that "in [his] experience, predictions are very difficult, particularly when they talk about the future." (*See* Johnson Dep. at 67, 69, 70.) The statement quoted by SpeechNow in their proposed finding of fact came after the following exchange:

Q. If they had to adhere to the candidate contribution limits going forward, isn't it true that they would not be able to spend as much money in independent expenditures as they were able to do from 2001 through 2006?

Mr. Wilson: Objection. Asked and answered and answered and calls for speculation.

Mr. Gall: And I will move on once I get a good answer. Any answer.

Mr. Wilson: He's answered your question a number of times, sir.

Mr. Gall: He's not answered this question.

The Witness: I think I have. Repeatedly. You know with all respect, sir, I think I've answered the question repeatedly.

(*See* Johnson Dep. at 71-72.) Accordingly, the Commission objects to the statement being entered as a finding of fact. Plaintiffs should not be permitted to harass a witness until they get an answer that they like. The passage quoted by SpeechNow simply does not mean that groups will raise less money if compelled to operate under contribution limits.

114. State legislative candidates spend significantly less on their campaigns in states with contribution limits. Milyo Decl. at ¶ 65.

FEC RESPONSE: The Court should decline to enter Plaintiffs' proposed finding of fact because it relies on Milyo's mischaracterization of an academic source. Milyo asserts that "Recent empirical work by Stratmann (2006) confirms that state legislative candidates spend significantly less on their campaigns in states with contribution limits, all else constant." (Milyo Decl. ¶ 65.) However, the paper (Thomas Stratmann, *Contribution limits and the effectiveness of campaign spending*, Public Choice (2006) 129: 461-474, FEC Exh. 152) is really about a different issue. As Stratmann explains, "this study tests whether campaign expenditures by state House candidates are more productive when candidates are subject to contribution limits. The results show that campaign expenditures by incumbents and challengers are more productive when candidates run in states with campaign contribution limits, as opposed to states without limits. In states with contribution limits, incumbent spending and challenger spending are equally productive, and spending by both candidates is quantitatively important in increasing their vote shares." *Id.* Furthermore, it is important to note that the study concerns *candidate* spending and direct contribution limits; it doesn't have anything to do with independent expenditures or groups like SpeechNow.

"V. SpeechNow.org Poses No Threat of Corruption"

115. SpeechNow.org's mission and purpose is to expressly advocate the election or defeat of candidates based on those candidates' positions on issues affecting free speech; its mission and purpose is not to allow individuals to gain access to or obtain gratitude of any candidates. Keating Decl. at ¶¶ 2-3, 10; *Bylaws*, Art. II.

FEC RESPONSE: Whether or not SpeechNow's "mission and purpose" is to "allow individuals to gain access to or gratitude of any candidates" is irrelevant to the

determination of the constitutionality of the statutory provisions challenged by plaintiffs. The Supreme Court has already recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), when it upheld the Act's individual contribution limit to candidates and candidate committees, that it is the potential for corruption that is relevant, not the motives of potential contributors. (*See* FEC Resp. Mem. § IV.)

116. The individual plaintiffs wish to donate money to SpeechNow.org to support its speech-related mission, not to use their contributions to obtain access to or gratitude of candidates or officeholders. Keating Decl. at ¶ 52; Young Decl. at ¶ 9; Crane Decl. at ¶ 9; Russo Decl. at ¶ 7; Burkhardt Decl. at ¶ 7.

FEC RESPONSE: (*See* Resp. to SN ¶ 115.)

117. The individual plaintiffs either do not care whether any candidates or officeholders know about contributions they intend to make to SpeechNow.org or they would prefer that candidates not know about such contributions. Keating Decl. at ¶ 52; Young Decl. at ¶ 9; Crane Decl. at ¶ 9; Russo Decl. at ¶ 7; Burkhardt Decl. at ¶ 7.

FEC RESPONSE: SpeechNow.org's bylaws would not prevent SpeechNow.org and its members, officers, agents, employees and donors from making candidates aware of their contributions to SpeechNow and expenditures by it. Not all candidates are aware of the identities of those who contribute funds to organizations to finance independent expenditures that support the candidate or oppose the candidate's opponents, but candidates generally are aware of the identities of the donors. Candidates likely are more aware of the identity of donors who give donations in excess of the Act's contribution limits than the identity of donors who give less than the contribution limits.

118. Based on the research by Clyde Wilcox, the FEC's expert in this case, most individuals who donate money to political candidates and committees do so for ideological reasons. Simpson Decl. Exs. 21, Excerpts from the Deposition Transcript of Clyde Wilcox, taken September 22, 2008 at 145:6-17, 157:10-14, 219:10-13, 226, 229, and 22, Excerpts from Wilcox et al., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES AND INTIMATES* (2003) at 45, 48-49, 67.

FEC RESPONSE: In support of this proposed fact, SpeechNow cites to fragments of Professor Wilcox's past research and his deposition testimony. But SpeechNow ignores parts of Wilcox's book and testimony which suggest that "investors," donors who contribute seeking tangible personal gain, account for a significant percentage of those who make contributions. His research showed that "a combined 60 percent admitted that it was always or sometimes important whether a candidate was friendly to their industry, and more than half said that it was at least sometimes important to give so that their business was treated fairly." (Peter L. Francia, *et al.*, *The Financiers of Congressional Elections: Investors, Ideologues and Intimates* 45 (2003)).

119. Individuals are legally able to make unlimited independent expenditures as long as they are not coordinated with candidates or political party committees. Thus, for instance, the FEC admits that Fred Young could spend his own money to produce and broadcast the advertisements that SpeechNow.org wants to run as long as he follows the FEC's rules concerning coordination. FEC's Mem. in Opp'n to Pls.' Mot. Prelim. Inj. 34 (Mar. 5, 2008, Docket No. 13) ("Thus Mr. Young, who allegedly is willing to contribute \$110,000, could finance these or similar advertisements himself.").

FEC RESPONSE: No additional specific response.

120. According to the FEC, Fred Young could hire consultants to produce and broadcast advertisements like those SpeechNow.org wants to run without having to register as a political committee and be subject to contribution limits. Simpson Decl. Ex. 4, Excerpts from the Deposition Transcript of Fred M. Young, Jr., taken October 3, 2008 at 92:11-93:4. However, Fred Young would like to associate with SpeechNow.org and its supporters for that purpose. *Id.* ("Q: Could you hire someone with the time and expertise? THE WITNESS: Well, I'm hoping that I can quote/unquote hire SpeechNow.org to do that sort of thing.").

FEC RESPONSE: No additional specific response.

121. Individuals may make independent expenditures in aggregate amounts of greater than \$1,000 and may coordinate their efforts with other individuals who make independent expenditures in aggregate amounts of greater than \$1,000, without having to register as a political committee as long as they do not have a “major purpose” of nominating or electing a candidate for office. Simpson Decl. Ex. 23, Excerpts from FEC Responses to Plaintiffs’ Second Set of Discovery Requests, dated September 25, 2008 (FEC Response to Request for Admission No. 24).

FEC RESPONSE: No additional specific response.

122. Whatever concerns about corruption may be raised by a group’s independent expenditures would also be raised by an individual’s independent expenditures. Simpson Decl. Exs. 23 (FEC Response to Request for Admission No. 26) and 21 (Wilcox Deposition Excerpts) at 178:7-179:2; *see also* Milyo Decl. at ¶¶ 26-28.

FEC RESPONSE: Irrelevant. The Supreme Court analyzes expenditure limits, such as a cap on the amount of money an individual could spend on an independent expenditure, differently from contribution limits. *See Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). An expenditure cap is not at issue in this case.

In addition, one of the cited sources does not support plaintiffs’ proposed fact.

The Commission actually stated:

[I]ndependent expenditures by individuals raise many of the same concerns about corruption as individual expenditures by groups, but DENY that independent expenditures by groups raise the exact same concerns. For example, independent expenditures by individuals do not raise the concern regarding undue access or influence over officeholders to the same extent as independent expenditures by groups.

Simpson Decl. Exs. 23 (FEC Response to Request for Admission No. 26.) Similarly, in the sections of Milyo’s deposition cited by plaintiffs, he does not discuss what risks of corruption arise from an individual making independent expenditures.

123. If SpeechNow.org’s bylaws are followed by SpeechNow.org and its members, officers, agents, employees and donors, SpeechNow.org will not make

coordinated communications. Simpson Decl. Ex. 23 (FEC Response to Request for Admission No. 32).

FEC RESPONSE: As the Commission explained, “SpeechNow.org’s bylaws would not prevent SpeechNow.org and its members, officers, agents, employees and donors from making candidates aware of their expenditures. *Id.*”

124. The FEC effectively utilizes its rules against coordination, 11 C.F.R. § 109.21, to handle allegations of coordination. Simpson Decl. Ex. 23 (FEC Response to Request for Admission No. 31).

FEC RESPONSE: Plaintiffs’ proposed fact is partially unsupported. The Commission is an agency of limited jurisdiction. The Commission responded to plaintiffs’ request for admission as follows:

The Commission effectively utilizes its rules to handle coordination allegations when complaints are filed with the Commission or when information regarding coordination comes to the Commission’s attention “on the basis of information ascertained in the ordinary course of carrying out its supervisory responsibilities” pursuant to 2 U.S.C. § 437g(a)(1) and (2).

(Simpson Decl. Exh. 23 (FEC Response to Request for Admission No. 31).) The Commission’s response did not address other allegations of coordination.

125. It is a well-established result in game theory and human subject experiments that collusive behavior is, in general, *less* likely to occur when the number of persons involved in the potentially-collusive arrangement increases. Milyo Decl. at ¶ 26.

FEC RESPONSE: The Court should decline to enter any of Plaintiffs’ proposed findings of facts concerning Milyo’s discussion of “game theory” because Milyo’s claims are unsupported and irrelevant. First, Milyo claims that collusive behavior is generally less likely to occur when the number of persons involved in the potentially-collusive arrangement increases. His support for this claim is a 1980 literature review by Robyn Dawes entitled *Social Dilemmas*. The claim is unsupported, however, because a

potentially cooperative relationship between the members of or donors to SpeechNow and an office-holder do not appear to fit the pattern of a social dilemma. According to Dawes, “Social dilemmas are characterized by two properties: (a) the social payoff to each individual for defecting behavior is higher than the payoff for cooperative behavior, regardless of what the other society members do, yet (b) all individuals in the society receive a lower payoff if all defect than if you all cooperate.” (Robyn Dawes, *Social Dilemmas*, Ann. Rev. Psychology, Volume 31:169-93 (1980), FEC Exh. 154.) After repeated questioning, Milyo was unable to explain how collusive behavior between an officeholder and SpeechNow would fit within this system of payoffs, conceded that he “did not endeavor to model the activities of SpeechNow,” and furthermore, stated that he was not aware of any modeling that has been done about independent expenditures and implicit relationships with officeholders.” (See Milyo Dep. at 159-170, 167, and 171.) Milyo’s broad conjecture, parroted by the Plaintiffs, does not consider any of the relevant characteristics of a group like SpeechNow and is thus inapplicable.

126. Thus, while research has found that implicit cooperation can occur even without explicit contracting mechanisms in relationships involving two people, where the number of people involved in the relationship is increased, implicit cooperation becomes much less feasible. The reason is that in group settings, it is harder to know how much control or influence any one individual or sub-group of individuals has over the group as a whole. Milyo Decl. at ¶ 28. Further, any political favors directed by an office holder to some members of the group may not be equally valued by all members of the group, or even recognized by all members of the group. *Id.* In other words, there is less reason to be concerned that a political candidate and a group will establish and maintain a collusive relationship than there is for a political candidate and a single person. *Id.* at ¶ 26.

FEC RESPONSE: In addition to the reasons stated above (Resp to SN Facts ¶ 125), the Court should decline to enter Plaintiffs’ proposed findings of fact based on Milyo’s discussion of game theory because he misunderstands how corruption (or its appearance) can occur between an officeholder and a contributor to a group that makes

independent expenditures. There does not need to be any cooperation among the group. If a group is spending its resources to support a candidate (or defeat her opponent), an individual could use a large contribution to the group to seek a favor from the candidate whether all of the other members of the group were cooperating or not. Similarly, where a single individual functionally controls all of the activities of a group, like in the case of SpeechNow, the cooperation and shared “values” of other donors or contributors, is irrelevant. Plaintiffs’ proposed finding of fact should not be entered because it wrongly assumes that there needs to be coordination between a candidate and every member or donor to a group working together for the candidate to be corrupted or appear to be corrupted by an independent expenditure.

127. SpeechNow.org will spend contributions it receives according to the sole discretion of the association. Keating Decl. at ¶¶ 25, 36; *Bylaws*, Art. VI § 11. Accordingly, individual donors will not be able to direct their contributions to particular advertisements or particular candidates’ races. Keating Decl. at ¶ 36.

FEC RESPONSE: No additional specific response.

128. Political candidates do not necessarily approve of independent expenditures made in support of their campaigns or in opposition to their opponent’s campaigns. For instance, both presidential candidates in this year’s election, as well as other candidates, have asked donors to their campaigns not to contribute to independent groups. Simpson Decl. Exs. 14 (FEC Response to Request for Admission No. 14), 23 (FEC Responses to Requests for Admission Nos. 28-30), and 24, News Articles concerning Candidate Disapproval of Independent Expenditures.

FEC RESPONSE: Campaigns may at various times have publicly discouraged donors from contributing to independent groups, including the statements in the referenced article. However, campaigns have not consistently discouraged such activity. *See, e.g.*, Marc Ambinder, Quietly Obama Campaign Calls In the Cavalry, *TheAtlantic.com*, Sept. 9, 2008; Jim Rutenberg and Michael Luo, Interest Groups Step Up Efforts In A Tight Race, *New York Times*, Sept. 16, 2008. In fact, in virtually every

campaign, independent groups frequently run negative ads and allow candidate campaigns to disavow them and say “with a wink” that they were unaware of the ads and condemn them. Wilcox Rept. at 15. Candidate disavowals are consistent with this phenomenon.

129. There is no scientific empirical evidence to support the contention that limits on contributions to groups like SpeechNow.org have any impact whatsoever on either corruption or the appearance of corruption. Milyo Decl. at ¶ 62.

FEC RESPONSE: Professor Milyo is also, however, not aware of a study, one way or the other, that even “attempts to explore the relationship between independent expenditures and public policy, let alone any undue or corrupt influence on policy.” (Milyo Dep. at 274.) Second, with regard to the appearance of corruption, Professor Milyo published a study which found evidence that “public disclosure and restrictions on contributions from organizations improve perceived political efficacy.” (Milyo Dep. at 283; Milyo Dep. Ex. 10; David M. Primo and Jeffery Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, Elec. L. J. Vol. 5:1 (2006).) Large contributions to groups making independent expenditures can be conceived of as indirect contributions to candidates (FEC Facts ¶ 165), and plaintiffs’ own expert has found that contribution limitations improve individuals’ views of government. Finally, SpeechNow’s proposed finding of fact regarding the lack of evidence of corruption and the appearance of corruption should be disregarded as it is in direct conflict with such evidence offered by the Commission including academic studies, expert analysis, sworn testimony by political officeholders and insiders, and numerous actual examples of such corruption taking place. (See FEC Facts ¶¶ 132-344.)

130. In the last six election cycles, numerous groups and individuals have reported making independent expenditures but no contributions or coordinated

expenditures. Simpson Decl. Exs. 14 (FEC Response to Interrogatory No. 3), 23 (FEC Response to Request for Admission 33), and 33, Attachment I03 to FEC Responses to Plaintiffs' First Set of Discovery Requests, dated August 25, 2008. In non-presidential elections during that time period, the number of groups and individuals reporting independent expenditures but no contributions or coordinated expenditures grew from 65 (1997-1998 election cycle) to 93 (2001-2002 election cycle) to 128 (2005-2006 election cycle). Simpson Decl. Ex. 33. In presidential elections the number grew from 126 in the 1999-2000 election cycle to 169 in the 2003-2004 election cycle. *Id.* Through August 22, 2008 of the 2007-2008 election cycle, 167 groups or individuals had reported making independent expenditures but no contributions or coordinated expenditures. Simpson Decl. Exs. 14 and 33.

FEC RESPONSE: No specific additional response.

“VI. The Administrative, Organizational, and Continuous Reporting Requirements for Political Committees.”

131. A political committee must organize, register, and report according to FECA and BCRA and applicable Commission regulations. Scott Dep. at 78:17-79:5; Simpson Decl. Ex. 7 at 10:5-13. Failure to follow these regulations could result in civil penalties for the committee and for the treasurer in his official and even personal capacity. Scott Dep. at 116:15-117:19.

FEC RESPONSE: Civil penalties are available against treasurers in their personal capacity in only very limited circumstances. (*See supra* Response to SN Fact 54.)

132. If SpeechNow.org begins accepting donations that, in the aggregate, are in excess of \$1,000, it will have to register as a political committee and be subject to the administrative, organizational, and continuous reporting requirements for political committees. Keating Decl. at 45; Simpson Decl. Ex. 14 (FEC Response to Request to Admit No. 1); Scott Dep. at 93:3-14.

FEC RESPONSE: No specific additional response.

133. SpeechNow.org does not want to be identified as a PAC because the term would imply that the association gives to and works with candidates, political parties, or both. Keating Decl. at ¶ 49. Mr. Keating believes that many people, including those in the media, donors, and voters, have a negative view of PACs because of the reputation of PACs as colluding with elected officials, political parties, and candidates. *Id.*

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

134. Mr. Keating also does not want SpeechNow.org to have to register as a political committee or have to refer to it as a political committee, because that will make it more difficult to raise funds. Keating Decl. at ¶ 49. Donors are aware of the contribution limits that apply to political committees and parties, and many of them will be reluctant to contribute more than \$5,000 or they will conclude that their contributions will count towards their biennial aggregate limits if SpeechNow.org is subject to contribution limits. *Id.*

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

135. If SpeechNow.org were deemed to be a political committee, it would be classified as a “non-connected” committee. Scott Dep. at 17:14-18:2.

FEC RESPONSE: No additional specific response.

136. When an organization becomes a political committee, it must obtain a tax identification number from the IRS and establish a bank account in a federally insured institution. Scott Dep. at 108:16-109:3, 123:18-21.

FEC RESPONSE: This proposed fact erroneously implies that the Act requires political committees to obtain a tax identification number from the Internal Revenue Service. While the Act requires political committees to maintain depository accounts at federally insured financial institutions (2 U.S.C. § 432(h)), the Act or Commission regulations do not require a tax identification number for such accounts. However, Commission staff have been informed that banks require a tax identification number. The Commission’s Information Division therefore recommends that committees obtain a tax identification number. Scott Dep. at 114-116, FEC Exh. 14.

137. Non-connected committees must register with the FEC using a “Statement of Organization,” or FEC Form 1. Among other things, the four-page form requires committees to list the committee name and address, to designate a treasurer and custodian

of records, and to list all bank accounts in which committee funds are deposited. Simpson Decl. Ex. 26, FEC Form 1, Statement of Organization; Scott Dep. at 122:15-123:14. Any changes to the Statement of Registration must be made within 10 days. Scott Dep. at 123:22-124:6. The form comes with an additional five pages of instructions. Simpson Decl. Ex. 27, Instructions for FEC Form 1.

FEC RESPONSE: No additional specific response.

138. Non-connected committees must periodically disclose all contributions and expenditures using a "Report of Receipts and Disbursements," or FEC Form 3X. Simpson Decl. Ex. 28, FEC Form 3X, Report of Receipts and Disbursements for Other than an Authorized Committee, and associated schedules; Scott Dep. at 124:7-16. The form includes five pages for summary information concerning receipts and disbursements and an additional 16 pages of "schedules" on which committees are required to disclose detailed information on all contributors and the amounts they donate (schedule A); all disbursements and to whom they are made (schedule B); any loans the committee receives (schedule C); any loans and lines of credit the committee receives from lending institutions (schedule C-1); all debts and obligations of the committee (schedule D); any itemized independent expenditures the committee makes (schedule E); any itemized coordinated party expenditures the committee makes (schedule F); the committee's activities relating to state or local elections (schedule H1-H6); and the committee's "Levin" funds (schedules L, L-A, and L-B). Simpson Decl. Ex. 28; Scott Dep. at 125:22-127:5. Form 3X and the various schedules are accompanied by 31 pages of instructions. Simpson Decl. Ex. 29, Instructions for FEC Form 3X and Related Schedules.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

139. A non-connected committee must file Form 3X and the various schedules that go along with it four times in an election year, and must file two semiannual reports in a nonelection year. It must file a 12-day pre-primary report in any state in which it participates. Additionally, it must file a pre-general election report and a 30-day post-general election report if it participates in any general election. A non-connected committee must also file these pre- and post-reports for any special election in which it participates. Alternatively, it can choose to file monthly rather than quarterly, and thus avoid pre- and post-election reports. It may change its filing schedule only once per year and only after giving the FEC written notice. After the 20th day before an election, it must file an independent expenditure report within 24 hours each time it spends more than \$1,000. Before that, it must file a report within 48 hours each time it spends more than \$10,000 on an election. *See* 11 CFR §§ 104.5(c) and (g); Scott Dep. at 131:3-132:14.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

140. Mr. Keating currently operates SpeechNow.org out of his home. Keating Decl. at ¶ 47.

FEC RESPONSE: No additional specific response at this time.

141. If an individual administers a non-connected committee from his home and is being paid for his services by the committee, that individual must allocate costs for the use of his home to the committee, lest the expense be treated as in-kind contribution from the individual to the committee. Scott Dep. at 136:8-137:8. The costs are to be determined by assessing the usual and normal charge for, or fair market value of, that portion of the home. *Id.* at 138:7-16. The same is true for expenses associated with using the home computer, telephone, or personal internet connection. *Id.* at 139:6-20. These cost allocations—based on the individual’s determination of their fair market value—have to be reported on Form 3X. *Id.* at 123:7-16; Simpson Decl. Ex. 29 at 10-11 (Instructions for Schedule A, Itemized Receipts).

FEC RESPONSE: Objection, irrelevant. SpeechNow does not pay anyone to work out of his or her home and has not alleged an intention to do so.

142. All costs associated with a fundraiser for a non-connected committee, even in a person’s home, must be treated as expenses to be paid by the committee lest any costs for the event—including the costs associated with using the home, or the costs of food or invitations—be treated as an in-kind contribution attributable to the committee. Scott Dep. at 142:1-143:7. The costs are to be determined by assessing the usual and normal charge for, or fair market value of, that portion of the home, invitations and food. *Id.* at 143:8-14. These costs must be reported on Form 3X. *Id.* at 123:7-16; Simpson Decl. Ex. 29 at 10-11 (Instructions for Schedule A, Itemized Receipts).

FEC RESPONSE: No additional specific response.

143. If a non-connected committee also made independent expenditures in state or local elections, it would have to allocate its costs for fundraising and communications according to regulations at 11 CFR Part 106. Scott Dep. at 143:15-144:5. The committee would also report the allocations using various Schedules H, which are accompanied by seven pages of instructions. Scott Dep. at 146:12-148:9; Simpson Decl. Ex. 29 at 23-30.

FEC RESPONSE: No additional specific response.

144. The FEC has an entire division, the Information Division, a large part of whose resources are devoted to providing information to those who must comply with the laws. Scott Dep. at 11:3-21:11, 53:16-54:20. The Division answers telephone and email inquiries, it publishes manuals and guides, and it conducts training sessions. *Id.* at 11:12-12:1, 13:10-14:13, 56:1-12. The Information Division recommends that those complying with the campaign finance laws always consult its guides, instructions for forms, and other publications. *Id.* at 37:11-22.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

145. However, reliance on the information provided by the FEC is not a shield to liability. Scott Dep. at 158:17-20. In fact, the information division “always caution[s]” and advises those complying with the obligations for political committees to

consult the statutes and applicable regulations and not rely solely on information provided by the FEC. *Id.* at 34:19-35:7.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

146. Political committees often hire accountants and attorneys to assist them in complying with the federal campaign finance laws and regulations. Scott Dep. at 87:4-20. There are also hundreds of experts, professionals, and specialists who make their livings by aiding organizations to comply with the requirements for political committees. *Id.* at 84:17-22, 88:15- 89:2.

FEC RESPONSE: This proposed fact is irrelevant to the determination of the constitutionality of the provisions challenged by plaintiffs. Furthermore, as noted previously, the Act's registration and reporting requirements are not unduly burdensome. While some requirements are more complicated than others, generally the requirements that apply to nonconnected political committees are not complicated. Scott Dep. at 156, FEC Exh. 54. The professionals alluded to work not just for nonconnected committees, but also state and national party committees, corporate and union PACs, and candidate committees.

147. The FEC's Information Division has 14 employees, ten of whom answer questions from the general public on matters of campaign finance law and compliance. Scott Dep. at 12:3-9. While the number of calls has declined since the Commission provided information over the Internet, the division still receives thousands of calls each year from the general public and political committee administrators in the regulated community. *Id.* at 29:13- 30:6.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

148. The FEC publishes several documents to explain and provide information concerning the laws and regulations with which political committees must comply. The Campaign Guide for Non-Connected Committees, which is 134 pages long, is periodically updated to include additional rules and interpretations by the Commission. Scott Dep. at 18:3- 20:3; FEC Campaign Guide: Nonconnected Committees, May 2008, available at <http://www.fec.gov/pdf/nongui.pdf> (last visited October 28, 2008). Between updates to the Guide, the FEC issues a series of brochures and monthly supplements containing any new rules, interpretations or policies of the Commission that are pertinent to political committees. *Id.* at 18:3-19:2, 22:1-23:3. Committee treasurers must keep

abreast of these supplements in order to keep their knowledge of FEC rules, policies, and interpretations current. *Id.* at 34:8-18.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

149. However, reliance on this information is not a shield to liability. *Id.* at 158:17-20. Treasurers may be personally liable for violations in political committee reporting. 2 U.S.C. §§ 432(c), 434(a)(1); see also Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (January 3, 2005). SpeechNow.org's bylaws provide that the Treasurer is responsible for compliance with statutory reporting requirements. Bylaws, Art. V, § 8.

FEC RESPONSE: Civil penalties are available against treasurers in their personal capacity in only very limited circumstances. (*See supra* Resp. to SN Fact 54.)

150. The FEC holds training conferences for the administrators of political committees and other employees of or consultants to political committees three to four times per year. Scott Dep. at 56:13-57:1, 59:12-17. The conferences typically last two days and consist of approximately six hours of substance per day. *Id.* at 56:13-57:13. The FEC also provides periodic training seminars and workshops. *Id.* at 57:21-59:7, 62:10-22. All of these training sessions cover topics related to the obligations of administering political committees. *Id.* at 63:1- 7. Like its publications, training sessions must periodically be updated to reflect new rules, interpretations, and policies. *Id.* at 65:19-67:3.

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

151. Non-connected committees that receive or intend to spend over \$50,000 of contributions in a calendar year must report electronically. Scott Dep. at 38:18-39:4. The FEC publishes an introductory manual for its electronic filing system called "Getting Started with FECfile," which is 50 pages long. *See* Getting Started with FECFile (For PAC and Party Committees), http://www.fec.gov/support/GettingStartedManual_U.doc (last visited Oct. 20, 2008). The primary manual for using the electronic filing system is 351 pages long. *See* FECFile User Manual for PACs & Party Committees, http://www.fec.gov/electfil/unauthorized_manual/entireUNAUTHmanual.pdf (last visited Oct. 20, 2008).

FEC RESPONSE: (*See* FEC Resp. Mem. § V.)

152. Non-connected committees are subject to audits for cause, which exists when the committee's reports demonstrate compliance, accounting, or reporting problems. Scott Dep. at 150:1-151:9. During an audit, the FEC must access and review the committee's records. *Id.* at 154:13-18. Audits can trigger enforcement actions against a committee that can lead to civil penalties. *Id.* at 156:8-12. As a result, some

committees employ accountants and lawyers to represent them in audits. *Id.* at 154:19-155:6.

FEC RESPONSE: Objection, relevance and vagueness as to “some committees,” as plaintiffs do not establish whether nonconnected committees like SpeechNow have employed accountants and lawyers.

153. The Commission has a Reports Analysis Division (RAD) whose purpose is to analyze reports filed by committees and other entities and to determine whether they are in compliance with campaign finance laws and regulations. Scott Dep. at 67:7-11. Employees of RAD often send committee treasurers Requests for Additional Information (RFAI) that seek information necessary for the Commission to determine whether a committee is complying with the law. Scott Dep. at 71:13-72:1. A failure of a political committee to answer an RFAI can result in an investigation and a recommendation that the Commission seek a conciliation agreement with the committee that results in a civil penalty. *Id.* at 73:7-20.

FEC RESPONSE: No additional specific response.

154. The Commission sends out approximately 5,000 RFAs in a calendar year, all of which are related to administering and reporting of political committees. Scott Dep. at 75:16-76:7. There are approximately 8,000 political committees registered with the Commission, not all of which are active. *Id.* at 76:8-16.

FEC RESPONSE: Objection, relevance and vagueness. Plaintiffs do not establish whether any or a significant portion of the RFAs are sent to nonconnected committees, which have more straightforward reporting obligations, or whether most of the RFAs are sent to state and national party committees, corporate and union PACs, and candidate committees.

155. All administrative fines issued by the Commission relate to the failure to properly report the activities of a political committee. Scott Dep. at 80:19-81:6. The Commission resolves approximately 100 administrative fine matters per year, and the amount of fines collected is \$201,963 from the Administrative Fines Program alone. Simpson Decl. Ex. 30, Federal Election Commission 2006 Annual Report, at 7. This is an average civil penalty of at least \$2,000. Still other civil penalties for failing to properly administer or report the activities of political committees are collected through the Commission's standard enforcement process, and alternative dispute resolution programs. Scott Dep. at 82:3-12.

FEC RESPONSE: No additional specific response.

156. The FEC can investigate alleged violations of the campaign finance laws that are brought to its attention through administrative complaints filed under 11 CFR § 111.4 or that its staff discovers and has "reason to believe" that a violation has occurred. Simpson Decl. Ex. 14 (FEC Response to Interrogatory No. 6). Alleged violations discovered in this manner are assigned a "Matter Under Review" number. *Id.*

FEC RESPONSE: No additional specific response.

157. Since October 1, 1999, the FEC has found reason to believe that one or more violations have occurred in 427 Matters Under Review and it has conducted an investigation in 118 of these MURs. Simpson Decl. Ex. 14 (FEC Response to Interrogatory No. 6). Of those 118 investigations, matters were pending an average of 544 days from the date the MUR was opened until it was closed with respect to the last respondent. *Id.* (FEC Response to Interrogatory No. 8).

FEC RESPONSE: No additional specific response.

158. Complying with the administrative and continuous reporting requirements for political committees would be burdensome for SpeechNow.org. Keating Decl. at ¶ 47. Mr. Keating operates SpeechNow.org alone in his spare time. He has no employees nor anyone else working with him, and complying with the obligations for political committees would be time consuming and difficult. *Id.*

FEC RESPONSE: This proposed fact ignores contrary testimony.

The Commission's Deputy Staff Director for the Information Division Greg Scott testified that the Act's registration and reporting requirements are not difficult.

(Scott Dep. at 156, FEC Exh. 14.) Further, plaintiff David Keating testified that he had prior experience with reporting and could fulfill the requirement of treasurer.

Furthermore, Mr. Keating testified that his desire to avoid registration and reporting by

SpeechNow was based on his desire to spend time on family and leisure activities.

(FEC Facts ¶¶ 451-52, 449-50.)

159. It would be particularly burdensome for David Keating to shoulder these obligations before SpeechNow.org can spend money on political advertisements or other activities that advance its mission. Keating Decl. at ¶ 47. In such a situation, Mr. Keating would be spending a great deal of time ensuring that SpeechNow.org complied with above-mentioned obligations, but he would be unable to spend that time advancing SpeechNow.org's mission. *Id.* at ¶ 47; Simpson Decl. Ex. 34, Excerpts from the Deposition Transcript of David Keating, taken September 25, 2008.

FEC RESPONSE: Plaintiffs have provided no support, other than the self-serving testimony of David Keating, that it would be “burdensome” for SpeechNow to comply with “obligations” (presumably referring to the “administrative” and “reporting” requirements referred to in the preceding paragraph) prior to the date that SpeechNow first spends money on “advertisements or other activities that advance its mission.” In particular, plaintiffs have provided no support for the statement that compliance with the Act's requirements would prevent David Keating from spending any significant amount of time “advancing SpeechNow.org's mission.”

160. SpeechNow.org cannot accept donations under \$1,000 even though David Keating has been contacted through the website and other means by potential donors who want to make such donations. Keating Decl. at ¶ 50. This is because such donations would inch SpeechNow.org closer to being a “political committee,” but they would not give it nearly enough money to produce and run advertisements, which are a necessary precondition to a successful fundraising effort. *Id.* Accepting even small donations could expose SpeechNow.org to the administrative and reporting requirements for political committees without providing it enough money to speak out through advertisements in support of its mission and become a going concern. *Id.* Thus, SpeechNow.org cannot accept the \$100 donations that Brad Russo and Scott Burkhardt are ready, willing, and able to make. *Id.*

FEC RESPONSE: Objection to the extent contains a legal conclusion and suggests that SpeechNow may not be able to accept donations in the future. (*See* FEC Facts ¶¶ 51-52, 395-401.)

“VII. Reporting Requirements for Independent Expenditures.”

161. SpeechNow.org will report its contributions and expenditures under the reporting requirements for those who make independent expenditures. Keating Decl. at ¶ 35. Complying with these reporting requirements is less burdensome than complying with the obligations for political committees. *Id.* at ¶ 48.

FEC RESPONSE: No additional specific response.

162. Groups “other than political committees” that make independent expenditures must report their activities pursuant to the FEC regulations at 11 CFR §§ 104.4(a), (e) and (f), and § 109.10. Scott Dep. at 95:7-98:14.

FEC RESPONSE: No additional specific response.

163. To report its independent expenditures, a group like SpeechNow.org that was not a political committee would use the “Report of Independent Expenditures Made and Contributions Received,” or FEC Form 5. Simpson Decl. Ex. 31, FEC Form 5, Report of Independent Expenditures Made and Contributions Received; Scott Dep. at 101:6-102:1. This form requires the filer to list the total contributions received and the total expenditures made during the period on a one-page form, and then to list those who contributed to the independent expenditure and the payees for the independent expenditures. It is accompanied by three pages of instructions. Simpson Decl. Ex. 32, Instructions for FEC Form 5 and Related Schedules.

FEC RESPONSE: No additional specific response.

164. The FEC requires that all costs associated with the independent expenditure must be disclosed. This would include costs for airtime for broadcast communications; production costs for broadcast communications; postage and printing costs for communications made by mail; research costs to determine the most optimal form of communication; fees for the media buyer or direct mail vendor; costs associated with producing newspaper ads; the costs of newspaper space; and the costs associated with producing and distributing internet banner ads. Scott Dep. at 102:4-105:1.

FEC RESPONSE: SpeechNow’s proposed facts repeatedly state that the group will disclose its contributions and expenditures under the Act’s disclosure and disclaimer provisions that apply to independent expenditures. *See* SN Facts ¶¶ 25-26, 161.

Mr. Keating has, however, given mixed signals on this issue. Should SpeechNow prevail, it is not entirely clear whether such disclosure will include all contributions it receives, including those whose funds were used solely for purposes such as candidate

research and polling, *see* SN Facts ¶ 24, or only those contributions that were solicited for, and will be directly used to purchase air time for independent expenditures.

At deposition Mr. Keating indicated that he personally agreed with the position of his employer, Club for Growth, that disclosure of contributions for candidate research and polling was not required. (Keating Dep. at 82-84, FEC Exh. 11). *See* FEC Facts ¶ 375. Similarly, at a public forum about the case, Mr. Keating said “(t)he only thing people won’t know is how much money we’re receiving or spending on administrative stuff until we make uh, or I guess they’ll never know until they look at the IRS how we’re spending on administrative stuff.” (“Freeing SpeechNow: Free Speech and Association vs. Campaign Finance Regulation,” Mar. 5, 2008, FEC Exh. 103 at 4.) Since Mr. Keating has been inconsistent, plaintiffs have provided inadequate assurance to the Court to permit a finding that SpeechNow’s disclosures would be exhaustive. The Court, therefore, should not accept SpeechNow’s assurances or make the finding plaintiffs suggest.

165. If an organization like SpeechNow.org that was not a political committee decided to make independent expenditures against candidates for State or local office, its reporting obligations to the FEC would not change or increase. Scott Dep. at 107:7-108:5.

FEC RESPONSE: No additional specific response.

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 Bonham
(D.C. Bar No. 397859)
Senior Attorney

/s/ Graham M. Wilson

Steve Hajjar
Graham M. Wilson
Greg J. Mueller (D.C. Bar No. 462840)
Attorneys

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

Dated: November 21, 2008

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 146



David Keating <david@spechnow.org>

Media: Anacostia Diaries Blog

5 messages

Francwa Sims <fsimsdc@gmail.com>

Wed, Mar 5, 2008 at 3:33 PM

To: david@spechnow.org

Francwa Sims
fsimsdc@gmail.com
March 15, 2008
Anacostia Diaries Blog
<http://anacostiadiaries.blogspot.com>

I am interested in an interview.

David Keating <david@spechnow.org>

Thu, Mar 6, 2008 at 9:49 PM

To: Francwa Sims <fsimsdc@gmail.com>

Sorry for the delay, this wound up in the spam folder for reasons beyond me.

Saturday at 11:30 would probably work best for me. Other times on Saturday would work too, or even this evening.

[Quoted text hidden]

—
David

David Keating
President
SpeechNow.org | PO Box 18773 | Washington DC 20036
301-717-7410 (mobile)

Francwa Sims <fsimsdc@gmail.com>

Sat, Mar 8, 2008 at 4:44 PM

To: David Keating <david@spechnow.org>

Thank you for responding.

Just a few questions:

1. What was the inspiration for starting SpeechNow? Was it an epiphany that you woke up with one morning or did some incident push you into action?
2. What is YOUR definition of a PAC and exactly how does your organization differ?
3. Could religious groups, other types of nonprofits or let's say, a group of bloggers also form FSG (Free Speech Groups) like yours?
4. Most of my readers are African-American so how could such FSG's help to reform and solve the many problems of the African-American communities? Just your thoughts, advice, suggestions.

Thank You for your time.

Francwa Sims
Anacostia Diaries blog
<http://anacostiadiaries.blogspot.com>

<https://mail.google.com/a/spechnow.org/?ui=1&ik=5f122f5f18&view=pt&th=118966d030f20787&search=i...> 8/4/2008

SNK0195

[Quoted text hidden]

Mail Delivery Subsystem <mailer-daemon@googlemail.com>
To: david+caf_3017177410=vtext.com@speechnow.org

Sat, Mar 8, 2008 at 4:45 PM

This is an automatically generated Delivery Status Notification

Delivery to the following recipient failed permanently:

3017177410@vtext.com

Technical details of permanent failure:
PERM_FAILURE: SMTP Error (state 16): 550 SMTP connection refused

----- Original message -----

Received: by 10.114.59.1 with SMTP id h1mr3212626waa.39.1205009086214;
Sat, 08 Mar 2008 12:44:46 -0800 (PST)
X-Forwarded-To: 3017177410@vtext.com
X-Forwarded-For: david@speechnow.org 3017177410@vtext.com
Delivered-To: david@speechnow.org
Received: by 10.114.175.1 with SMTP id x1cs610363wae;
Sat, 8 Mar 2008 12:44:39 -0800 (PST)
Received: by 10.114.13.1 with SMTP id 1mr3226374wam.4.1205009079616;
Sat, 08 Mar 2008 12:44:39 -0800 (PST)
Return-Path: <fsimsdc@gmail.com>
Received: from wf-out-1314.google.com (wf-out-1314.google.com [209.85.200.168])
by mx.google.com with ESMTP id k9si6772555wah.3.2008.03.08.12.44.38;
Sat, 08 Mar 2008 12:44:39 -0800 (PST)
Received-SPF: pass (google.com: domain of fsimsdc@gmail.com designates 209.85.200.168 as permitted sender) client-ip=209.85.200.168;
Authentication-Results: mx.google.com; spf=pass (google.com: domain of fsimsdc@gmail.com designates 209.85.200.168 as permitted sender) smtp.mail=fsimsdc@gmail.com; dkim=pass (test mode) header.i=@gmail.com
Received: by wf-out-1314.google.com with SMTP id 28so1069539wfc.6
for <david@speechnow.org>; Sat, 08 Mar 2008 12:44:37 -0800 (PST)
DKIM-Signature: v=1; a=rsa-sha256; c=relaxed/relaxed;
d=gmail.com; s=gamma;
h=domainkey-signature:received:received:message-id:date:from:to:subject:in-reply-to:mime-version:content-type:content-transfer-encoding:content-disposition:references;
bh=deWVEZbLn2tyXvo/gqdPxvkw+UtWUIUMhzCXWHqd1Ns=;
b=V1+iQz8Faw5zE2EbZXq7SMFY2NKWmZ14+RVV13Sfv8CYH00H4pJrc44PVkKr9cflFcrfjy45XhT3LHGjtU1ei6EIM2GA
K82GPJUx9B5UyF8X+UG+71JmXkuXZKImKXhivsepM4w1114YBUHrh/OzALEj9NVRvjgJzJjGs5B2qg=
DomainKey-Signature: a=rsa-sha1; c=noftws;
d=gmail.com; s=gamma;
h=message-id:date:from:to:subject:in-reply-to:mime-version:content-type:content-transfer-encoding:content-disposition:references;
b=G/LmWRD+sYmCFs5nsbAu/MHEk32P2g8ve+v+RdOpLyMgJf9ZZz8juixKsDimxnSqoPDHYmdkTB0mlKp9q/
py4j5jhK0PPbPuTh0C8pzPAi/ArpAgpCMbujyls3QX4oZBn5/odYfyuG/HlfvRSSgw0pUUrq2MSfCB/MxtvZv3Wk=
Received: by 10.142.179.12 with SMTP id b12mr1307132wff.88.1205009077149;
Sat, 08 Mar 2008 12:44:37 -0800 (PST)
Received: by 10.142.207.3 with HTTP; Sat, 8 Mar 2008 12:44:37 -0800 (PST)
Message-ID: <f28ae0920803081244v45297caft40f86799c4128900@mail.gmail.com>
Date: Sat, 8 Mar 2008 15:44:37 -0500
From: "Francwa Sims" <fsimsdc@gmail.com>
To: "David Keating" <david@speechnow.org>
Subject: Re: Media: Anacostia Diaries Blog
In-Reply-To: <c0d197de0803061749s3b11422fh158231197cc57ea4@mail.gmail.com>
MIME-Version: 1.0
Content-Type: text/plain; charset=ISO-8859-1
Content-Transfer-Encoding: 7bit
Content-Disposition: inline
References: <f28ae0920803051133l6d1e6866q741f167aee4f0250@mail.gmail.com>

https://mail.google.com/a/speechnow.org/?ui=1&ik=5f122f5f18&view=pt&th=118966d030f20787&search=i... 8/4/2008

<c0d197de0803061749s3b11422fh158231197cc57ea4@mail.gmail.com>

Thnak you for responding.

Just a few questions:

1. What was the inspiration for starting SpeechNow? Was it an epithany that you woke up with one morning or did some incident push you into action?
2. What is YOUR definition of a PAC and exactly how does your organization differ?

---- Message truncated ----

David Keating <david@speechnow.org>
To: Francwa Sims <fsimsdc@gmail.com>

Sun, Mar 9, 2008 at 10:02 PM

1. In my work in the nonprofit sector for years, I've found it increasingly difficult to understand what the law is on speech. There are so many rules it boggles the mind. These rules were created by politicians who want to limit public criticism of their actions. Yet there was no group working to hold anti-free speech politicians accountable during the election season.

I also wanted to create an organizational structure that would be simple and easy for people to copy if they wanted a free speech zone – where Americans could talk to each other, organize and raise money from each other, then go out and speak to other Americans about what they think is important for the future of the country.

2. The law defines PAC, and I accept that description. However I don't think it is constitutional.

SpeechNow.org differs from PACs because we will never give money to candidates or political parties. PACs exist primarily to give donations to candidates and parties.

3. Only individuals could form free speech groups like SpeechNow.org. So bloggers could do it, but churches and nonprofits could not. Individuals associated with religions or nonprofits could form free speech groups.

4. Politicians prefer to control the agenda discussed during an election campaign. They also prefer to talk in general terms rather than specifics. Free speech groups can inject issues they want discussed and addressed. Discussion and debate are essential to reform and problem solving.

David

[Quoted text hidden]

—

[Quoted text hidden]



David Keating <david@speechnow.org>

Great Editorial in the LA Times on SpeechNow.org case

1 message

David Keating <david@speechnow.org>

Sat, Feb 16, 2008 at 12:39 AM

To: Ed Crane <kkcrane@aol.com>, Ed Crane <ecrane@cato.org>, Anne Marder <a.marder@comcast.net>, Jon Coupal <jcoupal@sbcglobal.net>, jon@hjta.org, Danny Shapiro <kjpmn@yahoo.com>, Daniel Shapiro <dshapiro@wvu.edu>, Fred Young <fyoung@execpc.com>

Other articles from today are pasted below. But this editorial is the best read.

<http://www.latimes.com/news/print/edition/opinion/la-ed-speechnow15feb15.1.6451632.story>

On message

Campaign finance laws that regulate political ads by interest groups also infringe on free speech.
February 15, 2008

Let's say you want to spend your own money on a TV commercial that will urge your fellow citizens not to vote for Candidate X. You want to air it widely enough to have an impact on the outcome of the election. But you're not rich, so you get together with some friends and form a loose coalition.

Your group does not contribute to, or coordinate with, any campaign, nor does it accept contributions from labor unions or corporations. In fact, let's imagine you're so well-versed in the minutiae of campaign finance law that you even know to avoid such recondite infractions as hiring vendors with ties to politicians. So if you jumped through all those hoops, would you be allowed to air your ad? No, according to the 1974 Federal Election Campaign Act and a recent advisory opinion by the Federal Election Commission.

According to federal law, two or more people who combine resources to support or oppose a federal candidate become a "political committee" subject to government regulations and limits. But a lawsuit filed Thursday by the group SpeechNow.org, which had planned to air TV spots condemning Sen. Mary L. Landrieu (D-La.) and Rep. Dan Burton (R-Ind.), will reopen the question of how much freedom of speech must be curtailed in the name of legitimate campaign finance reform.

SpeechNow selected Landrieu and Burton because of their support of legislation that curtails political participation by public interest groups. The ads the FEC advised against were set up as a test case of the 1974 law, and the resulting Catch-22 tautology – you can't agitate effectively against political speech regulations because that would require you to oppose politicians who support those regulations, which would violate political speech regulations – was a result SpeechNow had in mind. The advisory opinion by the commission's general counsel seems well within the language of the law.

And that's the problem. The FEC, and perhaps Congress, need to revisit the overreaching rules on campaign ads. Courts have repeatedly stated that the only compelling state interest in limiting political speech is to avoid corruption or the appearance of corruption in government – this was the idea when the McCain-Feingold law rightly banned

<https://mail.google.com/a/speechnow.org/?ui=1&ik=5f122f5f18&view=pt&th=118208a0fa960a38&search=s...> 8/5/2008

SNK0198



David Keating <david@speechnow.org>

I'd like to donate \$10K to SpeechNow.org

Thu, Apr 17, 2008 at 6:42 PM

To: david@speechnow.org

I'm a big fan of the First Amendment, and would like to help your effort to explain to the public why Congresspeople shouldn't vote for unconstitutional bills, and why Congresspeople who do so, should be voted out of office.

I'm a donor to IJ, a co-founder of the [REDACTED] Foundation, and have worked on many free speech issues over the decades.

Thank you for bringing this issue to the courts and to the public.

[REDACTED]

INFORMATION REDACTED PURSUANT TO FIRST AMENDMENT RIGHTS OF POLITICAL EXPRESSION AND ASSOCIATION.

Paul Sherman

From: Gmail Team [mail-noreply@gmail.com]
Sent: Saturday, June 23, 2007 11:44 PM
To: david keating
Subject: Your Gmail account, speechnow2008@gmail.com, has been created

Congratulations on creating your brand new Gmail account, speechnow2008@gmail.com. Please keep this email for your records, as it contains an important verification code that you may need should you ever encounter problems or forget your password.

You can login to your account at <http://mail.google.com/>

Enjoy!

The Gmail Team

Verification code: 9508045a-6b96f1ec-22bc6bf4c4

<https://mail.google.com/a/speechnow.org/?ui=2&ik=5f122f5f18&view=pt&search=inbox&msg=118780a9e1db85fc&dsqt=1>

>
> We are trying to get CSPAN to cover our event on Wednesday. CSPAN asks for
> the talking points of speakers at an event. If you could summarize your
> presentation in two or three sentences, that would be great. Thanks. John

>
>
>
> John Samples
> Director
> Center for Representative Government
> The Cato Institute
> 1000 Massachusetts Avenue, NW
> Washington, DC 20001
> Phone: 202.789.5248
> Fax: 202.842.2240
> Cell: 703-772-5977
> Email: jsamples@cato.org
> Web: <http://www.cato.org/people/samples.html>

>
> Check out my new book The Fallacy of Campaign Finance Reform at
> <http://www.press.uchicago.edu/cgi-bin/hfs.cgi/00/202354.ctl>.

>
>
>
>

--
David

David Keating
President
SpeechNow.org | PO Box 18773 | Washington DC 20036
301-717-7410 (mobile)

Bio

Steve Simpson is a senior attorney at the Institute for Justice. He currently focuses primarily on free speech cases in the state and federal courts across the country. Steve's views and writings have been published in a number of newspapers and journals, including The Washington Post, Legal Times, the Wall Street Journal, the New York Post, the Houston Chronicle, and others.

Before coming to the Institute, Steve spent five years as a litigator with the international law firm Shearman & Sterling and he clerked for two years for a federal district court in Florida. Steve is a member of the bars of New York and the District of Columbia.

IJ Description and Campaign Finance Work

Founded in 1991, the Institute for Justice is the nation's only libertarian public interest law firm. IJ represents individuals in constitutional challenges in four key areas: free speech, economic liberty, property rights, and educational choice. IJ has represented individuals in challenges to state campaign finance laws across the country and has filed amicus briefs in a number of major campaign finance cases before the U.S. Supreme Court. IJ's current campaign finance cases are:

SpeechNow.org v. Federal Election Commission: IJ, along with lawyers at the Center for Competitive Politics, represents SpeechNow.org and several of its supporters in a constitutional challenge to the application of contribution limits and "PAC" registration and administrative regulations to SpeechNow.org. SpeechNow.org is an independent group of individuals who want to pool their funds in order to produce and broadcast television advertisements calling for the election of candidates who support the First Amendment and the defeat of those who do not. Because SpeechNow.org will not give money to politicians or parties or coordinate its activities with them, it raises no concerns about corruption. However, under the campaign finance laws, SpeechNow.org may not accept more than \$5000 from any individual per year. These limits make it impossible for small groups like SpeechNow.org to raise the necessary funds to speak effectively about political candidates and they violate both SpeechNow.org and its supporters rights to speech and association.

Sampson v. Coffman: IJ represents Karen Sampson and five of her neighbors who were sued after they opposed the annexation of their neighborhood into the nearby town of Parker, Colorado for failing to register as an "issue committee" and to file reports of all expenditures and contributions. IJ and its clients contend that a provision of the laws that private citizens to sue anyone they believe has violated the campaign finance laws unconstitutionally chills speech. They also contend that the registration and reporting laws unconstitutionally burden speech and association and violate rights to privacy and anonymous association. The case is currently pending in the Federal District Court for the District of Colorado.

Independence Institute v. Coffman: IJ represents the Golden, Colo.-based Independence Institute, a free market think tank, that was also sued for speaking out about a ballot issue without complying with campaign finance laws. After the Independence Institute criticized Referendum C, a controversial tax referendum, (Referendum C), the chief proponent of the referendum sued the Institute for failing to register as an issue committee and to comply with registration and reporting requirements. IJ and the Independence Institute contend that the campaign finance laws are unconstitutionally vague and overbroad, unconstitutionally burden the exercise of rights to speech and association, and violate the right to privacy and anonymous association. The case is currently before a State trial judge. A ruling on the parties' cross motions for summary judgment is expected soon.

San Juan County v. No New Gas Tax: IJ represents a ballot issue campaign that was sued by a number of municipalities in Western Washington State for failing to report as "in-kind" contributions the radio commentary of two Seattle-area talk radio hosts. The hosts, conservatives Kirby Wilbur and John Carlson, criticized a controversial new gas tax and urged listeners to support a petition for its repeal. The municipalities sued the campaign that was trying to gather the necessary signatures and sought an injunction compelling them to estimate the value of the radio hosts' commentary. A trial judge granted the injunction, which, under a law limiting contributions in the last three weeks of an election to \$5000, would have prevented further commentary by the radio hosts about the campaign. IJ appealed the decision, which was argued before the Washington Supreme Court last June. A decision is expected any day.

Association of American Physicians & Surgeons v. Brewer: IJ represents an political committee and a candidate for state office in a challenge to Arizona's Clean Elections Act. IJ and its clients argue that the Act violates the First Amendment by effectively coercing candidates into the public financing scheme where they must accept spending limits. Candidates that opt-out of the public financing scheme must comply with onerous filing requirements not imposed on candidates that opt into the scheme and they face a matching-fund provision that gives money to publicly-financed candidates every time anyone—even someone unconnected with the privately-funded candidate—supports a privately-funded candidate's election. IJ recently argued the case before the U.S. Court of Appeals for the Ninth Circuit and is awaiting a decision.

INSTITUTE FOR JUSTICE & CENTER FOR COMPETITIVE POLITICS



INSTITUTE FOR JUSTICE



FOR IMMEDIATE RELEASE:
January 22, 2008

CONTACTS: Mike Schimpf, CCP, (703) 682-9359
Lisa Knepper, IJ, (703) 682-9320

FEC Draft Opinion Would Silence SpeechNow.org, Independent Speech Groups

Arlington, Va.—The Federal Election Commission today released a draft “advisory opinion” that would, if adopted, effectively silence SpeechNow.org, a new independent speech group that wishes to advocate for or against federal candidates on the basis of their support for free political speech.

The draft opinion asserts that SpeechNow.org and any similar groups must organize and register as “political committees” and may not accept contributions larger than \$5,000 per person per calendar year. The opinion would for the first time explicitly extend the full array of federal campaign finance regulations to groups of individual citizens acting independently of candidates and parties without corporate or union support.

“This opinion would leave practically no room for Americans to exercise our First Amendment rights to join together and speak freely to other Americans about who to elect to office,” said David Keating, president of SpeechNow.org.

The opinion would make it impossible for SpeechNow.org to raise enough money quickly enough to air TV ads during the 2008 election cycle. Supporters have pledged enough money for SpeechNow.org to begin its advocacy now, but each contribution is over the government limit.

“The FEC is now saying that any time two or more people pool their resources to support or oppose a federal candidate, they become a political committee subject to government regulations and limits,” said Bradley Smith, chairman of the Center for Competitive Politics. “But it should be common sense that if individuals can speak without limit, so too can groups of individuals.”

The FEC is scheduled to consider the draft opinion in an open meeting next Thursday, January 24, at 10 a.m. Because the commission currently lacks a quorum, it cannot officially adopt the opinion or approve SpeechNow.org’s operational plan by the legal deadline of January 28. Without approval, SpeechNow.org could later face penalties such as fines and jail time for its speech, and today’s opinion strongly suggests that the commission would rule against the group in an enforcement action.

“This opinion is a serious blow to the First Amendment rights of free speech and association, and it is a tragedy that a federal agency failed to take SpeechNow.org’s constitutional rights seriously,” said Steve Simpson, Institute for Justice senior attorney. “Now facing the specter of fines and jail time, SpeechNow.org’s only recourse is the courts.”

SpeechNow.org is a nonpartisan independent speech group with a new form of organizational charter designed to magnify the voices of individual citizens opposed to the erosion of political speech rights. Under that charter, SpeechNow.org will accept only individual, not corporate or union, contributions. The charter also bans donations to candidates and political parties and requires the disclosure of all donations and expenditures to the FEC within 48 hours of speech urging election or defeat of a federal candidate. The Institute for Justice and the Center for Competitive Politics represent SpeechNow.org.

#

SNK0522

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 147

[Log In](#) | [Register](#) | [FAQ](#) | [Take a QuickTour](#)



FAQ

- [Company](#)
- [Candidate Submission](#)
- [User Submission](#)
- [Local Producer Sign Up](#)
- [Contact Us](#)
- [Press](#)

FAQ

General

1. WHAT IS SAYSME.TV?
2. WILL I BE ABLE TO SEE IT ON MY TV?
3. IS IT REALLY ON TV? WHEN WILL I SEE MY AD?
4. WHAT CHANNEL IS IT ON?
5. CAN I LET OTHER PEOPLE KNOW THAT I WILL HAVE AN AD ON THE AIR?
6. CAN I BUY AN AD TO RUN IN ANOTHER STATE?
7. IS IT REALLY MY NAME ON THE AD?
8. DOES IT HAVE TO BE IN MY NAME?
9. CAN I SUBMIT MY OWN AD?
10. DOES SAYSME.TV SUPPORT THE POLITICAL BELIEFS OF THE CAMPAIGNS, POLITICAL ACTION COMMITTEES AND THE ORGANIZATIONS REPRESENTED ON THIS SITE?
11. WHAT IF I HAVE OTHER QUESTIONS?

Technical Support

1. WHAT BROWSERS SHOULD I BE USING?
2. MY FLASH PLAYER DOESN'T WORK FOR YOUR VIDEOS
3. WHAT ELSE CAN I DO?
4. WHAT IF I HAVE OTHER QUESTIONS?

General Questions

WHAT IS SAYSME.TV?

SaysMe.tv is a website that gives individuals the opportunity to use TV to make an enormous difference in their politics, in their local community... and beyond. The 2008 election is just around the corner and the

Internet has enabled bloggers of every affiliation to become as powerful in political circles as candidates, journalists and pundits. SaysMe.tv wants to further empower citizens by letting them make their voices heard on TV as well as the Internet. Sign up for SaysMe.tv, choose an ad featuring your candidate or issue of choice, select a network, and personalize your ad. With just a few simple clicks, you can put an ad on TV! Then you can distribute or embed your personalized ads anywhere on the Internet.

WILL I BE ABLE TO SEE IT ON MY TV?

If you have access to the cable channel and zipcode you've selected, then sit back and see your ad with your name on your TV. Make sure you have cable!

IS IT REALLY ON TV? WHEN WILL I SEE MY AD?

Yes! After you purchase your ad and choose the market(s) in which you want your ad or ad campaign to run, you will receive a confirmation of your purchase immediately. Then, at least 24 hours prior to air time, you will also receive a confirmation of the time and date that it will run so you can record it or watch it live with friends. Ads purchased may take 5-7 business days to run on the air. It is possible that local markets may have to push your ad to run at a later date than originally stated - SaysMe has no control over this and in the event this occurs we will make every effort to let you know the revised date prior to your ad airing. Please be advised this is not common and under most situations your air date should remain intact.

WHAT CHANNEL IS IT ON?

When you visit the SaysMe.tv website, we'll show you a list of available channels and prices in your area. You choose the channel and we do the rest.

CAN I LET OTHER PEOPLE KNOW THAT I WILL HAVE AN AD ON THE AIR?

Yes! You can choose to have SaysMe.tv blast your address book to let all your friends and family know that your ad will be on TV.

CAN I BUY AN AD TO RUN IN ANOTHER STATE?

Yes, you can choose to run an ad in any of our available markets. Very soon we will have 92 from which

to choose around the country. For a complete list of our available markets, please use the drop-down box to browse cities as the first step on our application found on www.saysme.tv/front.

IS IT REALLY MY NAME ON THE AD?

YES! That's one of the unique features of SaysMe.tv. All of our ads end with a 5 second clip that says 'Paid for by (YOUR NAME)!' Put your personal stamp on the ad of your choice. In just a few months, you'll be able to add more personalization features to your ad like your own graphics and voice-over.

DOES IT HAVE TO BE IN MY NAME?

Yes. It's television, so you need to use your own name to stand behind your own cause. Everyone must represent themselves.

CAN I SUBMIT MY OWN AD?

Yes! Visit our upload page at <http://www.saysme.tv/static/submission>. We expect to see all kinds of content from general issues, politics, advertisements for local musicians and entertainers, personal/classifieds to OpEds, PSA's, and ads for local businesses and events. SaysMe.tv plans to be the Voice of the People. We want to let your voice be as powerful as that of an advertiser or big corporation. Put your mouth where your money is and SAY SOMETHING!

DO YOU SUPPORT THE POLITICAL BELIEFS OF THE CAMPAIGNS, POLITICAL ACTION COMMITTEES AND ORGANIZATIONS REPRESENTED ON THIS SITE?

As a platform for the distribution of individual ideas, SaysMe.tv is agnostic. Like you, the people who work at SaysMe.tv have strong beliefs and like to debate them vigorously with each other. We are a diverse organization made up of individuals on both sides of the aisle, but as a company we strongly agree that a non-partisan stance facilitates the greatest flow of opinions and the largest number of voices to be heard. We have only one constraint - broadcast standards.

WHAT IF I HAVE OTHER QUESTIONS?

Please email our customer service at cs@saysme.tv and we will get back to you within 24-48 hours.

TECHNICAL SUPPORT

QUESTIONS

WHAT BROWSER SHOULD I BE USING?

Windows Users

Internet Explorer is the best viewing option for Windows users. The Firefox browser is a good browser, but has problems playing files back at times. You should download the latest version of the Internet Explorer browser [here](#) or via the link below:

<http://www.microsoft.com/windows/downloads/ie/getitnow.msp>

AOL browsers also have problems playing back video files. If you are an AOL user we suggest that you use the Internet Explorer browser that comes with your computer. The stock Microsoft Internet Explorer browser seems to perform better than the customized IE that AOL has developed. To use the stock browser go to the start menu and select "Internet Explorer" from the program menu.

Mac/Apple Users

All Mac/Apple web browsers can play back the Flash videos on our files under most situation except with Firefox 3, which has been known to have issues. We recommend updating the browser to the latest version of Firefox or using Safari.

To download the latest version of Safari please visit the site below:

<http://www.apple.com/safari/>

To download the latest version of Firefox please visit the site below:

<http://www.mozilla.com/en-US/firefox/>

MY FLASH PLAYER DOESN'T WORK FOR YOUR VIDEOS?

Make sure you have the most up to date flash player installed on your computer. You should download the newest version of the flash player (FREE) [here](#) or via this link:

<http://www.adobe.com/products/flashplayer/>

WHAT ELSE CAN I DO?

We recommend you follow these steps in order for the best viewing experience of our videos:

A) Download the latest flash player

<http://www.adobe.com/products/flashplayer/>

B) Upgrade to the most recent browser version

Internet Explorer: <http://www.microsoft.com/windows/downloads/ie/getitnow.msp>

Safari: <http://www.apple.com/safari/>

Firefox: <http://www.mozilla.com/en-US/firefox/>

C) Clear your cache! Cleaning up your browser often helps performance issues. Here are instructions on clearing your cache in each of the following browsers:

1. Internet Explorer -

<http://www.microsoft.com/windows/ie/ie6/using/howto/customizing/clearcache.msp>

2. Safari -

http://www.ehow.com/how_2033308_delete-memory-cache.html

3. Firefox -

http://www.ehow.com/video_2320708_clear-cache-mozilla-firefox.html

D) Restart your computer

WHAT IF I HAVE OTHER QUESTIONS?

Please email our customer service at cs@saysme.tv and we will get back to you within 24-48 hours.

Please make sure to include your computer/operating system information and browser type.

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[Press](#)

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 148



BROADCAST YOUR
POINT OF VIEW

- Home
- Browse Ads
- Create
- **Sponsor**
- FAQ
- Press
- About Us



HOW TO SPONSOR AN AD

Choose an ad by clicking on the Browse button. You'll find ads organized by Candidate, Cause, and Initiative. Once you've found an ad you want to sponsor, you'll be guided through the three step process below.

[GET STARTED ▶](#)

1 CHOOSE AN AD THAT EXPRESSES
YOUR OPINION, OR UPLOAD ONE



2 LET US KNOW YOUR BUDGET AND WHERE YOU WANT THE AD TO RUN



3 SIT BACK AS YOUR OPINION REACHES MILLIONS OF VOTERS



© 2008 WideOrbit Inc

- Home
- Browse Ads
- Create
- Sponsor
- FAQ
- Press
- Privacy & Terms

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

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Defendant.)	
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FEC EXHIBIT 149



BROADCAST YOUR POINT OF VIEW

- Home
- Browse Ads
- Create
- Sponsor
- FAQ
- **Press**
- About Us



BROADCAST YOUR POINT OF VIEW

Article Index

- ❑ [WideOrbit Launches Populist Political Ad Site \(Broadcasting & Cable\)](#)
- ❑ [Web-Based Ad Buying Systems Serve Candidates' Pentchant for TV \(ClickZ\)](#)
- ❑ [New Site Airs Homemade Political Ads on TV \(The Nation\)](#)
- ❑ [VoterVoter Launches: Could This Be the ActBlue of Political Ads? \(Personal Democracy Forum\)](#)
- ❑ [Get ready to see some homemade ads on TV \(Politico\)](#)
- ❑ [MediaBytes: YouTube Insight - Comcast - BitTorrent - CBA - VoterVoter \(ShellyPalmer.com/ MediaBytes\)](#)
- ❑ [Your Own Campaign Ads \(ABC News Channel 36\)](#)

WideOrbit Launches Populist Political Ad Site

Broadcasting & Cable
 John Eggerton
 March 27, 2008

[WideOrbit Launches Populist Political Ad Site](#)

Reposted by: Broadcast Newsroom, Business Finance & Economy

The run-up to the last big primary push for the presidential candidates has brought another political ad-targeted online site into the mix and created something of a mini-campaign for clients among online ad companies.

Press release

Click here to view our press release



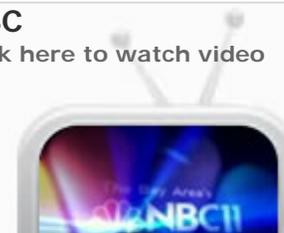
FOX

Click here to watch video



NBC

Click here to watch video



San Francisco Software online media company WideOrbit is launching VoterVoter.com Thursday, looking to grab some election ad business by targeting "passionate citizens" and letting them sponsor TV campaign ads themselves, either ready-made, customizable, or their own submissions.

The announcement comes a day after another online ad production and media buying company Spot Runner, backed by CBS and some big ad agencies, announced it was ramping up its online political advertising business, though it was targeting campaign coffers. WideOrbit backers include Hearst--it got a new infusion from Hearst Ventures just last month--and its media buying client list includes the New York Times, NBC, Hearst-Argyle, Gannett and Meredith.

Unlike Spot Runner, which is providing TV, radio and online political advertising services, VoterVoter is focusing on TV advertising for now, though a source said it has plans to expand. VoterVoter is also targeting individuals who want to place ads directly on TV rather than the campaigns, saying it allows those individuals to avoid the \$4,600 limit on campaign contributions to a candidate.

"Some individuals sponsor cocktail parties to meet their favorite candidates," said VoterVote.com founder Eric Mathewson in announcing the new service. "Now, with VoterVoter.com, passionate citizens can influence literally millions of their fellow voters by purchasing TV time.

Votervoter is an equal opportunity advertiser, planning ready-made ads in support of Senators Clinton, McCain and Obama, as well as congressional and gubernatorial candidates and issues. But like Spot Runner, VoterVoter.com will provide end-to-end services for those looking to produce and place ads, including providing demographic targeting and even filings with the Federal Election Commission.

WideOrbit says it has already generated "several hundred thousand dollars" worth of passion in the form of insertion orders in its "pre-launch" phase.

Elsewhere on the online ad placement front, Internet radio ad company TargetSpot was looking to get campaigns to jump on its online bandwagon by offering them matching funds, pledging to match up to the first \$500 any money a "valid electoral committee" applies toward its online platform for purchasing radio campaign spots.

TargetSpot was pitching its new site as ideal for local campaigns.

[Return To Top](#)

Web-Based Ad Buying Systems Serve Candidates' Penchant for TV

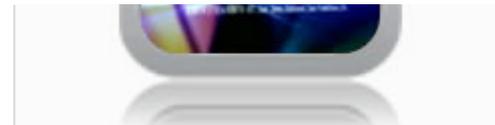
ClickZ

Kate Kaye

March 27, 2008

[Web-Based Ad Buying Systems Serve Candidates' Penchant for TV](#)

Reposted by: Marketing Vox



Thousands of dollars' worth of TV spots in support of one unnamed presidential candidate are set to go on-air through a new Web service from ad management service WideOrbit.

The company's VoterVoter.com system was created to allow individuals to place pre-existing or custom TV spots across local and even national stations and cable networks. The service and another from Spot Runner that's aimed at political advertisers could mean ad spending through Web-based tools for buying TV ads will exceed the tiny amount candidates and their supporters are expected to invest directly in online ads this election season.

According to Eric Mathewson, founder and CEO of WideOrbit and VoterVoter.com, "several hundred thousand dollars" of TV ad insertions, all for one presidential hopeful, have been submitted through the system, expected to launch today. "But that's not by design; that's just the way it turned out," he continued. The company provides software to manage sales, trafficking and billing of ads running on hundreds of TV and radio stations, cable networks, and in mobile and out-of-home environments.

The VoterVoter site has a handful of TV spots created by independent TV producers available for anyone to choose and target based on a city, state or national level, day-part, and other demographic data. But the company is hoping many more will be added to its library by amateur producers or Hollywood types.

"I think there are people out there, particularly in the creative and advertising world... that would like to create better messaging for the candidates," said Mathewson.

Spot Runner, a Web system used to design ready-made locally-targeted television spots, is working with "a few dozen" political advertisers, including Erik Fleming, Mississippi's Democratic nominee for U.S. Senate, according to the firm's VP Communications Rosabel Tao. Many of its customizable ads are based on issues like the environment, or border security, such as one that indicates the candidate "knows how to keep our communities safe, secure... and American."

Spot Runner's Political Advertising Program enables targeting by political district in conjunction with other data such as age or household income. As with the VoterVoter service, it lets advertisers vary ad creative depending on the audience or region ads are targeted to.

Spot Runner and similar online services "can give the campaigns an advantage," said Jaime Bowers, new media director at National Media, a full service media agency for Republican campaigns. She doesn't think they pose a threat to agencies like National Media. "I think it's a completely different service," she said. "They don't substitute for the experience and wisdom of an agency."

Both ad buying systems are open to anyone, not just candidate campaigns or advocacy groups. That prospect may frighten some candidate campaigns. While the Web has been flooded with blog commentary, homemade viral videos, e-mails and other

content created by individuals to influence elections, the ability for lone supporters or relatively small groups of people to easily place ads on TV takes the lack of control inherent in the Web to a new level.

To Spot Runner and VoterVoter, it's all about "democratization" of the political process. "There's always been very broad discourse on the candidates... with blogs, multiple news sources, Web sites, etc.," said Mathewson. "We're simply enabling freedom of speech rights." Still, the fact that such systems could facilitate TV ad buys by operations such as 527 groups, known for negative and influential campaigns, could create controversy.

Although he plans to promote the service to individuals at first, Mathewson didn't rule out going after organizations such as 527s. "We do have designs on a much broader swath of the political populace," he told ClickZ News.

TV spots delivered through these systems must be disclosed in the manner required of all political ads. For instance, the anti-Barack Obama ad from VoterVoter that declares, "He's change we can't believe in," also must indicate who paid for its placement. In addition to disclosure requirements, VoterVoter takes care of Federal Election Commission filings required of political advertisers. Because individuals must disclose their involvement with a candidate campaign, the firm doesn't seem too concerned about rogue political staffers placing ads through its system.

Costs vary to use both platforms, though Mathewson said VoterVoter will take the traditional 15 percent cut from TV stations running its ads, and will require a minimum expenditure of about \$1,000 by advertisers. Spot Runner ad creative rates start at \$499 and go beyond \$15,000.

Although Spot Runner enables digital advertising, it hasn't seen much interest in Web ads from its political advertisers since introducing its system in beta last year. VoterVoter expects to roll out other media options, too, but decided TV was the logical place to start. That conclusion comes as no surprise considering the dearth of online political ad spending, and the fact that donations raised on the Web are often used to advertise on television. Reports indicate online political ad spending in the 2008 election could be as low as \$20 million.

According to Tao, many political advertisers don't even buy Spot Runner ads through the Web site. "A lot of our candidates actually call us," she said.

[Return To Top](#)

New Site Airs Homemade Political Ads on TV

The Nation

Ari Melber

March 27, 2008

[New Site Airs Homemade Political Ads on TV](#)

Reposted by: Free Republic, HowieinSeattle, MugDave, Yahoo! Tech

Forget the YouTube election. For the first time, Americans can now run their own political advertising campaigns on television, thanks to VoterVoter.com, a new business unit of a major advertising firm.

Starting around \$1,000, the site lets people purchase broadcast time in any market across the country, target specific demographics, and choose an ad for their candidate or cause -- or even make their own. Then the company, WideOrbit, which currently manages about \$10 billion in advertising across 900 television stations, places the ads and takes a standard 15 percent cut of sales. "This is the first focused political site that enables the purchase of air time," CEO Eric Mathewson told me. WideOrbit's current clients include NBC Universal, Hearst and Gannett. Operating as a nonpartisan business, it will run political ads from across the political spectrum. Mathewson says he already has early orders for "hundreds of thousands of dollars" in ads for one of the presidential candidates, and he expects a full range of buyers once the site goes live on Thursday. Current users kept their names private, for now, but FEC law requires that buyers' names are listed at the end of the ads when they air.

VoterVoter.com is launching with mock-ups of positive and negative ads for the three presidential candidates, and it plans to roll out ads for congressional, state and local races. The site also welcomes open source input from donors and activists. If a homemade ad is popular on YouTube, for example, Mathewson said VoterVoter can help buyers produce a similar message in the high resolution video required for television broadcasts.

In an era when hundreds of thousands of people donate to candidates and millions more debate politics online, VoterVoter could find a receptive market in donors and activists willing to pool their resources for a greater impact on campaign messaging. And when buying ads directly, donors are not restricted by the FEC's \$4,600 limit on donations to individual presidential candidates. Political advertising often captivates activists -- netroots groups and the John Edwards Campaign have previously run contests to broadcast grassroots ads. Just this week, MoveOn.org launched an "Obama in 30 Seconds Ad" competition, promising the winner's ad would "air on national TV." If VoterVoter catches on, volunteers, bloggers and donors could skip the contest and air their ads directly. (Screenshot included)

[Return To Top](#)

VoterVoter Launches: Could This Be the ActBlue of Political Ads?

Personal Democracy Forum

Micah L. Sifry

March 27, 2008

[VoterVoter Launches: Could This Be the ActBlue of Political Ads?](#)

When we launched Personal Democracy Forum back in 2004, we posted a modest manifesto. It starts:

Democracy in America is changing.

A new force, rooted in new tools and practices built on and around the Internet, is rising alongside the old system of capital-intensive broadcast politics.

Today, for almost no money, anyone can be a reporter, a community organizer, an ad-maker, a publisher, a money-raiser, or a leader.

If what they have to say is compelling, it will spread.

Well, one more piece of that vision has come to fruition. Now, thanks to a new nonpartisan service called VoterVoter, you can not only be an ad-maker who spreads your ideas on the net. You can get your ad on television, without having to learn how to navigate the complicated world of TV ad-buying, targeting and placement.

Historically this was too difficult for an individual to do, says Eric Mathewson, the founder and CEO of VoterVoter, who spoke with techPresident yesterday. He's right. But that's changing. VoterVoter will take a user-generated ad, or work with the maker to get it into high-resolution video required for TV. It is also going to post all the ads that people are making, and enable anyone to sponsor an ad, choose where they want to place it, and help sponsors target by geography or viewer demographics. Any assertions made in an ad has to be documented, but other than that VoterVoter will impose no restrictions on what users can upload or sponsor.

The minimum required to sponsor an ad is \$1,000, and the price increments rise rapidly from there, with VoterVoter taking a standard 15% fee. The company is a subsidiary of WideOrbit, an advertising firm that manages \$10 billion in advertising., and this new service is built on top of its existing relationships with about 1,000 TV stations in the U.S. Mathewson clearly has his eye on a wealthier clientele, noting that individuals in California alone spent \$40 million on political ads in the last cycle. Observing that such people are limited in what they directly give to campaigns, he expects that many users of VoterVoter will be independent players or institutions looking for a new efficient way to get their messages on TV.

That may well be, but I suspect VoterVoter's real potential for growth will be in supporting the myriad of self-organizing political groups populating the blogosphere and videosphere. With a few tweaks to its platform, VoterVoter could become the ActBlue of political advertising. It would have to make it easier for individuals to visibly pool their money thru the site (rather than requiring one entity to pay upfront), and it would have to make visible usage statistics, so everyone could see which ads were popular and where they were being placed. But with those functionalities, it could help foster a lot more participation in one of the last preserves of the professional political consulting class. Imagine a group of bloggers who were trying to make a difference in a Congressional race, frustrated with their candidate's official advertising, or wanting to hit her opponent with an independent attack ad. VoterVoter will make it a lot easier for online political activists to play the old media game, or perhaps introduce a whole new vernacular to political advertising on TV.

In our conversation yesterday, Mathewson admitted that he had not even heard of ActBlue, but quickly understood its significance. We've talked about making this service accessibly to groups, in the future. And over time we will show more data about the ads themselves, he told me.

This could get very interesting.

[Return To Top](#)

Get ready to see some homemade ads on TV

Politico

Anne Schroeder Mullins

March 27, 2008

[Get ready to see some homemade ads on TV](#)

Reposted by: Wonkette

As of today, VoterVoter.com is helping you get more airtime for your chosen candidate. Basically, VoterVoter is going to air homemade ads on TV. Huh? Homemade political ads? On TV? But how? And why? Here's why: "In an era when hundreds of thousands of people donate to candidates and millions more debate politics online, VoterVoter could find a receptive market in donors and activists willing to pool their resources for a greater impact on campaign messaging. And when buying ads directly, donors are not restricted by the FEC's \$4,600 limit on donations to individual presidential candidates," writes The Nation. Ah, the loophole. Or, in VoterVoter's words:

Q: Why use VoterVoter instead of contributing the money directly to a cause or candidate?

A: VoterVoter allows you to select the specific advertisement you want to support and the amount that you want to spend. Because you are not contributing to a campaign but are making your own choice on how to spend your money, your independent expenditure is not limited. If you were to contribute your money to a candidate, you would be limited by Federal Election Commission guidelines, which currently limit contributions to \$2,300 per election cycle.

As they say, stay tuned.

[Return To Top](#)

2008 03-27 MediaBytes: YouTube Insight - Comcast - BitTorrent - CBA - VoterVoter

ShellyPalmer.com/ MediaBytes

Shelly Palmer

March 27, 2008

[2008 03-27 MediaBytes: YouTube Insight - Comcast - BitTorrent - CBA - VoterVoter](#)

YOUTUBE has added Insight, a new feature that tracks when and where videos are

being watched. Insight breaks down views by both geography and time, giving video publishers some powerful new performance data. The tool has a number of practical applications, including market-testing TV ads to determine locations with high receptivity. Most importantly, it will provide more data on what makes a video popular on the top video-sharing site.

COMCAST and BITTORRENT will collaborate to make the P2P software run more smoothly on the Comcast network. Comcast will stop throttling traffic for all users of any specific application (such as BitTorrent) and focus only on users that consume a large amount of bandwidth. BitTorrent will also tweak its code to work more effectively on Comcast's network. Comcast plans to have its new policies in place before the end of the year.

THE COMMUNITY BROADCASTERS ASSOCIATION has filed a court action to prevent the marketing of DTV converter boxes that block analog signals. The federal coupon program currently only supports boxes that are all-digital, which means that consumers who make the switch will be unable to access local low-power stations that are still broadcasting in analog. The CBA claims this violates the FCC's 1962 all-channel receiver act and creates a major threat to its stations. The group asked the FCC to rule on the matter last year but has not received a response. The issue will now head to court.

WIDEORBIT has launched VoterVoter.com, a powerful new tool that allows ordinary citizens to purchase political advertising on television. Users can create their own video ads, use ones that others have uploaded or choose standard spots offered by VoterVoter. WideOrbit will place the ad based on the desired demographics and locations, taking the standard 15% cut. Purchases are not subject to FEC donation limits. The site launches today with a focus on the presidential election. However, WideOrbit plans to add support for congressional, state and local races.

VERIZON has asked the FCC to force cable operators to accept disconnect orders directly from a customer's new video provider, just like they require for phone companies. Currently, cable operators will only accept disconnect orders directly from the customer, which Verizon says slows the process and hinders their ability to gain new customers for its FiOS TV service. The NCTA's VP of communications called the request a fairy tale complaint and a lame attempt at seeking a regulatory handout.

MOTOROLA has officially decided to spin off its troubled mobile phone unit, creating a separate publicly traded company.

[Return To Top](#)

Broadcast Coverage:

Your Own Campaign Ads (VIDEO)

ABC News Channel 36
Ted Fioraliso

March 27, 2008

[Your Own Campaign Ads \(VIDEO\)](#)

Do you think you can make a better political ad than the ones the presidential candidates are running? Well, now you can - if you've got the money.

It's called votervoter.com

Founder Eric Mathewson knows the media business. He invented advertising software used at almost a thousand media outlets nationwide, and he's a stockholder in our parent company.

"Votervoter.com allows an average person to purchase TV time directly to benefit a cause or a candidate they're really passionate about," said Mathewson.

On votervoter.com you can sponsor or create your own political ads. If you like an existing political commercial, votervoter can recreate it with a similar message and get it on the air.

"I think this is a good effort. It's taking YouTube and Myspace video to the next level of trying to get these personally-produced activist-originated videos airtime," said Elmira College political science professor Jim Twombly.

He says he has a few concerns.

"The access that private individuals now have to larger media is significant and further de-democratizes the whole process," said Twombly.

Media outlets set the ad prices, and votervoter.com charges a 15% commission.

"Is it really a question of because you have more money than I do, you get to have more of an influence in the political process. Some people would argue that's not fair," said Twombly.

So, what do you think? Is this an unfair advantage for the rich, or a chance to give ordinary citizens more of a say in the political process?

[Return To Top](#)

Site design [Rylander Design](#)

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SPEECHNOW.ORG, ET AL.,)	
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)	
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Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 150



BROADCAST YOUR
POINT OF VIEW

- Home
- Browse Ads
- Create
- Sponsor
- **FAQ**
- Press
- About Us

FAQ

- [What is VoterVoter?](#)
- [Why use VoterVoter instead of contributing the money directly to a cause or candidate?](#)
- [How does VoterVoter work?](#)
- [Where will my advertisement run?](#)
- [How do I sponsor an ad?](#)
- [How do I create an ad?](#)
- [Can others use the ad I create?](#)
- [What are my payment options?](#)
- [What if the media advertising purchased costs less than my budget?](#)
- [Does my sponsorship comply with FEC guidelines?](#)
- [How is VoterVoter.com paid?](#)
- [Can my contribution be made anonymously?](#)

What is VoterVoter?

VoterVoter is a non-partisan political advertising service. We make it easy for you, as an individual, to run your own political advertisement on TV. VoterVoter.com enables you to directly help your candidate or cause through broadcast TV. With VoterVoter, you can select or create the advertising message of your choice and have that message play on TV stations throughout the country.

[Return To Top](#)

Trying to reach ...

For questions or to contact a VoterVoter staff person, please email support@votervoter.com or call



415-675-6765

VoterVoter Support is available Mon-Fri, 9:00am-8:00pm EDT

Browse

See the TV ads that really can change the world



Create

Upload an ad of your own and

Why use VoterVoter instead of contributing the money directly to a cause or candidate?

VoterVoter allows you to select the specific advertisement you want to support and the amount that you want to spend. Because you are not contributing to a campaign, but are making your own choice on how to spend your money, your independent expenditure is not limited. If you were to contribute your money to a candidate, you would be limited by Federal Election Commission guidelines, which currently limit contributions to \$2,300 per election cycle.

[Return To Top](#)

How does VoterVoter work?

The process is simple.

1. Decide on your advertisement: Browse the existing selection of political advertisements in the VoterVoter library and select the one you want to use, or upload your own advertisement.
2. Select Your Target Audience and Market: You decide who you want to reach - geography, age, sex and ethnicity. Once you select the target audience, and tell us your budget, VoterVoter media buyers will determine the advertising placement schedule that meets your objectives.
3. Payment: Pay by credit card (MasterCard, VISA, American Express and Discover) or wire funds directly to VoterVoter. Due to broadcast TV station policy, payment needs to be made in advance of buying the media time requested for a political advertisement. Contact VoterVoter at 415-675-6765 or email support@votervoter.com if you decide to wire the funds to us.

[Return To Top](#)

Where will my advertisement run?

You decide who you want to reach - city, state, or throughout the country - as well as age, gender and ethnicity. Once you select the target audience and tell us your budget, VoterVoter media buyers will determine the advertising placement schedule that meets your objectives.

[Return To Top](#)

How do I sponsor an ad?

Simply browse through our commercial video library and choose the ad or ads that best express your opinion, let us know your budget and where you want to air the ad,

share it with others



Sponsor

Pay for a political ad to run on television



and we'll take care of the rest. Then sit back as your message reaches millions of voters.

[Return To Top](#)

How do I create an ad?

Either upload your finished ad through VoterVoter.com or submit your ad to us. Click [here](#) to Find Out How to Upload Your Own Ad

[Return To Top](#)

Can others use the ad I create?

Absolutely! Contribute your own advertisements and you can post them for others to use.

[Return To Top](#)

What are my payment options?

All TV stations require that new advertisers must pay in advance. We accept credit cards (MasterCard, VISA, American Express and Discover), and you can also choose to wire funds directly to us (call us at 415-675-6765 for details).

[Return To Top](#)

What if the media advertising purchased costs less than my budget?

We will refund any balance left over from your original budget if not used to book and run your ad.

[Return To Top](#)

Does my sponsorship comply with FEC guidelines?

Advertising paid for by an individual through VoterVoter is not subject to any FEC limitations. As part of the VoterVoter registration process, we ask all the questions required to comply with FEC guidelines and filing requirements.

[Return To Top](#)

How is VoterVoter.com paid?

VoterVoter is paid the same 15% commission that is paid by the TV stations and to all advertising agencies.

[Return To Top](#)

Can my contribution be made anonymously?

No. Federal Election campaign rules require that your name and address must be disclosed on the ad.

[Return To Top](#)

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- [Home](#)
- [Browse Ads](#)
- [Create](#)
- [Sponsor](#)
- [FAQ](#)
- [Press](#)

- [Privacy & Terms](#)

**UNITED STATES DISTRICT COURT
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Defendant.)	
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FEC EXHIBIT 151



A CAMPAIGN FINANCE INSTITUTE BOOK

The Campaign Finance Institute is a non-partisan, non-profit institute affiliated with the George Washington University that conducts objective research and education, empanels task forces and makes recommendations for policy change in the field of campaign finance. Statements of the Campaign Finance Institute and its Task Forces do not necessarily reflect the views of CFI's Trustees or financial supporters. For further information, visit the CFI web site at www.CampaignFinanceInstitute.org.

The Election After Reform
*Money, Politics, and the Bipartisan
Campaign Reform Act*

Edited by
Michael J. Malbin

ROWMAN & LITTLEFIELD PUBLISHERS, INC.
Lanham • Boulder • New York • Toronto • Oxford

2

Party Finance in the Wake of BCRA: An Overview

Anthony Corrado

Political party committees were the organizations most directly affected by the Bipartisan Campaign Reform Act (BCRA). Because the law was principally designed to address the problems associated with unlimited contributions to national party committees, commonly known as “soft money,” many of its major provisions were focused on party financing. In addition to prohibiting national party committees from raising or spending soft money, the law required all party committees, including state and local organizations, to finance any federal election activities, including any broadcast ads that promote, support, attack, or oppose a federal candidate, with federally regulated, hard money funds.¹ The new rules even eliminated the exemption contained in the original provisions of the 1974 Federal Election Campaign Act (Public Law 93-443), which allowed national party committees to use unlimited contributions to finance building construction and maintenance costs. The law also increased party contribution limits, codified provisions for party independent expenditures on behalf of candidates, and established a new category of federally regulated state or local party funding known as “Levin money.”²

In short, BCRA required significant changes both in the ways parties raise money and in the ways parties finance their electioneering efforts in support of federal candidates. Its direct effects on party financing were greater than those of any other campaign finance regulation adopted in the past century, with the possible exception of the 1907 Tillman Act (34 Stat. 864) ban on corporate contributions.²

In an effort to assess the principal effects of the new law, this chapter presents an overview of national party committee financing in the wake of BCRA. The discussion focuses on the central issues raised in the debate on BCRA and gives particular attention to the financial activities of the Democratic National Com-

nittee (DNC) and Republican National Committee (RNC). While the activity in one election cycle is not enough to gauge the eventual consequences of this reform, the 2004 experience highlights how the parties have responded to the new rules and offers indications of how they are likely to conduct their financial activities in the future.³

QUESTIONS

Would the parties be weakened under BCRA? This was a central question throughout the congressional deliberations, legal challenges, and regulatory proceedings associated with the law's passage. Those engaged in the debate generally agreed that parties have a vital and salutary effect on the political system, and most were advocates of strong party organizations. But they disagreed as to the parties' potential capacity to raise funds under BCRA's constraints and drew varying conclusions from recent patterns in party finance.

The major issue raised in the BCRA debate concerned the role of party committees in national elections. Would the parties continue to play an important role in campaign funding without soft money? Would they be able to replace a substantial portion of their former soft money receipts and, if so, over what period of time? The national party committees certainly faced a sizable task in replacing the combined \$495 million of soft money receipts that they raised in each of the two previous election cycles. To compensate for this loss completely, the Democrats would need to more than double the \$213 million of hard money they raised in 2000, while the Republicans would have to up their total of \$362 million by almost 70 percent. By contrast, between the 1996 and 2000 presidential election cycles, the national parties had increased their combined hard money resources by only \$77 million, with the Democratic committees, which began with a much smaller base, increasing their hard money funds by \$47 million, or 28 percent, and the Republican committees increasing theirs by \$30 million, or 9 percent. Some analysts argued that the national parties would not be able to compensate wholly for the loss of soft money and that they would be required to reduce their activities and organizational efforts in federal campaigns (La Raja 2002, 2003c; Milkis 2003). Others contended that the parties would have an incentive to invest more effort into hard money fundraising, especially with regard to the solicitation of small donors, and, as a result, would strengthen their grassroots organizational support by involving larger numbers of party members in their fundraising activities (Green 2003; Mann and Ornstein 2004; Mann 2004).

A second, and related, issue concerned the effect of BCRA on interparty competition. Since the adoption of the Federal Election Campaign Act (FECA) in 1974, the Republican national party committees had been more successful in raising hard dollars than their Democratic counterparts. The Republicans benefited from continuing investments in direct mail fundraising over a long term, which had provided the party with a broad base of active small donors. Accordingly, many analysts expected that under BCRA's hard money regime the Repub-

licans would hold a substantial financial advantage over the Democrats. In the two elections immediately preceding the adoption of the new law, the Republicans raised significantly more hard money than the Democrats, and the Democrats had become increasingly dependent on soft money to remain competitive. In the 2000 cycle, the Republicans raised \$149 million more in hard money contributions than the Democrats; in 2002, \$191 million more. In these same elections, the Democratic national party committees raised more than half of their total receipts from soft dollars. These patterns led some analysts to argue that the Democrats would be seriously disadvantaged under the new rules, with some observers going so far as to claim that it would prove to be a "Democratic Party suicide bill" (Gittel 2003). Others maintained that the Democrats would rise to the occasion and raise the monies needed to wage meaningful campaigns. The Democrats, they contended, would at least have the resources needed to compete where party spending might matter most—in battleground presidential general election states and the relatively small number of competitive Senate and House contests. Thus, the question of whether the Democrats would be able to raise enough money to compete financially remained open, particularly given the expected financial disparity between the parties and the fact that party committees would have the option of spending unlimited amounts of hard money on independent expenditures in key contests.

Experts also differed in their assessments of the effects of BCRA on party campaigning and party integration. From 1996 to 2002, national party committees on both sides of the aisle relied increasingly on soft money funded electioneering tactics as their principal means of candidate support. While the parties continued to spend hard dollars on candidate contributions and coordinated expenditures that were limited by law, most of their electioneering resources were devoted to candidate-specific issue advocacy advertisements and voter mobilization programs conducted jointly by national and state party organizations, both activities that could be financed in large part with soft money. BCRA's ban on soft money prohibited national parties from continuing such activities. Consequently, some analysts predicted that the law would discourage coordination among federal and nonfederal party organizations and thereby reduce the party-building initiatives that had been advanced in recent years (La Raja 2003b, 2003c; Milkis 2003). Others noted that the new law would give parties a stronger incentive to pursue independent expenditures as a principal means of candidate support (Malbin 2004). This approach would allow party committees to spend unlimited amounts of hard money on behalf of a candidate, so long as the party did not coordinate its efforts with the candidate. It would thus encourage less interaction between parties and their candidates. Advocates of BCRA countered these arguments with claims that the parties' growing reliance on soft money fundraising and the advent of issue-advocacy advertising had done little to promote party grassroots development (Krasno and Sorauf 2003). They further noted that the national committees could still use hard dollars to assist state and local committees and work with their affiliates to build stronger party organizations.

NATIONAL PARTY ADAPTATION AND RESPONSE

The 2004 election cycle was not the first in which national party committees were forced to respond to changes in campaign finance law. During the past three decades, the parties have had to adjust to changes in the regulatory environment on more than one occasion and have demonstrated a notable capacity to adapt to new rules in both intended and unintended ways.

In the 1970s, national party committees had to adjust to the fundraising and spending restrictions imposed by FECA, which required national party committees to finance their campaign efforts with monies raised in limited amounts from restricted sources. The parties responded by recruiting thousands of individual donors through direct mail and telemarketing programs and embarked on a period of financial growth in which national party committee receipts rose from less than \$60 million in 1976 to more than \$400 million in 1984.

In the mid-1980s, parties again altered their financial strategies to capitalize on regulatory rulings that permitted the expanded use of soft money, or nonfederal funding. In this "mixed system" of hard and soft money fundraising, national party revenues rose from \$425 million in 1988 to more than \$1 billion in 2002. Soft money fundraising alone jumped from \$45 million in 1988 to \$496 million in 2002, growing from about 11 percent of total national committee revenues in 1988 to more than 40 percent in 2002.

The parties, however, faced a more formidable challenge in adapting to BCRA. BCRA did increase the individual limit on party contributions, allowing an individual to give up to \$25,000 per year to a single national party committee (as opposed to \$20,000 under FECA) and up to \$57,500 in aggregate contributions to party committees in each two-year election cycle (as opposed to an aggregate individual contribution limit under the old law of \$50,000 every two years for all federal contributions, including donations to candidates and political action committees called PACs). But the higher limit offered the parties an opportunity to reclaim only a minor portion of former soft money funds. For example, in the 2000 election cycle, the national party committees received a combined \$39.3 million of soft money from about 3,900 individual donors who each gave at least \$1,000 but less than \$60,000. They received \$135.6 million of soft money from 429 individual donors who each gave more than \$60,000. Even if none of these 429 donors made hard money contributions in 2000 and each of them gave the \$57,500 maximum in the 2004 cycle, the parties' maximum total receipts would only be \$24.7 million in the 2004 cycle, which would represent a decline of more than \$110 million from this small group alone. The parties also raised a total of \$280.3 million in soft money contributions from corporations, labor unions, and other organizations, almost all of which would now be prohibited by law (Rogers 2001).

The revenue implications of BCRA were obvious, and both parties began to enhance their hard money fundraising infrastructures and reorient their financial strategies months before the law took effect. The DNC, facing the prospect of a much better funded Republican opposition, began their efforts even before the McCain-Feingold bill was approved by Congress. The DNC used a portion of its

soft money funds in 2002 to pay for the construction of a new party headquarters. In addition to providing the party with a modern headquarters facility, this action reduced the committee's overhead costs. It ended the DNC's need to spend more than a million dollars every election cycle leasing office space, while at the same time, because the costs were prepaid, freed the committee from future mortgage payments. The committee also invested about \$15 million into new computer technology to retool its direct mail and Internet fundraising programs, as well as millions to build a centralized voter contact list, informally known as "Denzilla," containing information on more than 150 million potential voters (Associated Press 2003; Cillizza 2003a; Farhi 2004a).

Both national parties also increased investments in small donor solicitation programs and announced new donor programs designed to take advantage of BCRA's higher contribution limit. In March of 2002, DNC chairman Terrence McAuliffe announced an ambitious plan to replace soft dollars by raising \$100 million in direct mail donations (as compared to \$31 million in 2000) and \$12 million in online contributions (as compared to \$2 million in 2000) (Lane and Edsall 2002). In addition, the DNC formed the "Presidential Trust Fund" to attract \$25,000 gifts, pledging to deposit donations of this amount into the Trust for exclusive use in supporting the party's 2004 presidential nominee (Associated Press 2003; Edsall and Vondrehle 2003).

The DNC and RNC also modified their networked fundraising efforts to accommodate the new rules. In recent years both parties had worked to develop networks of volunteer fundraisers, sometimes called "bundlers" in campaign finance parlance, to help raise money for party coffers. In advance of the 2004 election, both parties revised their fundraising network programs, or established new ones, to enhance their capacity to attract hard dollar contributions. The DNC, for example, established an elite "Patriots" program for party supporters. To qualify as a "Patriot," an individual was required to raise at least \$100,000 for the party during the 2004 election cycle. The DNC also established a more select "Victory 2004 Trustees" program, consisting of individuals able to raise \$250,000 for the party between May 1 and July 1 of the election year (Kaplan 2004). By the time of the 2004 national party convention, the DNC had recruited at least 17 Trustees and 188 Patriots (Democratic National Committee 2004c).

The RNC continued to rely on many of its established donor programs, including its long-standing Republican Eagles program and Team 100, which began in 1988 as a vehicle for recruiting \$100,000 soft money donors and was now converted to a program for individuals willing to give the maximum contribution of \$25,000 in each of the four years of a presidential election cycle (Van Natta and Broder 2000; Justice 2004a). The Republicans also sought to build from President Bush's strong personal fundraising base by creating a group of volunteer fundraisers known as "Super-Rangers." This group was an extension of the successful "Rangers" fundraising effort established by the Bush presidential committee, which consisted of volunteer fundraisers, each of whom was responsible for raising \$200,000 for the campaign. The Super-Rangers consisted of an elite group of Rangers and other Bush fundraisers who, in addition to their

efforts on behalf of the presidential campaign, were charged with raising at least \$300,000 for the party committee (Kaplan 2004). By July of 2004, 62 individuals had already achieved Super-Ranger status; by November, 104 individuals had qualified for this group (Edsall 2004d; 2004a).

PARTY FUNDRAISING

Establishing the requisite infrastructure and outreach programs to solicit contributions nationally is only part of a successful party fundraising effort. Individuals also have to be willing to give. At times in the past, the national parties, especially the DNC, had invested resources into hard money fundraising efforts without realizing a major return in response (Corrado 1994). But the 2004 election cycle was defined by a number of factors that led to a political environment that proved especially conducive to party fundraising.

The deep partisan polarization within the electorate offered fertile ground for party fundraising appeals. Even before the election year was underway, the Democrats were unified by the lingering dissatisfaction with the outcome of the controversial 2000 presidential race and the aggressive partisan politics exhibited by the Republicans in the 2002 election cycle. Republicans rallied in support of the President as he led efforts to confront the threat of terrorism and directed the war in Iraq. By the time the voters began going to the polls in Iowa and New Hampshire, public opinion on the President's overall performance was fairly evenly divided, with Democrats and Republicans expressing sharply contrasting views on most of the key issues facing the nation, ranging from the state of the economy to the conduct of the war in Iraq. These partisan attitudes intensified throughout the election cycle, strengthened by the high levels of voter interest in the close presidential race and citizen perceptions of the contest as an important election, with high stakes for the future direction of the nation's foreign and domestic priorities.

The parties also benefited from their investments in improved technology. Both parties used highly sophisticated, computerized direct mail and telemarketing programs to target prospective contributors. These efforts identified likely donors not only by such standard measures as past contribution activity and demographic information, but also by sophisticated "data mining" models that culled cultural and lifestyle information that was used to build donor profiles on the basis of such personal information as magazine subscriptions, personal vehicle ownership, and consumer buying habits (Farhi 2004a). More important, the growth of the Internet as a means of conducting a variety of everyday financial transactions made it easy for partisan supporters to contribute to the party of their choice. The DNC and RNC worked to promote this move to online contributions by constructing email lists of millions of party supporters who could be solicited for donations in a highly efficient manner at minimal cost.

This combination of factors constituted a powerful mix, creating a context that one national party leader described as "a perfect storm" for party fund-

raising (Farhi 2004c). It produced strong donor incentives, an unprecedented surge in party contributions, and historic levels of individual participation in party funding. As a result, both parties raised record sums of money, and many of the problems anticipated at the time BCRA was adopted failed to emerge.

By the end of the 2004 election, the national party committees had raised more money in hard dollars *alone* than they raised in hard and soft dollars *combined* in any previous election cycle. In all, the national party committees collected more than \$1.2 billion, or about \$164 million more than they received in hard and soft money in the 2000 election cycle, and \$222 million more than they received in the 2002 cycle. This total included almost \$56 million in leftover presidential primary campaign monies transferred to the parties by Bush (\$26 million) and Kerry (\$29.6 million). Even if these monies are excluded, party fundraising rose by more than \$100 million from the 2000 cycle. Both parties were thus able to make up for the loss of soft money with new hard dollar contributions.

As in the past, the Republicans led the Democrats, but by nowhere near the margin that most analysts expected. The Republicans raised \$657.1 million compared to \$576.2 million by the Democrats. In the 2000 cycle, the Republicans had raised \$611.5 million compared to the Democrats' \$458.1 million. The Democrats thus narrowed the gap by a substantial amount. In dollar terms, the gap in the amounts reported by the two national parties was the smallest in more than two decades. The last election cycle in which the Democratic national committees were less than \$90 million behind their Republican counterparts was in 1978. In that cycle, the Republican national committees took in a mere \$59 million, but they still outspent the Democrats, who raised a total of \$14 million, by a margin of four-to-one.

It is important to note, however, that a strict comparison of the finances of the national party committees in the 2004 election cycle with receipts in previous cycles is complicated by changes in party structure that took place in response to BCRA. Prior to the 2004 cycle, the RNC included certain nonfederal party organizations, such as the Republican Governors Association and Republican state leadership organizations within their Republican National State Elections Committee (RNSEC), the party's principal nonfederal (soft money) operation. The Republican Governors Association conference was also included in the RNC's soft money accounts. In advance of the 2004 election, the Republican Governors Association was reorganized as a Section 527 organization independent of the RNC, so that its finances would not be affected by the soft money ban imposed on the national committee. (The Democratic Governors Association had operated as an independent Section 527 organization for a number of years prior to 2004 for political reasons unrelated to BCRA.) Similarly, the Republican State Leadership Committee operated as a Section 527 organization independent of any national party committee. In the 2004 cycle, the Republican Governors Association raised and spent \$34 million, according to reports filed with the IRS covering all of 2003 and 2004. (The Democratic Governors Association reported \$24 million in receipts and expenditures.) The Republican State Leadership Committee raised and spent \$10.7 million. Since the finances of these

committees were reported by the RNC as part of the aggregate amount received in the RNSEC account, separate disclosure reports detailing the finances of these particular entities were not filed with the FEC in past years. Consequently, the finances of these committees in past cycles, which are included in the Republican soft money totals for past cycles, are not readily available. If the funds raised by these committees in 2004 are considered in calculations of national committee funding, the gap between the two parties is wider than that suggested by the totals reported by the national party committees but still smaller than in any previous election cycle in at least a decade.

Democratic national party committees increased their total hard money receipts by almost \$365 million compared to the 2000 cycle, while the Republican committees increased their hard money by \$295 million. Moreover, for the first time since the beginning of the modern campaign finance era in 1974, the DNC led the RNC in fundraising. The Democrats' principal national committee raised \$394.4 million in the 2004 cycle, or about \$2 million more than the RNC. This achievement was especially noteworthy, given the committee's failure to keep pace with RNC hard money fundraising in the past. In the 2000 cycle, for example, the RNC raised about \$89 million more than the DNC in hard money donations to go with a \$30 million advantage in soft money gifts. In the 2002 cycle, the RNC surpassed the DNC by more than \$100 million in hard dollars alone. But in 2004, the combination of strong anti-Bush sentiments among the Democratic faithful and a renewed emphasis on small dollar donors helped the DNC more than triple its hard money fundraising total as compared to the 2000 cycle, which was the committee's best previous hard money fundraising cycle ever. After

Table 2.1 National Party Committee Fundraising (\$ millions)

Committee	2000			2002			2004	
	Hard	Soft	Total	Hard	Soft	Total	Hard	Total ^a
DNC	124.0	136.6	260.6	67.5	94.6	162.1	394.4	394.4
DSCC	40.5	63.7	104.2	48.4	95.1	143.5	88.7	88.7
DCCC	48.4	56.7	105.1	46.4	56.4	102.8	93.2	93.2
Democrats	212.9	245.2	458.1	162.3	246.1	408.4	576.2	576.2
RNC	212.8	166.2	379.0	170.1	113.9	284.0	392.4	392.4
NRSC	51.5	44.7	96.1	59.2	66.4	125.6	79.0	79.0
NRCC	97.3	47.3	144.6	123.6	69.7	193.3	185.7	185.7
Republicans	361.6	249.9	611.5	352.9	250.0	602.9	657.1	657.1
Total	574.5	495.1	1,069.6	515.2	496.1	1,011.3	1,233.2	1,233.2

Source: Federal Election Commission data. Totals are adjusted for transfers among committees, particularly in soft money accounts, and thus may vary slightly from the sums reported individually by committees.

^aThe 2004 Democratic totals include \$29.6 million in excess primary funds transferred from the Kerry for President Committee (\$23.6 million to the DNC, \$3 million to the DSCC, and \$3 million to the DCCC). The Republican totals include \$26 million in excess primary funds transferred from the Bush-Cheney '04 presidential committee (\$24 million to the RNC, \$1 million to the NRSC, and \$1 million to the NRCC).

the election in November, the DNC held a surplus of almost \$10 million, a stark contrast to its position four years earlier, when it ended the election cycle in debt. Furthermore, the DNC demonstrated impressive fundraising momentum, gaining ground on its Republican counterpart throughout the election year. At the end of 2003, the RNC led the DNC in fundraising by a margin of more than two-to-one, with the RNC garnering \$107.8 million and the DNC, \$43.8 million. In the first half of 2004, the RNC remained ahead, but by a narrower margin, raising \$111.6 million during this period as opposed to the DNC's \$81.6 million. From July 1 through November of 2004, the DNC burst ahead, raising \$279.4 million to \$173.0 million for the RNC.

All of the national party committees significantly increased their hard money receipts as compared to previous election cycles, but the congressional committees did not manage to replace all of their former soft money resources. In this regard, their financial results were more in line with pre-election predictions, although they too achieved notable success in hard money fundraising. The Democratic Senatorial Campaign Committee (DSCC) and Democratic Congressional Campaign Committee (DCCC) were the most dependent on soft money of all the national party committees, raising more than 57 percent of their combined funds in the 2000 cycle and 61 percent in the 2002 cycle from unlimited donations. It is therefore not surprising that they had a more difficult time making up for their lost soft money revenues. In all, the DSCC increased its hard money receipts from \$40 million in the 2000 cycle and \$48 million in 2002 to almost \$89 million in 2004. But total DSCC receipts were down in comparison to 2000, when the committee raised \$104.2 million including soft money, and 2002, when it raised a total of \$143.5 million. The DCCC raised over \$93 million in the 2004 cycle, including a \$10 million loan. The committee's \$83 million in contributions compared to \$48 million in hard money donations in the 2000 cycle and \$46 million in 2002. But total committee receipts (including soft money) were down in comparison to the 2000 cycle, when the committee raised \$105 million in all, and the 2002 cycle, when the committee took in a total of \$103 million.

The National Republican Senatorial Committee (NRSC) and National Republican Congressional Committee (NRCC) were less dependent on soft money than the Democratic competitors. These committees raised about 40 percent of their combined funds from soft money sources in the 2000 and 2002 cycles. The NRCC was the better performer of these two committees in 2004, raising \$186 million as opposed to almost \$145 million in hard and soft money combined in the 2000 cycle. It was the sole congressional committee to best its 2000 fundraising performance. The NRCC did not, however, replace all of its funds compared to the 2002 cycle, when it raised almost \$193 million, or about \$8 million more than it did in the 2004 cycle. NRCC hard money receipts continued, however, to show a steady—and impressive—upward climb, rising from \$97 million in the 2000 cycle to \$124 million in 2002 to \$186 million in 2004. In contrast, the NRSC was the worst performing of the national party committees, raising about \$79 million, or about \$10 million less than the DSCC. The committee did increase its hard money resources from about \$52 million in the 2000 cycle to

\$59 million in 2002 and to \$79 million in 2004, but the rate of the growth did not match that of any of the other congressional committees.

The parties' success in adapting to BCRA and increasing their hard money resources was largely the result of an unprecedented surge in the number of party donors, particularly in the number of small donors. Although final contributor information has not been released by all of the national committees, the available information indicates that both parties significantly expanded their bases of donor support and involved more individuals in the financing of party activity than ever before in the nation's history. The scale of the increase in donor participation was historic by any standard.

This growth in party support was evident by the beginning of the election year. The RNC, benefiting from the President's heightened support in the aftermath of 9/11 and building from the party's gains in the 2002 midterm elections, added more than one million new donors to its rolls by the beginning of the 2004 election year. This expansion of party support surpassed the growth experienced during the Reagan administration, when the Republicans added almost 854,000 donors in the course of eight years (*USA Today* 2003). The DNC also began to expand its donor list, increasing its number of direct mail donors from 400,000 in the 2000 cycle to more than one million (Democratic National Committee 2004a). As a result, \$32 million of the DNC's \$44 million in total 2003 receipts came from small donations. This \$32 million represented an 85 percent increase in small donor funds, as compared to the amount raised from such contributions in 1999 (Democratic National Committee 2004a).

The congressional committees also succeeded in expanding their donor bases. By the end of the spring primary season, committees on both sides of the aisle had recruited hundreds of thousands of new donors. The NSRC and NRCC recruited a combined total of more than 700,000 new donors before June (Edsall 2004b; Carney 2004b). The DCCC added 230,000 new donors, more than double the 100,000 new donors it recruited in the entire 2002 election cycle (Carney 2004b). The DSCC at the time did not release specific numbers but noted that its donor base had "increased significantly" (Democratic Senatorial Campaign Committee 2004a, 2004b).

This sharp rise in the number of new contributors early in the cycle proved to be a harbinger of things to come. As public opinion on the war in Iraq became more divided, and the presidential election began to take shape with the emergence of John Kerry as the Democratic challenger, party support continued to expand, as hundreds of thousands of individuals expressed their political views by contributing to their party's cause. In the first four months of 2004, the DNC posted 35 million pieces of fundraising mail, which exceeded the amount of fundraising mail posted by the committee in the entire decade of the 1990s (Democratic National Committee 2004d). By the end of the election in November, the DNC had completely revitalized its once relatively moribund direct mail program. Starting with 400,000 direct mail donors after the 2000 election, the DNC added 2.3 million more, bringing its total direct mail donor base to 2.7 million. In addition, the DNC had 4 million donors make contributions via the

Internet (McAuliffe 2004). As a result, the committee easily surpassed its goals for small donor fundraising and online contributions. In all, the committee reported raising more than \$248 million in small donations as of December 2004, which represented an extraordinary increase over the \$35 million in small donations that the party reported receiving in the 2000 election cycle (Democratic National Committee 2004b).

While the RNC did not release final figures on its new donors or fundraising patterns, it is clear that the committee also experienced a flood of new small donor gifts. One measure of the committee's success in attracting small donors is the number of unitemized (less than \$200) contributions that it reported on its FEC disclosure filings. Unitemized contributions are contributions that sum to \$200 or less for any donor in a given year. Such donations do not have to be itemized on FEC disclosure reports, hence the nomenclature. According to an analysis conducted by the FEC, the RNC reported \$157.1 million in unitemized receipts by the end of the election in the 2004 cycle as opposed to \$91.1 million in the comparable period in the 2000 cycle (Federal Election Commission 2005b). This represents an increase of almost 75 percent in small donor contributions. (The comparable numbers for unitemized DNC receipts were \$165.8 million in the 2004 cycle, up from \$59.5 million in the 2000 cycle.)

While much of the growth in party receipts was a result of the increase in small donor fundraising, the national party committees did collect substantial amounts from their large donor solicitation programs, which made an important contribution to the national parties' overall financial success. According to a postelection analysis of party contributions conducted by the FEC, the RNC and DNC raised a total of \$104.2 million in individual contributions of the maximum permissible amount (\$25,000 per year per committee), with the RNC garnering \$60.9 million from such gifts and the DNC, \$43.4 million (Federal Election Commission 2004b). In the comparable period in the 2000 cycle, the two committees raised a total of \$23.7 million of hard money from individual contributions of the maximum permissible amount (at the time \$20,000 per committee per year), with the RNC collecting \$12.7 million in such gifts and the DNC, \$11.0 million.

Simple division of these aggregate amounts by the size of a maximum party donation in each election cycle reveals that the RNC and DNC received at least 4,168 maximum contributions in the 2004 cycle and 1,185 maximum hard money gifts in the 2000 cycle. The RNC received at least 2,434 maximum contributions in the 2004 cycle and 633 in the 2000 cycle. The DNC received at least 1,734 in 2004 and 552 in 2000. Since BCRA increased the annual limit on individual gifts to a national party committee by \$5,000, these 4,168 maximum donations translate into \$20.8 million in additional hard dollar receipts that can be attributed to the change in the contribution limit.

PARTY EXPENDITURES

Armed with ample coffers, the national party committees were able to spend substantial sums of money in support of their candidates. Generally, the parties fol-

lowed the basic strategic approach employed in other recent election cycles: they concentrated their expenditures in battleground presidential election states and a relatively small number of Senate and House races, while allocating only minor sums to party activities in states that were not venues for targeted federal contests. The DNC and RNC also followed past patterns in concentrating their expenditures on the presidential race, leaving spending in the congressional races to the Hill committees.

Beyond these general approaches, party spending varied significantly from the patterns established in the past. While some of these changes were related to BCRA, most of the differences were due to the particular dynamics of the 2004 presidential race, as well as major innovations in the way parties participate in presidential elections. One of these innovations, the use of independent expenditures, was an anticipated change. The other, which can be called "hybrid spending," was not.

After the passage of the 1974 FECA and the implementation of the presidential public funding system, direct candidate support in presidential general election campaigns was financed principally through the public funding grant received by each of the major party nominees, along with a limited amount of party coordinated spending financed with hard money funds. FECA rules specifically prohibited party committees from making independent expenditures that directly advocated the election or defeat of a presidential candidate. Yet, parties did find ways of supplementing their limited coordinated spending, primarily by supporting candidates through indirect means of support, such as expenditures on generic party activities, including voter registration and mobilization programs, most of which could be funded with soft dollars. In the 1996 election, the parties also began to use a mix of hard and soft money to finance issue advocacy advertisements in direct support of their presidential nominees. This tactic quickly became the preferred alternative of both party committees, since monies spent on issue ads were not subject to spending restrictions. In both 1996 and 2000 the parties spent more on issue advocacy advertisements than they spent on coordinated communications.

BCRA ended the soft money expenditures of national party committees but made no change in the limits on party coordinated expenditures. Thus, in 2004, the DNC and RNC were permitted to spend \$16.2 million apiece in coordination with their presidential nominees. BCRA did, however, expand the parties' capacity to spend money in direct support of a federal candidate by codifying rules that recognize the national party committees' ability to make independent expenditures on behalf of candidates. Under BCRA's original provisions, a party committee was required to choose at the time of a candidate's nomination whether it would assist that candidate through limited coordinated expenditures or unlimited independent expenditures. But the Supreme Court struck down this provision (Section 213 in the statute) in *McConnell v. Federal Election Commission* (540 U.S. 93, 199-205 [2003]), thus opening the possibility that a party might engage in both forms of support in a postnomination campaign. The rules promulgated by the FEC to implement BCRA allowed parties to make coordinated and/or independent expenditures in support of a candidate, provided that

the party abided by the coordination rules to ensure that the independent expenditures were "independent." The new regulations also dropped the pre-BCRA regulatory provision that prohibited independent expenditures in presidential general election contests (see 69 Fed. Reg. 63919).

The parties made the most of the new regulatory environment, spending money both in coordination with and independent of the presidential candidates. The parties also waited until the general election to begin this spending. Although the DNC and RNC did spend money throughout the election year on generic activities such as voter registration, volunteer organization, and voter mobilization, they made no coordinated or independent expenditures until after the national conventions. In 1996 and 2000, the parties had begun spending funds much earlier, launching issue advocacy advertising campaigns in support of their prospective nominees by early summer. But these efforts, particularly the RNC's advertising in 1996 in support of Robert Dole and the DNC's advertising in 2000 in support of Al Gore, were designed to help candidates constrained by the public funding expenditure limit to weather the "bridge period" between the effective end of the primaries (the point at which a putative nominee has clearly emerged) and the start of the formal general election period. In 2004, such party assistance was not needed, since Bush and Kerry had opted out of the primary matching funds program and were raising unprecedented sums of money in the months leading up to the party conventions. During the pre-convention period, Kerry also benefited from tens of millions of dollars of spending by Democratic-oriented 527 groups, which minimized the need for party assistance. Consequently, the national committees could conserve their monies for use in the final election.

The DNC and RNC spent more money on direct candidate support in the 2004 presidential race than in any previous presidential contest. In addition to the \$16 million in coordinated expenditures made by each party, the committees carried out major advertising campaigns financed through independent expenditures. Overall, the two national committees spent a combined \$138.7 million on independent expenditures, all focused on the presidential race. Most of this sum, more than \$120 million, was spent by the DNC. From the time of Kerry's nomination at the end of the July, the DNC maintained a relatively steady stream of independent advertising, primarily consisting of negative advertising against President Bush. The committee averaged about \$9 million in spending per week, beginning in the first week of August, and spent more than twice the amount the Kerry campaign spent on paid media during the course of the general election.

DNC spending was especially important in August, when the Bush campaign held a major financial advantage over Kerry. During this month, the Kerry campaign, due to its end of July convention, was already operating off of the \$75 million presidential public funding grant, while the Bush campaign was still free to spend unlimited amounts during the weeks before the Republican convention at the end of August. The DNC was therefore responsible for carrying the Democratic message in August and spent \$35 million on paid media doing so. In comparison, the Bush campaign spent about \$33 million on paid media during this month, while the Kerry campaign spent a mere \$406,000.

The DNC, however, chose to broadcast negative advertisements against President Bush throughout August, rather than ads directly promoting Kerry or responding to the charges contained in the ads sponsored by the Swift Boat Veterans for Truth (SBVT), which attacked Kerry's record in Vietnam. The SBVT ads were initially broadcast in only seven markets, with fewer than 100 spots aired each day, as part of a relatively modest \$500,000 media buy (Nielsen Monitor-Plus and The University of Wisconsin Advertising Project 2004; Edsall 2004e). But the attacks received widespread media coverage, multiplying their exposure, and thus had a greater effect on the public discourse in the campaign than the DNC media, which failed to effectively address the issues raised by the group.

The RNC devoted \$18.3 million to independent expenditures in support of President Bush in the period after the Republican convention. Thus it spent substantially less in this way than the Democrats. The primary reason for the disparity is that the Republicans pursued an innovative tactic, unforeseen by either the Kerry campaign or analysts of the new law. This new form of financing consisted of campaign advertisements jointly funded by the presidential campaign and the RNC in an "allocated" or "hybrid" manner. The initial advertisements financed in this way, which were broadcast in September, featured President Bush and included generic party messages about the party's agenda or principles, as well as mention of the Republican "leaders in Congress" (Sidoti 2004a). The Republicans contended that such ads, which combined a message of support for the President with a generic party message, could be financed in an allocated manner with the cost divided between the presidential campaign and the party committee. Further, they reasoned that such allocated generic party spending did not count against the party's coordinated spending limit or constitute a contribution to the publicly funded presidential nominee. At the time these ads were initiated, neither the party nor the presidential campaign committee submitted an advisory opinion request to the FEC seeking guidance as to whether this practice was permissible under federal law.

The Republicans chose the hybrid spending approach over the independent expenditure approach because it allowed the presidential campaign to exercise more control over the content of party advertising, since the party did not have to act independently of the presidential campaign. It was also a highly creative way of reducing the severity of the spending caps imposed on both publicly funded candidates and party coordinated expenses. In effect, the tactic allowed the presidential campaign to stretch its limited public money and spend far more than the amount allowed under the public funding expenditure limit. From the party's perspective, it allowed the RNC to spend far more in coordination with a candidate than the amount allowed under the coordinated spending limit.

Not to be outdone, the DNC and the Kerry campaign soon following suit and developed jointly financed hybrid advertisements of their own (Sidoti 2004b; *New York Times* 2004b). By the end of the general election campaign, the RNC had reported \$45.8 million in generic hybrid expenditures to the FEC. The DNC did not specify its hybrid spending in its FEC reports, but an analysis conducted after the election estimated that the DNC devoted about \$24.0 million to this

type of spending (Devine 2005; FEC 2005b). Party funds were thus used to augment expenditures by the presidential campaigns with about \$70 million worth of paid media advertising.

Contrary to most preelection expectations, the financial role of the national parties did not diminish in 2004. In fact, the DNC and RNC spent record sums on direct candidate support in the presidential race. Moreover, in the presidential general election, the party committees actually outspent the candidates. In all, the DNC spent \$160 million in support of Kerry, or twice the amount given to the Kerry campaign in public funding. The RNC spent \$80 million in direct support of Bush, an amount slightly greater than the sum Bush received in public funding. In contrast, in 2000 the national parties spent \$13.7 million apiece in coordinated funds in support of the presidential nominees. In addition, the parties spent at least \$59 million on issue advocacy advertising funded largely with soft money (Corrado 2002). The 2000 total, about \$86 million, was less than 40 percent of the \$240 million total spent by the national committees in 2004.

Beyond this direct candidate support, both parties also mounted extensive, highly sophisticated, volunteer-intensive voter outreach and mobilization efforts. These efforts were particularly noteworthy, not only because they constituted an important component of party activity in 2004, but also because it was this aspect of party operations that some observers thought would be the most likely to suffer the loss of soft money under BCRA. In recent elections, the parties financed their voter outreach efforts primarily with soft money. Thus, it was anticipated that this aspect of party electioneering might be reduced significantly under BCRA's hard money regime (La Raja 2003b, 2003c; Milkis 2003; Cochran 2001; Clymer 2001).

The parties' willingness to invest resources in these voter turnout programs was based on the experience of the 2000 presidential election, which highlighted

Table 2.2 National Party Committee Expenditures in 2004 (\$ millions)

	Contributions	Coordinated Expenditures	Independent Expenditures	Generic Ads	Total Candidate Support
DNC	0.0*	16.1	120.4	24.0	160.5
DSCC	0.7	4.4	18.7	—	23.8
DCCC	0.4	2.4	36.9	—	39.7
Democrats	1.1	22.9	176.0	24.0	224.0
RNC	0.2	16.1	18.3	45.8	80.4
NRSC	0.8	8.4	19.4	—	28.6
NRCC	0.5	3.2	47.3	—	51.0
Republicans	1.6	27.7	85.0	45.8	160.0
Total	2.7	50.6	261.0	69.8	384.5

Source: Based on Federal Election Commission data as of March 14, 2005. Totals may not add up due to rounding.

*The DNC made only \$7,000 in contributions to candidates.

the importance of turning out and counting every vote. It was also spurred by the experience in the 2002 election, wherein the Republicans developed a “72-Hour Program” that was credited with increasing Republican turnout and producing victories in a number of important congressional contests. Both parties therefore began the 2004 cycle with the intention to emphasize person-to-person voter contact programs.

In this regard, the RNC had an advantage over the DNC, since it began the election cycle with a head start. In the 2002 cycle, the Republicans had invested \$50 million into voter registration and the 72-Hour Program (Edsall and Grimaldi 2004). In 2004, they continued to build on this base and further refined their voter identification and contact methods. At the start of the election year, the Republicans announced a goal of registering three million new Republican voters, and in one week in March alone, deemed “National Voter Registration Week,” registered more than one million (Sweeting 2004; Republican National Committee 2004b).

The party also decided to focus its efforts on turning out its partisan base and concentrating on prospective Republican supporters, or “soft” voters, who were not currently registered or had not voted in the previous presidential race, instead of focusing most of its resources on undecided voters. This strategic decision was based on the assumption, supported by opinion research, that more than 90 percent of likely voters or registered partisans had already made their decision as to whether or not they would support President Bush for reelection. It was grounded on party research that highlighted the inefficiency of an approach relying on traditional phone banks and direct mail programs to turn out voters in traditionally Republican precincts. This research indicated that only 15 percent of all Republican voters—and an even smaller share of soft Republican voters—lived in precincts that voted Republican by 65 percent or more (Edsall and Grimaldi 2004). The RNC thus relied on sophisticated microtargeting programs based on commercial databases and survey research to identify prospective supporters outside of these traditional Republican strongholds, including those living in primarily Democratic neighborhoods. These efforts produced a broad base of potential contacts. According to Bush campaign strategist Matthew Dowd, this targeting quadrupled the number of Republican voters who could be reached through direct mail, phone banks, and knocking on doors (Edsall and Grimaldi 2004). The party developed an extensive person-to-person, colleague-to-colleague, largely volunteer voter contact program to reach these new voters, spending a total of \$125 million on this effort, or three times the amount allocated for voter contact in the 2000 campaign (Balz and Edsall 2004).

The Democrats also increased their investments in voter contact and mobilization, even as pro-Democratic 527 groups such as America Coming Together, Voices for Working Families, and the New Democratic Network were spending tens of millions of dollars to conduct voter registration and outreach programs that were designed to increase Democratic turnout. Like the RNC, the DNC emphasized person-to-person contact methods and identified prospective supporters with computerized targeting programs. But unlike the RNC, the Demo-

crats tended to focus on city precincts and other Democratic strongholds, while the pro-Democratic 527 groups placed more effort on rural areas and suburban precincts. In all, the DNC invested \$80 million into its field operation, an increase of 166 percent over the amount spent on such operations in 2000 (Democratic National Committee 2004b). The party organized 233,000 volunteers to form the backbone of its efforts and made eleven million person-to-person, door-to-door contacts with voters, as well as thirty-eight million telephone calls to prospective supporters in battleground states (Democratic National Committee 2004b).

Thus, the parties sponsored a substantial amount of activity in the 2004 election. The DNC and RNC each spent a total of more than \$200 million in connection with the presidential race, with the DNC spending more on advertising (\$160 million) than field operations (\$80 million), and the RNC emphasizing field operations (\$125 million) over advertising (\$80 million). While the parties engaged in more activity independent of candidates than in the past, there was still a substantial amount of coordinated activity. Most important, the parties made major gains in their organizational development, at least in targeted areas of the nation, and developed viable programs for promoting grassroots participation.

LOOKING AHEAD

National party financing in the first election conducted under BCRA proved to be more dynamic and vigorous than most observers anticipated. Will these committees continue to thrive in the future? Although major challenges remain, the prospects for future party success are very encouraging, and the parties are likely to continue to play a prominent role in federal electioneering for some time to come.

In the 2006 election cycle, the parties will again face the problem of raising the monies needed to wage meaningful campaigns without access to soft money. They will face the additional burden of having to raise funds without the public excitement and partisan intensity that accompanies a presidential campaign. It is therefore likely that national committee receipts will decline, as is typical in a midterm election cycle. But the parties are now in a better position to maintain their financial support than they were four years ago and should continue to operate for some time in a political environment conducive to party fundraising.

The national committees will begin the next election cycle with the largest donor bases ever recruited in party history. The central challenge they will face is finding ways to retain these donors and keep them actively involved in party funding. If the general experience of most organizations with direct mail contributors is taken as a basis for judging party prospects, it is likely that these committees will experience some attrition in donor support. The party organizations' success in minimizing the rate of attrition will be a key to their continuing financial success. This task will be complicated by the competition for dollars created by the leading 527 committees—should they follow through on their stated intentions of continuing their efforts in future elections—since these

groups will be making appeals to many of those who gave to the parties in 2004. The parties thus will need to be responsive to donors and put forward clear messages that provide individuals with strong incentives to continue to invest in party politics, rather than the initiatives of more specialized organized groups.

Party prospects should also be buoyed by a political environment characterized by polarized partisan attitudes. A second narrowly decided presidential race did little to resolve the partisan divide within the electorate. Nor did it resolve the divisions of opinion on such key issues as the war in Iraq, tax cuts, health care, and budget priorities. With a debate over Social Security reform and the prospect of at least one Supreme Court nomination looming in the next Congress, the parties should have an issue agenda favorable to partisan appeals.

Finally, the Internet and other technologies will continue to offer parties a means of soliciting contributions at minimal cost. Both parties have developed email lists containing contact information for millions of individuals, which will provide them with opportunities to solicit contributions through narrowly targeted and personalized messages. Party websites will receive even greater use as portals for collecting contributions. Individuals interested in supporting a party will find it easy to do so by making a donation with only a few clicks of a mouse.

In 2004, the national party organizations once again demonstrated their capacity for adapting to changes in the regulatory and political environment. At the end of the first election under BCRA, the national party organizations were stronger, not weaker.

NOTES

1. BCRA sets forth a specific statutory definition of the activities that constitute "federal election activity" for purposes of the act. In general, federal election activity is defined as including: (1) voter registration activity within 120 days of a federal election; (2) voter registration, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a federal candidate appears on the ballot (regardless of whether a state or local candidate also appears on the ballot); (3) any public communication that refers to a clearly identified candidate for federal office that promotes or supports, or attacks or opposes, a candidate for federal office, regardless of whether the communication expressly advocates a vote for or against a candidate; and (4) services provided during any month by an employee of a state, district, or local party committee who spends more than 25 percent of compensated time during that month on activities in connection with a federal election (see 2 U.S.C. §431(20)).

2. The adoption of the Tillman Act, which banned corporate contributions in federal elections, including any election in connection with the selection of electors for the office of President and Vice President, had a major effect on Republican Party fundraising at the time but no significant effect on the Democratic Party. In 1904, the RNC collected an estimated \$2.35 million, including as much as \$1.53 million from corporations. The DNC relied on contributions from a few wealthy individuals for most of its \$700,000 in funding at the time and did not accept corporate or trust contributions in 1904 at the insistence of its presidential nominee, Judge Alton Parker. In 1908, without corporate contributions, the RNC raised an estimated \$1.65 million, including the funds sent directly to selected state party committees. The DNC collected \$629,000 that year (*New York Times* 1912b; *New York Times* 1912a; Alexander 1971; Pollack 1926; U.S. Senate Committee on Privileges and Elections

1912-1913). The author thanks Heitor Gouvea of Boston College for sharing his research on party fundraising in the early twentieth century.

3. Unless otherwise noted, all of the data on party finances included in this chapter are based on the information contained in national party committee disclosure reports as summarized and reported by the Federal Election Commission.

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

SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	

FEC EXHIBIT 152

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HAS THE U.S. CAMPAIGN FINANCE SYSTEM COLLAPSED?

Internet Fundraising in 2008: A New Model?

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Internet Fundraising in 2008: A New Model?*

Clyde Wilcox

Abstract

The surge in internet fundraising in 2004 and especially in 2008 suggests that campaigns may have found a way to involve a new group of citizens in giving. Using data from an earlier 2000 survey of large and small donors, I show that internet donors are different from other small donors in interesting ways.

KEYWORDS: campaign finance, money and politics, contributions, internet

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Three startling figures signal a new dynamic in presidential fundraising in 2008. In January, 2007, Senator Barack Obama raised more than \$35 million dollars from individuals for his primary election campaign against Senator Hillary Clinton, including \$16 million in contributions of \$200 or less. More than 90% of his donors in January gave \$100 or less, and more than 40% gave \$25 or less. Obama's total was higher than all combined Republican presidential candidates.¹ Just a few days later, Obama's campaign announced that it had raised more than \$7.5 million over the internet in just 36 hours.²

Perhaps more surprisingly, on November 5, 2007 GOP presidential candidate Ron Paul raised \$4.07 million in individual contributions in 24 hours, primarily through the internet. A Gallup poll conducted of national Republicans completed the previous day showed that Paul had the support of less than 1% of Republicans nationwide.

To put these figures in perspective, consider the following. In January, 2004, George W. Bush raised \$12 million from individual donors. During that same month, John Kerry raised \$4 million and Howard Dean raised \$6 million. At the time, these were seen as large sums – indeed Bush and Dean both set new campaign fundraising records for their respective parties. But Obama raised more in 36 hours than Dean had in the entire month, and his January total was approximately three times greater than what Bush had raised just four years before. And Ron Paul – a footnote in the GOP polls – raised more money in a single day than John Kerry did in the entire month of January, 2004.

The explosion of internet fundraising has practical implications for campaigns. It may well transform the dynamics of nomination campaigns. Hillary Clinton's fundraising strategy of courting large donors has been very successful – in January she raised 25% more than George Bush's record total in 2004, and her total was more than twice what Dean had raised. But Obama's record haul gave him a huge advantage in advertising in several key states. Moreover, the vast majority of Obama's donors have not made maximum contributions, and so they can give again, and again, and again. Meanwhile a majority of Clinton's money has come from donors who have given the maximum legal contribution.

But it is possible that internet fundraising will have a more profound impact on who contributes, and how they become involved in politics (Wilcox, 2001). It might enable candidates to reach a new set of potential donors, and therefore broaden the demographic and political range of the pool of people who finance American elections. The internet has provided a new technology to reach smaller donors – one that is cheaper, allows for a wider range of ideology, and provides a

¹ Campaign Finance Institute. "Newly Released January 2008 Reports Highlight Obama's Dominance in Presidential Fundraising," Press release, Feb 21, 2008.

² Patrick Healy and Jeff Zeleny, "Obama Outshines Clinton at Raising Funds," *The New York Times*, Feb 8, 2008.

wider range of incentives than existing techniques such as direct mail. If the internet ultimately involves a group of donors who have different backgrounds and political views than the existing donor pool, then it might have positive democratic effects.

Broadening the pool of donors, and especially broadening the base among less affluent citizens, could have a number of positive consequences for democracy. First, it might lessen the participatory distortion of contributing. Compared to all other forms of participation, contributing is most heavily concentrated among the affluent (Verba, Schlozman, & Brady, 1995). Candidates who spend their time raising money from the traditional pool of larger donors hear the voices of a distinctive choir – composed of a narrow elite whose priorities and policy views differ substantially from the general population.

Moreover, there is some evidence that once citizens make even a small contribution to a candidate, they may pay more attention to campaigns, and might become involved in other ways. In 2004, the Bush campaign very successfully recruited small donors to do other forms of campaign activity. The Bush and Kerry campaigns made a major effort to find new small donors in the spring and summer months, and the Clinton and Obama campaigns have sought to involve small donors in broader participation as well.

There is of course no data on Obama's and Ron Paul's internet donors, and there may never be. Most candidates in 2008 have opted out of the federal matching fund program, and thus are not required to disclose the name and address of their small donors. Unless the campaigns voluntarily release the names and addresses of their small donors, we will be able to learn little about them.

In this paper I draw some inferences about internet donors, using data from earlier donor surveys in 1972, 1988, and 2000. The 1972 and 1988 surveys are of donors of \$200 or more – a level that federal law deems sufficiently large to mandate disclosure.³ The 2000 survey includes separate samples of donors of \$200 or more, and also donors of smaller amounts. And the 2000 survey includes questions that allow us to separate out those who gave through the internet, and those who gave using traditional means. These data may allow us to make educated guesses about how the donor pool may be changing as a result of internet solicitation

The 2000 survey is a rare opportunity to look at smaller donors. The law requires campaigns to disclose the names and addresses of contributors of more than \$200, but not of donors of smaller amounts. Yet candidates who seek matching funds must provide to the Federal Election Commission (FEC) the names and addresses of small donors as part of their submission for funds. In the

³ The data in 1972 were collected by Clifford Brown and Lynda Powell. The 1988 data were collected by Brown, Powell, and Clyde Wilcox. The 2000 data were collected by Alexandra Cooper, John Green, Michael Munger, Mark Rozell, and Clyde Wilcox.

1980s and early 1990s the Commission did not release matching fund records to the general public, so there could be no surveys of small donors during this period. More recently, in 2004 and again in 2008 the biggest campaigns did not seek matching funds, so they did not submit lists of names and addresses of small donors. But in 2000 all but two candidates received matching funds, and the FEC disclosed their names and addresses. And George Bush refused matching funds but did disclose the identities of his donors on the internet. Thus only the relatively small number of small donors to Steve Forbes brief campaign could not be included in the survey.

Contributing and the Donor Pool: Motives, Means, and Opportunity

Campaigns seek to identify citizens with the motives and means to give, and then provide them with the opportunity to do so. The vast majority of citizens can think of many more gratifying things to do with their money than to give it to presidential candidates. Thus the highest estimates suggest that fewer than 2% of citizens gave to a presidential candidate in 2004 – the previous record year for presidential fundraising.

Potential donors may be motivated to seek a mixture of three benefits – material benefits for their business or their families, social or solidary benefits that come from the pleasure of interacting with politicians and other donors, and purposive or ideological benefits that come from supporting candidates who share their views on narrow issues like abortion or global warming, or broader ideological orientations. Fundraising is the art and science of approaching potential donors with the right appeals at the right time.

Prior to the adoption of the FECA amendments in 1974, candidates often depended primarily on a few donors who could write very large checks. In 1968, Eugene McCarthy financed his campaign largely by large checks from fewer than 50 donors, and Robert Kennedy raised \$13 million in 13 weeks primarily by approaching very wealthy donors. Fundraisers knew the small number of individuals who were motivated enough to write large checks, and generally arranged for the candidates to ask for the money in person. The motives of these large donors were generally known by fundraisers, or could be ascertained easily when the candidate met the potential donor in person.

FECA changed the dynamic of fundraising by limiting contributions to \$1000. In an era of rapidly escalating campaign costs, the maximum contribution remained constant through the 2000 election, and has since increased to \$2300 in 2008. In 1972 Clement Stone gave the Nixon campaign more than \$2 million dollars, but in 1976 the maximum contribution he could make was \$1000. Suddenly campaigns needed to identify many more donors.

Finding Large Donors, 1974-present

Campaigns after FECA scrambled to find many new donors. Instead of a few donors with fat checkbooks, they sought instead a few solicitors with fat Rolodexes. Suddenly campaigns had to far beyond the “usual suspects” and identify a far larger group of potential donors. They did this by building pyramidal networks of solicitors.

At the top were those who pledged to raise large sums, such as the 500 Rangers and Pioneers in the 2004 Bush campaign who pledged to raise hundreds of thousands of dollars each. These top solicitors would then recruit others to solicit smaller amounts, and these individuals would in turn ask for contributions directly from friends, business associates, and neighbors.

Large contributions continue to be raised primarily by personal appeals from someone the donor knows. Fundraising professionals recommend starting with a list of those who “cannot say no to you.” This might be an employee, or a contractor to your company. It might be someone who regularly does business with government. It might be someone with a social obligation, who perhaps asked the solicitor to give to the opera and now is asked in return to give to a presidential candidate. At one fundraising dinner for Jack Kemp in 1988, the candidate asked to make only a short speech, because the donors were all there because of their obligation to the solicitor, and were not necessarily supporters of the candidate (Brown, Powell, & Wilcox, 1995).

Large contributions are usually made at splashy social events, which donors may also value. These provide an opportunity to see and be seen by others who can afford \$1000 a ticket. For some, the solidary benefit is tinged with ideology – it is a chance to mingle with Democratic or Republican businessmen and women, for example. Surveys show that large donors frequently care about ideology, but these networks of solicitors are especially skilled at raising money from those with material motives, and those who value the social atmosphere at fundraising events where maximum dollar donors gather (Brown et al., 1995; Francia, 2003).

By 2000 the pool of large donors had grown remarkably. George W. Bush received maximum contributions of \$1000 from more than 94,000 individuals that year, and other GOP candidates and the two Democratic candidates also attracted many large donors. Yet my analysis of data from surveys of donors in 1972, 1988, and 2000 suggests that the donor pool in 2000 looked very much like the pool in 1972. These surveys were of individuals who gave at least \$200 in each year, but it is important to note that inflation had greatly eroded the value of a \$200 contribution.

Table 1 shows some of the key demographic comparisons. In each year, large donors were overwhelmingly older, well educated white men. They were primarily concentrated in business and the professions, and were quite affluent.

Over this time, the donor pool became somewhat older, and involved slightly more new donors as solicitors broadened their efforts. There were predictably more women donors in 2000 than in 1972, although large donors were still overwhelmingly male.

Table 1: Demographic Characteristics of Significant Donors

	1972	1988	2000
Have given in most previous			
Presidential elections	51%	50%	44%
Education:			
High school or less	9%	6%	2%
Some graduate plus	52%	56%	56%
White	99%	95%	96%
Male	83%	73%	70%
Age			
18-30	7%	5%	1%
61+	21%	30%	40%

Source: Donor survey 1972 by Clifford Brown and Lynda Powell, Donor survey in 1988 by Brown, Powell, and Wilcox, and Donor survey in 2000 by Alexandra Cooper, John Green, Michael Munger, Mark Rozell, and Clyde Wilcox.

Comparing income across these years is more difficult, because the value of the disclosed contribution of \$200 changed dramatically with inflation. A contribution of \$200 in 1972 would be worth \$850 in 2000. Moreover, the income categories of the surveys do not quite match up with inflation during this period. But comparing donors of \$200 to donors of \$850 and up in 2000 suggests that donors in the two years are roughly equal in income. What is absolutely clear is that donors in all years are affluent. Only 2% of donors of \$200 or more in 2000 had incomes below \$50,000, and approximately half had incomes of \$250,000 or more.⁴

Large donors in 2000 look like donors in 1972 for obvious reasons. As campaigns turned their top donors into solicitors, these solicitors naturally turned first to their friends and neighbors – the people they knew best. They picked those who would be likely to have the motives and means to contribute. Large contributions are generally raised by personal solicitations by those who know the potential contributors, and so the donor pool reproduces itself as it expands

⁴ Donors in 1972 appear to have been comparatively wealthier than those in 2000, but remember that the donor threshold was in constant dollars much higher than in 1972 than in 2000, and that there was no contribution limit in effect in 1972. This means that the campaigns did not work to broaden the donor pool as much as they did in later elections.

(Brady, Schlozman, & Verba, 1999). Some candidates brought slightly different demographics to the donor pool – Jesse Jackson and Pat Robertson in 1988 both had more women donors than George H.W. Bush and Michael Dukakis. But these differences have generally been small.

Finding Small Donors, 1974-1999

Campaigns that wish to raise money from less affluent donors have traditionally faced the problem of identifying those with sufficiently strong motives to give. The Barry Goldwater campaign assembled a list of those who had written letters to the campaign, and in some cases to newspapers, and successfully mailed solicitations, but before the FECA campaigns had little incentive to seek out smaller donors. FECA not only limited the amount that a campaign's strongest supporters could give, but it also increased the value of smaller contributions by matching the first \$250 of all contributions. Thus a contribution of \$50 became \$100.

Between 1974 and 1999, campaigns primarily reached potential small donors through direct mail. In the 1970s, advances in computer technology made it easier for candidates to mail solicitations to pre-screened lists of potential donors. By renting lists of members of interest groups, subscribers to certain magazines, and donors to previous campaigns, candidates could be assured of reaching those who had in the past been sufficiently motivated to give. As technology advanced it was possible to create distinctive letters for members of different lists, and to match across lists to find those whose name appeared on more than one.

Direct mail costs money, and campaigns typically lose money when they "prospect" a list. But anyone who responds can be solicited again and again, and some donors pledge to give monthly. In 1988 Pat Robertson created the "1988 Club" of those who promised to give his campaign \$19.88 per month. FEC records show that many of his donors gave every week (Brown et al., 1995). Robertson's campaign was especially successful in direct mail fundraising because he built the list from those who responded to his television appeal to petition him to run for president. The vast majority of his donors had been regular donors to his television program.

It stands to reason that direct mail solicitations cannot offer a solidary benefit, since writing a check is not a social activity. And those who seek material benefits do not write small checks to be delivered by mail. Rather, direct mail works with those with purposive motives. Generally, it takes a strong purposive motive to induce someone with an average income to give to a presidential candidate.

Throughout this period, fundraisers reported that mail worked best only for ideologically extreme candidates. Direct mail solicitations typically warned of dire threats to the political system, which only a contribution of \$25 could prevent

(Godwin, 1988). The market for direct mail was primarily older Americans – a cohort that grew up reading and writing letters, who were at the stage of their life cycle when they looked forward to the mail as a highlight of their day. Younger citizens did not respond to direct mail, and were only slightly more likely to respond to telemarketing requests.

Thus in 1988, moderate candidates such as Dukakis, Bush, and Dole relied primarily on networks of larger donors with material and solidary motives, and ideological candidates such as Pat Robertson, Paul Simon, and Jesse Jackson relied more on small contributions raised from older, ideologues through direct mail. There were no financially viable ways to solicit contributions from more moderate or younger citizens.

Could the Internet Change Campaign Fundraising?

The internet provides a vehicle to reach less affluent citizens with a different mix of appeals. Compared with direct mail, e-mail and internet fundraising is very cheap, and thus the break-even point is far lower. Campaigns can therefore e-mail far more broadly than to carefully honed ideological lists. On a single day in late February I received three separate e-mails from the Clinton campaign asking for contributions, and two from the Obama campaign. One of Clinton's solicitations asked for a contribution of just \$5. Such repeated solicitations, with such a low target contribution, would be financially difficult through the mail.

With a lower threshold to break even, campaigns can seek to build much larger networks of donors. If prospecting is not expensive, then campaigns can spend time to develop complex networks of potential donors, and target them with a mixture of incentives. They can vary the message, and the packaging without incurring huge expenses.

Indeed, the internet provides the possibility that a citizen might give for the first time without being asked. Candidate web pages are designed to draw in those who browse them, and many links lead to a page that asks for contributions. Thus the internet can reach individuals whose names do not appear on lists, and need not focus exclusively on high-percentage ideological appeals.

In the 2000 campaign, several candidates launched major internet fundraising efforts. The most notable was John McCain, whose internet fundraising totals seem quaint just eight years later but which sent ripples through the Washington fundraising community. Al Gore and George W. Bush also mounted internet efforts late, and Ralph Nader used the internet for fundraising for his Green Party candidacy.

The data in Table 2 shows three sets of donors to presidential candidates in 2000: small internet donors, other small donors (almost entirely direct mail), and

large donors of over \$200.⁵ The data show that internet small donors were far more likely than other donors to be making their first contribution, although a majority had given previously in at least some elections.

Table 2: Big v Small Donors, 2000

	Small Internet	Other Small	Large
Have Given in Past Elections			
Most	23%	42%	44%
Some	40%	39%	42%
One or fewer	37%	20%	14%
Education:			
High school or less	3%	8%	2%
Some graduate plus	52%	39%	57%
Income			
Under \$50,000	18%	31%	3%
Over \$250,000	4%	5%	68%
White	95%	96%	96%
Male	80%	68%	69%
Age			
18-30	8%	2%	1%
61+	22%	57%	39%

Large donors were not surprisingly wealthier, than both sets of small donors. But small donors who gave through the internet were less likely to have incomes below \$50,000, and were almost as likely as big donors to have at least some post-graduate education.

Internet donors were just as likely as all other donors to be white, and were actually more likely than other donors to be male, a finding which might reflect gender difference in computer usage in 2000. They were much younger than other donors (and especially direct mail donors) but few were under 30.

Although the demographics of the internet donors are interesting, any possible differences in ideology, motives, and social group membership is more important. Whereas direct mail works primarily through strong ideology and fear, internet fundraising has the capacity to appeal beyond the narrow ideological wings of the political parties. Candidate web pages are deep with information on policy positions, in contrast to short fundraising letters. Moreover, the web pages are

⁵ All large donors are combined, because although a few gave through the internet, the data suggest that this was merely the way they delivered the check. Most were solicited either in person or by phone by someone they knew.

open for all to read and therefore are more carefully moderated than narrowly targeted letters. Thus the internet has the potential to raise money from donors with more moderate policy views, and to avoid some of the negative emotion inherent in direct mail solicitations.

The internet may also be able to deliver solidary benefit as well as purposive benefits. The e-mail solicitations I received in late February differed in a variety of ways – some were from the candidates, some from the candidate's families, and some from leaders who endorsed the candidate. All had short attached videos, and links to various parts of the candidate's web pages. In one solicitation, the video element was designed to make the viewer appear to be onstage with Senator Clinton, in an Obama solicitation I was invited to join in a network of citizens in my state who were working for the Senator. These solicitations clearly are designed to create the feeling of an online community. In the 2004 campaign, some candidates did internet meet-ups where they chatted with online donors. By 2008, college students were circulating their own videos with appeals to contribute to candidates, and candidates had their own pages on several of the social hosting sites like Facebook.

The data in Table 3 shows the ideology, motivations, and group memberships of small internet donors, other small donors, and larger donors who gave over \$200. Because the patterns differ in interesting ways by party, I show the data separately for those who identify with each party (including those who lean toward, but do not identify with, either party). Pure independents are excluded from this table.

Among Republicans, direct mail donors are the most likely to identify as extremely conservative on a seven point ideology scale like that of the NES. They also have more extreme views on social and economic issues, measured here by factor scores of a set of policy items from the survey. Internet donors are far more moderate, and have policy views that are closer to large GOP donors rather than small direct mail contributors.

In the Democratic party, however, it is direct mail small donors who are least likely to identify as extreme liberals, and who have more moderate scores on the issue scales. Small internet donors resemble large donors among Republicans also, but here it is in their ideological intensity, not moderation. This is a surprising result, and may reflect the efforts by the Clinton White House to build internet lists of party regulars, which the Gore campaign may have successfully tapped. It is also possible that the Democratic candidates built their internet lists from e-mail lists of interest groups, a topic I return to below.

The differences are muddier on motives. The values here are factor scores that combined several items that have been used in past studies to measure motives for contributing. These factor scores are assessed relative to the mean of all donors, so negative scores do not necessarily mean an absence of a motive – merely that

the particular group is less motivated by this goal than the average donors. The questions measuring solidary benefits may not be optimal for tapping into social benefits in virtual communities; these questions focused on fundraising events and the importance of meeting candidates and solicitors.

Table 3: Large and Small Donors in Both Parties

	Republicans				Democrats	
	Small Internet	Other Small	Big	Small Internet	Other Small	Big
Ideologically Extreme	12%		21%	12%	7%	14%
Social Issues Scale	.32		.85	.21	-.69	-.96
Economic Issues Scale	.48		.73	.46	-1.00	-1.07
Solidary Motives	-.16		-.20	.16	-.06	.28
Purposive Motives	.08		.20	-.02	.09	-.03
Business Motives	-.12		-.05	.48	-.39	-.16
Member:						
Business Group	25%		32%	68%	28%	47%
Professional	53%		36%	55%	51%	61%
Union	9%		1%	1%	16%	5%
Party	44%		39%	57%	48%	50%
Civic Association	10%		17%	37%	30%	38%
Pro-Gun	39%		40%	31%	10%	6%
Christian Conserv.	14%		26%	13%	1%	2%
Pro-Family	18%		30%	21%	7%	7%
Environmental	13%		7%	16%	37%	46%
Pro-Choice	7%		4%	11%	30%	33%

In both parties, large donors were more likely to be motivated by material and solidary benefits than small donors. Republican large donors stand out on business motives, Democratic large donors on solidary motives. Among Republicans, small internet donors have far lower purposive motives than small direct mail donors, and are slightly higher on solidary motives. Among Democrats, however, small internet donors have negative scores on all three motives, meaning that they have somewhat lower scores than the average donor in all areas. Of course, these donors were sufficiently motivated to give, but it may be that internet giving is in some ways easier for some donors, and thus it may take a less powerful appeal to tip them into making a contribution.

The bottom portion of the table shows membership in various political and social groups. Membership in business and professional groups is common among all groups of donors, and membership in unions is relatively rare. Large donors in both parties are more likely to be members of business, professional, and civic associations than smaller donors.

Once again Republican small internet givers resemble large donors more than they resemble small direct mail donors. Both are far less likely to be members of Christian conservative and pro-family groups, and (not shown) pro-life groups as well. Both are equally likely to be members of professional groups, and they are more likely than small internet donors to belong to party organizations. And small internet donors and large GOP donors are both more likely than small direct mail donors to belong to cross-cutting organizations such as environmental, pro-choice, and (not shown) civil rights groups. The one exception is pro-gun groups, where small internet donors are closer to small direct mail donors than are large donors. But the widespread membership in these organizations among all Republican donors is strikingly high.

Again Democrats present a contrast. Small Democratic internet donors look much like large donors here also, but it is in their higher rates of membership in Democratic leaning groups such as environmental and civil rights groups, and their low rates of membership in cross-cutting groups. The exception here is in pro-choice groups and (not shown) feminist groups. The lower rate of membership in these latter two types of groups is entirely explained by the gender gap in internet giving. Democratic men and women who gave through the internet were both more likely to belong to feminist and pro-choice groups than their same-sex counterparts among small direct mail giving.

In 2000, it appears that the internet mobilized different bases for the two parties. Among Republicans, the internet created a way to appeal for contributions among younger professionals who are more moderate, especially on social issues. These differences are stark in some survey questions. Fully 60% of GOP small internet donors would allow most abortions, compared with 30% of small direct mail donors. “Only” 12% of internet small donors believed that known homosexuals should be arrested, compared with 36% of direct mail donors. And more than 2/3 of internet small donors would allow feminists to teach in public schools – compared with only 41% of direct mail donors. Indeed, a relatively sizable minority of GOP internet donors might be described as libertarian, favoring free market economic policies such as tax cuts and opposing new government programs, but opposing regulations on abortion and criminalization of same-sex relationships.

Among Democrats, the internet in 2000 appears to have opened a path to collect contributions from younger and less affluent members of the liberal wing of the party, especially those who are members of liberal cause groups. Anecdotal

accounts suggest that this was true in 2004 as well, and certainly fits the pattern of mobilization by groups such as MoveOn.Org.

Of course, these results are from a very early stage in the development of internet fundraising, and may reflect idiosyncratic candidate strategies. John McCain positioned himself as a social moderate in 2000, and built the biggest direct mail network. And Al Gore may have used existing networks that interest groups and the Clinton White House had developed for other purposes.

Flash Forward to 2008

These survey data have the advantage of covering all presidential candidates, but internet fundraising has matured greatly in the past eight years. The 2008 campaign is far from over, but already we know that internet fundraising has reached an unprecedented level of new donors. Estimates of the number of all small donors in the record-breaking 2004 presidential campaign range from 2 to 2.5 million (Graf, Reeher, Malban, & Panagopoloulos, 2006). The Obama campaign alone could conceivably end up with more small donors in 2008 than all campaigns did in 2004. Obama will contact more donors moving forward, and Clinton has recently beefed up her internet efforts and apparently is doing far better than earlier in the campaign. She claimed to have raised \$3 million on the internet in 24 hours after her victories in Ohio and Texas. Moreover, the Republican nominee John McCain has already demonstrated the ability to attract new donors through the internet, and will certainly incorporate that strategy in 2008.

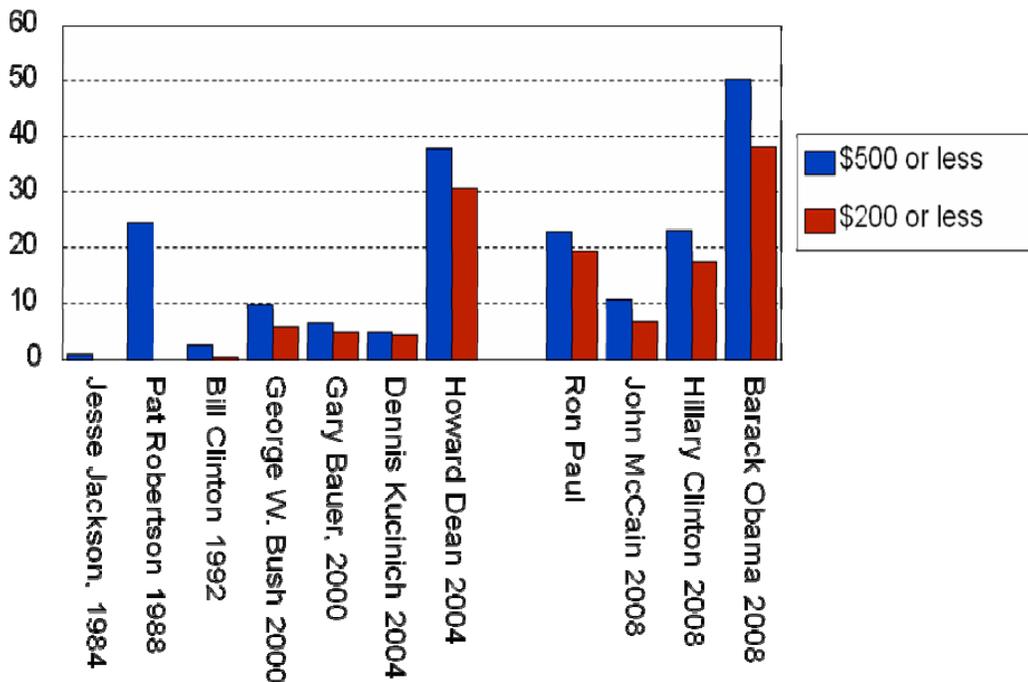
To show the impact of these efforts, Figure 1 shows total receipts through January 31 of the election year for select past campaigns. The data are in millions of dollars, and are adjusted to 2008 dollars. In the 1980s, the FEC only itemized contributions of over \$500, so the figure shows both total contributions of under \$500, and contributions of under \$200.

Prior to 2004 the record holder for small contributions was Pat Robertson, whose first FEC report was delivered in a flatbed truck. The vast majority of Robertson's small donors gave less than \$200, so if we could show that figure it would be nearly equal to his total under \$500. Gary Bauer, who did not come close to winning any primaries or caucuses, had almost as much money in 2000 from small donors as George Bush, who raised vastly more total funds. And Dennis Kucinich's quixotic quest also raised significant amounts in small contributions.

But Howard Dean in 2004 shattered Robertson's earlier record, in a campaign whose receipts were primarily from small donors, including both direct mail and internet. What is striking about 2008 is that several mainstream candidates have

been able to combine substantial contributions from large donors with substantial small donor mobilization.

In 2008, Ron Paul fit the earlier pattern of a candidate with an ideological constituency who relied primarily on small donors. Dean and Paul both raised more than 70% of their total funds in contributions of less than \$500. For Robertson in 1988, nearly 90% of his money came in contributions of less than \$500, and most of that was in small contributions of less than \$200.



Through Jan 31 of election year, in 2008 dollars

But in 2008, with internet fundraising in full use, moderate candidates are able to raise substantial sums from small donors, reaching many individuals who might give again or participate in their campaign, but still appeal to large donors as well. John McCain raised almost as much money in small contributions as Paul, but this constituted only 23% of his total funds. Hillary Clinton’s total haul from small donors put her nearly even with Ron Paul in 2008, even though she was clearly the candidate of the party establishment. But Clinton also raised almost \$90 million in contributions of \$1000 or more, compared with just \$6 million for Paul. Barack Obama’s remarkable fundraising among small donors did not mean that he did not also attract large donors. Indeed, 2/3 of his money came in contributions of \$500 or more.

In February, 2008, data just released shows that Clinton's revitalized internet fundraising campaign paid off. Clinton's campaign raised more than \$17 million in contributions of \$200 or less in February – more than any previous candidate in the early primary months. But Barack Obama raised a staggering \$30.5 million in small contributions in the same period. The Campaign Finance Institute reports that Obama's small donors have been making repeated small contributions. In February, Obama received more than 112,000 small contributions from individuals whose aggregate contributions crossed the \$200 threshold – in other words, donors whose repeated small contributions now require disclosure. This suggests that Obama (and probably Clinton) has developed a network of small repeat donors who over the course of a campaign may end up as large donors in the aggregate.

We cannot separate out direct mail money from internet money in these totals, but anecdotal evidence suggests that the vast majority of the surge in small contributions is through the internet. And although the internet can work well for the candidates who traditionally have used direct mail, like Ron Paul, it can also work to involve hundreds of thousands of small donors on behalf of more moderate candidates, as part of a balanced fundraising strategy.

We can only hope the major campaigns will disclose the identity of their small donors so that we can study this more closely. Several questions seem especially important. First, to what extent does the internet now provide a type of “virtual solidary benefit” to donors? The 2000 survey did not have questions uniquely suited to tapping this type of benefit. The viral transmission of video, text, and other campaign messages and their incorporation into individual's social networking pages is a topic worth further exploration. Campaigns frequently have arranged internet interactive events to try to create a virtual community among donors, something that seems especially attractive to younger Americans who text message while at dinner with friends.

The possibility that these new internet donors may enhance their democratic capacities as a result of their contributions is even more important. After giving, they may well follow the campaigns more closely, and become more informed about issues. They may become more sophisticated in their political thinking. They may even begin to participate in other ways.

Earlier I noted that the Bush campaign in 2004 successfully mobilized small donors into voluntarism. Both the Clinton and Obama campaigns have tried to move their campaign donors beyond merely giving and into other forms of activism. During the past few weeks, the e-mail solicitations that I have received from campaigns have invited me to do more than contribute. One Clinton solicitation provided a link to a site that would sign me up to call voters in Ohio and Pennsylvania from my home. A different Obama solicitation invited me to click a link to call super-delegates to persuade them to support Obama. Whether

the internet can turn donors into more active citizens remains to be seen, of course. But campaigns in 2008 appear to believe that it is possible.

It is likely that internet donors in 2008 will be more demographically diverse than in 2000. Anecdotal evidence suggests that many are under 30, which was not true in 2000 or 2004. Obama and especially Clinton are pushing for more women donors, so the gender gap in internet giving will probably be reversed in 2008. Obama's campaign may well have changed the ethnic composition of the donor pool. The most persistent finding in donor surveys is that donors are overwhelmingly white. In 1988, the year that Jesse Jackson made a widely publicized statement calling New York "Hymietown," our survey of his donors of \$200 and more found more Jews than African Americans. Obama will likely have attracted African American donors, and Clinton may well have more Latino donors.

Whether the new donors will have distinctive political views remains to be seen. Some other studies have found that internet donors are more moderate, and perhaps slightly more likely to have a general libertarian approach to politics (Powell, Powell, Thomas, & Wilcox, 2005). Yet clearly the internet can also mobilize ideologues and strong partisans. I think it is likely that the internet carries no inherent ideological bias as a fundraising tool, which makes it very different from direct mail. Ideologically quirky and extreme candidates like Ron Paul can still raise large sums on the internet, but so can moderate candidates. If so, then the internet may well prove a transformative technology in campaign fundraising.

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 153

Contribution limits and the effectiveness of campaign spending

Thomas Stratmann

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Abstract Much work on the apparent ineffectiveness on incumbent spending in congressional elections has hypothesized that the productivity of incumbent spending is low because incumbents operate on the “flat part” of their election returns function. Differences in campaign spending associated with state campaign finance laws allows for a test of this hypothesis because restrictions on campaign contributions tend to reduce campaign spending. Exploiting cross-state variation in campaign finance laws, this study tests whether campaign expenditures by state House candidates are more productive when candidates are subject to contribution limits. The results show that campaign expenditures by incumbents and challengers are more productive when candidates run in states with campaign contribution limits, as opposed to in states without limits. In states with contribution limits, incumbent spending and challenger spending are equally productive, and spending by both candidates is quantitatively important in increasing their vote shares.

1. Introduction

The ineffectiveness of incumbent campaign spending in House congressional elections has been one of the major puzzles in the campaign finance literature (Jacobson, 1978; Grier, 1989; Levitt, 1994; Coates, 1998; Palda & Palda, 1998). Even when studies find that incumbent spending is of small importance in House elections, they still find that incumbent spending is less productive than challenger spending (see, for example, Abramowitz, 1991; Green & Krasno, 1988).¹ One prominent explanation of this finding is the hypothesis, that incumbents are spending at the “flat part” of the election returns function so that the marginal product of spending is very small (Jacobson, 1978; Mueller, 2003). Studies that examine races at the federal level have difficulties testing this hypothesis across incumbents, because all incumbents face the same federal contribution limit and are thus equally constrained or unconstrained in

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¹ One exception Gerber (1998), who finds that in Senate races the productivity of challenger spending equals that of incumbent spending.

campaign spending. However, contribution limits differ among states and spending levels in states vary significantly with whether or not a state has a contribution limit. Thus, examining spending by state candidates may be a promising avenue to analyze incumbents' election production function, since incumbents who are constrained in spending, due to strict campaign finance limits, are expected to operate on a steeper part of the production reelection function than those who face no contribution limits. The hypothesis that incumbents operate on the flat part of the election returns function when they are relatively unconstrained in spending implies a larger marginal product of spending in states with contribution limits than without limits. This study tests this hypothesis.

An emerging literature on campaigns finance also generates the prediction that the productivity of spending is smaller when candidates face no contribution limits. Assuming that contribution limits induce candidates to make fewer promises to contributors, these models predict that voters do not switch their vote to the advertising candidate when they believe that this candidates has traded policy favors for contributions (Ashworth, 2003; Coate, 2004; Prat, 2002).^{2,3} This leads to a lower productivity of spending when candidates face contribution limits, because, by assumption, fewer favors are traded when limits are in place. (I will use the terms campaign contributions and campaign expenditures interchangeably, assuming that all contributions are spent.)

This results from this research design can be informative for the discussion of campaign finance restrictions. If incumbents' productivity of the campaign is small simply because they are spending large amounts, then limiting expenditures or contributions may level the playing field of incumbents and challengers. Whether spending is productive in election campaigns is also of relevance for the discussion as to whether candidates promise policy favors for contributors.⁴ If incumbent spending has no effect of the likelihood of their reelection, regardless of the level of spending, then campaign contributions are less likely to influence their legislative behavior, because incumbents have no or little reason to promise favors in exchange for contributions. However, if spending is productive, then candidates may be more likely to promise policy favors in exchange for contributions, because in this case contributions are valuable.

To test whether incumbents who are constrained in spending have a larger marginal product of spending than those who are less constrained, federal U.S. data are not useful, as contribution limits to federal candidates are uniform for all candidates and have remain unchanged in nominal terms from 1976 until the recent 2002 campaign finance reform legislation. This, however, is not the case with state campaign finance laws, which vary across states. State-level regulations provide the variation that allows one the hypothesis that campaign expenditures' effectiveness depends on whether or not contributions are limited. This study therefore analyzes the vote shares of candidates for state lower House races in states with and without contribution limits.

While states provide an interesting testing ground for the effectiveness of campaign spending by candidates running for the state assembly, depending on whether contribution limits are in place or not, an analysis of campaign spending by state assembly candidates is

²Houser and Stratmann (2006) provide evidence to support the prediction that voters switch to the opposition candidate when they believe that their own party's candidate promised many favors to special interests.

³Stratmann and Aparicio-Castillo (2006) provide support for some of the predictions of these theoretical models in that they find that contribution limits result in more competitive electoral races. They find this by examining data from races to state assemblies from 1980 to 2001.

⁴Greene (2000) also describes the use of the rank is a proper instrument.

quantitatively important in its own right. To my knowledge there is only very little empirical work that analyzes the effects of state assembly candidate spending on election outcomes.

While OLS estimates for races with an incumbent can give a glimpse with respect to differences in campaign spending productivity, unbiased estimates are obtained when controlling for the endogeneity of incumbent and challenger spending, as done in the previous literature. In this study, I will control for the endogeneity of both spending variables, as explained below.

The results in this paper indicate that the marginal product of advertising expenditures is higher for incumbents and challengers when they run in states with campaign finance limits. The findings is consistent with the view that candidates who are relatively unconstrained in spending because they face no contribution limits operate on a flatter part of their election production function than those who face limits. This findings suggest that campaign spending is productive, but that the productivity is sometimes masked by the diminishing marginal returns of spending.

The empirical research design is described in Section 2, and the data in Section 3. I report results in Section 4, and 5 contains conclusions.

2. Research design and methods

The empirical model for races with an incumbent and challengers is

$$\begin{aligned}
 V_{Sijt} = & \beta_0 + \beta_1 \text{Ispend}_{ijt} * \text{Nolimit}_{it} + \beta_2 \text{Ispend}_{ijt} * \text{Limit}_{it} \\
 & + \beta_3 \text{Cspend}_{ijt} * \text{Nolimit}_{it} + \beta_4 \text{Cspend}_{ijt} * \text{Limit}_{it} + \beta_5 \text{Limit}_{it} + \beta_6 \text{Party}_{ijt} \\
 & + \beta_7 \text{Pev} V_{Sijt} + \beta_8 \text{Seniority}_{ijt} + \gamma \mathbf{X}_{it} + \mathbf{v}_t + \lambda_k + \varepsilon_{ijt}.
 \end{aligned} \tag{1}$$

where V_{Sijt} is the incumbent's vote share in state i , district j , and election year t . The variables *Ispend* and *Cspend* are incumbent and challenger campaign expenditures.

To be consistent with the previous literature on the effects of expenditures on vote shares, I include the variable $\text{Pev} V_{Sijt}$ which measures the historical electoral strength of the incumbent (sometimes referred to as the normal vote). This variable serves as a measure of a district's partisanship. I also include the *Party*_{ijt} variable, which indicates the incumbent's party affiliation (Jacobson, 1978; Green & Krasno, 1988), and a variable that measures the incumbent's seniority (Abramowitz, 1991).

To control for the possibility that states with limits have a different political culture than those without limits, I include an indicator variable which measures whether a state has a limit on individual campaign contributions. *Limit* is an indicator variable which equals one when the campaign finance law restricts individual contributions to candidates running in state House elections and zero otherwise. *Nolimit* equals one if there are no restrictions on individual contributions and zero otherwise. I control for changes in national laws and national events that effect local elections via year fixed effects v_t .

Equation (1) differs from the campaign spending models in the earlier literature, because of the interactions of campaign expenditures with a contribution limit indicator. The theoretical model in Section 2 predicts that β_2 is positive and larger than β_1 and that β_4 is negative and larger in absolute value than β_3 .

Since this study is examining vote shares at the state level, the vector \mathbf{X}_{it} includes state characteristics which previous studies have found to be of importance in explaining incumbents' vote shares in state elections. The vector includes state per capita income, because

voters tend to reward incumbents when they believe that incumbents have helped in improving their financial well being (Lowry, Alt & Ferree, 1998). The vector of controls includes 'legislators' salary, which is a measure of the professionalism of the legislature (Fiorina, 1994; Moncrief, 1999; Berry et al., 2000). The vector of state controls also includes an indicator for those states that implemented term limits for state House legislators, since term limits reduce the duration an individual can be a legislator, making public office less valuable (Grofman, 1996). Another reason for including term limits is that the same political culture that leads to the adoption of term limits may also lead to the adoption of contribution limits. Thus, controlling for term limits is an additional control for variables that may simultaneously determine campaign contributions and election outcomes. Another control variable is an indicator variable measuring whether the state has an open primary election or not. I also include in the regression equation two additional variables, namely the share of the state popular vote received by the gubernatorial candidate and the presidential candidate who has the same party affiliation as the incumbent. These variables capture the political leanings of the constituency and also capture political tides (Berry et al., 2000). Previous studies have also included measures for redistricting but this is not required here as no redistricting occurred between the elections (1996, 1998, and 2000) analyzed in this paper.

For races with incumbents and challengers, ordinary least square estimates from Equation (1) may be biased without good measures of district partisanship and of incumbent and challenger quality. Much of district partisanship as well as candidate quality are unobserved. This omitted variable bias may lead biased estimates for incumbent and challenger spending (see, for example, Jacobson, 1978; Levitt, 1994).⁵ The two-stage least square (2SLS) method provides unbiased estimates if the instruments used are exogenous. A valid instrument has to be correlated with the endogenous variable and uncorrelated with the error term in the second stage.

Our instrument for incumbent spending is the cost of media advertisement, and in particular the cost of radio advertisement. Candidates for state Houses use radio as one means of getting out their campaign message and thus the cost of this advertisement is one determinant of how much money candidates have to raise in order to get out their campaign message. Since the cost of radio advertising is also highly correlated with advertisements in other media, this cost measure may be viewed as the cost of advertising to voters. Our measure of advertising cost is the advertising cost per rating point. This information was obtained from *Spot Quotations and Data, Inc. (SQAD)*, who collects radio advertising cost data for each of the Arbitron radio markets in the United States. The advertising cost data is "cost per point," which is an estimate of the dollar amount required to deliver one rating point (or one percent of the audience) of any designated population within a spot market area. The radio advertising cost per point is from the 3rd quarter and measures the costs for 60 second units, for population aged 18 and above. In 2000, there were 267 Arbitron radio markets. The Arbitron markets are generally composed of metropolitan areas as defined by the federal government. I mapped state House congressional districts into these radio markets. The number of radio markets per state vary from one in the state of Alaska to twenty-one in the state of California. In 2000, the highest average cost is New York with a cost of \$578 per rating point, while the lowest is in Montana with an average cost of \$7.64 per rating point. With respect to single markets,

⁵ Many unobserved variables determine vote shares. For example, vote shares are influenced by whether political parties recruit more challengers, by independent expenditures, by party soft money, by leadership funds, and by incumbents' war chests (Gierzynski & Breaux, 1991; Epstein & Zemsky, 1995; Milyo, 1997; Milyo & Groseclose, 1999; Hogan, 2000; Gross, Goidel & Shields, 2002). Unfortunately, much of this activity is not reported for candidates to state lower houses.

in the year 2000 the highest cost of radio advertisement is in Los Angeles, California with \$767 per rating point, while the lowest cost markets are in Billings, Montana, and Bismarck, North Dakota, with \$5 per rating point.

For advertising cost to be a valid instrument, the cost measure has to be correlated with campaign expenditures. Some anecdotal and some systematic evidence suggests that political TV and advertising is a significant component of all campaign expenditures. At the federal level, for example, a headline the *Washington Post* claims that “In Presidential Race TV Ads were biggest '96 Cost By Far” (March 31, 1997, page A19). Systematic evidence is provided in Herrnson (2000) showing that TV and radio advertisements are a significant component of total campaign spending. Finally, Ansolabehere and Gerber (1994) report that the average House incumbent spent forty-two percent of total campaign spending on communications.⁶

One concern with the advertising instrument is that high cost advertising districts are located in high income districts and that therefore incumbent quality differs systematically between high and low advertising districts. Similarly, if, for example, incumbents in high advertising cost areas would systematically attract high (or low) quality challengers the point estimates would be biased. However, this concern is less important than it may initially seem, since, for example Los Angeles, CA, and Chicago are covered by one television media market, but both high and low income districts are located in this market. In these examples, advertising cost are a measure of how expensive media advertising is, but do not reflect the economic conditions in a district. To assess whether these potential quality differences of candidates in high and low cost advertising areas are biasing our results, I will test for the robustness of the results using only high and low cost advertising districts in the analysis.

In the absence of a measure for challenger quality, the challenger campaign spending estimates may be biased and therefore I develop an instrumental variable for challenger spending. Classical work on measurement error by Wald (1940) has shown that the creation of an artificial instrument can lead to unbiased estimates. More recently the correctness of this measure has been shown by Koenker and Bassett (1978). To identify challenger advertising, I therefore create an indicator variable that equals one for challengers with more advertising than the median challenger advertising and that equals zero otherwise. Given that the instrument for challenger advertising is defined by whether challenger advertising is above or below the median challenger expenditure, it is correlated with challenger advertising, and thus fulfills one of the conditions for the validity of instruments. Wald (1940) and Koenker and Bassett (1978) showed that this instrument (the rank) is also independent of the disturbance term in the second stage, thus fulfilling the second condition for a valid instrument.⁷

3. Data

Data on vote shares in general elections for state House single member districts in 1996, 1998 and 2000 come from each state's Elections Division, or its State Board of Elections. I focus on single member districts since over 80 percent of all state legislators are elected to these districts, and because the theoretical models apply to these district types. Since at the federal level all House districts are single member districts, the focus on single member districts also

⁶Facing higher media advertising cost, candidates have incentives to reduce media advertising but increase spending on other types of advertising. Whether fewer purchases of media advertisement lead to lower advertising expenditures depend on the elasticity of demand. However, candidates in high media cost districts have an incentive to switch to other types of advertising and this will have the tendency to increase campaign spending.

⁷Greene (2000) also describes the use of the rank is a proper instrument.

makes it easier to transfer knowledge from the state to the federal level. Since no systematic data are available on campaign expenditure at the state level, I measure campaign expenditures by campaign contributions. Data at the federal level show that campaign contributions closely track campaign expenditures (<http://www.fec.gov/press/canye98.htm>).⁸ Data on campaign contributions to candidates in the 1996, 1998 and 2000 elections to state lower Houses come from the *National Institute on Money in State Politics*. Data on state characteristics were obtained from various issues of the *Statistical Abstract of the United States*.

The source for the campaign finance laws is the biannual publication, *Campaign Finance Laws*. States vary greatly in whether they have legal limits on campaign contributions by individuals, PACs, corporations, unions, and parties. In this study I focus on individual limits, as they provide the largest source of contributions to state candidates (Malbin & Gais, 1998). Another reason not to examine union or corporate contribution limits is that in some states union and corporate contributions are prohibited, and therefore prohibitions allow one to examine the effects of banning contributions, but not to study the effect of limiting but still allowing contributions, as is the goal of this paper.⁹

This data set includes thirty-seven of the fifty states. Since the empirical analysis focuses on single member districts, Arizona, New Jersey, and North Dakota are omitted from this data set. State legislators from these states run in multi-member districts. Similarly, Maryland and Vermont are excluded because their legislators run primarily in multi-member districts. Nebraska is omitted because its elections are staggered. Louisiana is omitted as its relevant competition occurs in primaries, and sometimes there is no general election depending on the outcome of the primary. No data or limited data were available for Alabama, Delaware, Iowa and South Dakota. Mississippi and Virginia are excluded because I focus on elections in 1996, 1998, and 2000 while the races in these states were in off election years.

If campaign spending in states with limits and without limits were equal, one would be unable to test the hypothesis that the productivity of spending differs by the level of campaign expenditures in electoral races. Table A1 in the appendix shows the effects of contribution limits on contributions raised. Those data show that individual contribution limits are associated with a significant reduction in campaign contributions. Therefore, the data are suitable for examining whether differences in campaign finance regimes lead to differences in the productivity of campaign spending.¹⁰

4. Results

Table 1 reports means and standard deviations of variables used in the regressions involving contested races with incumbent. Table 1 shows that approximately seventy percent of all races

⁸That campaign expenditures closely track campaign contributions is also suggested by the statistic that only one percent of total campaign expenditures are self financed (Herrnson, 2000).

⁹All categories of contribution limits tend to move together. That is, states that have strict contribution limits for individuals tend to also have strict limits for unions and corporations.

¹⁰To examine overall spending and vote share patterns when there are limits on corporations, unions, PACs, and parties, I compute an index of limits on parties, PACs, corporations, unions, and individuals (this similar as the index developed by Stratmann and Aparicio-Castillo, 2006). This index takes the value of zero when there is no limit on any of those contribution sources and the value of five when there is a limit on all sources. I compared spending in states with an index of zero to those with an index of five, and found that incumbent and challenger spending is significantly lower when states have restrictions on all five sources of contributions (\$22,600 vs. \$4,700 for incumbents and \$4,200 vs. \$1,800 for challengers). In this data set of contested races, the vote share for incumbent is also significantly lower (66% vs 63%) when states have restrictions on all five sources of contributions.

Table 1 Summary statistics for races with incumbents mean (standard deviation)

Percent of popular vote obtained by the incumbent	65.60 (11.19)
Incumbent spending	8.785 (30.72)
Challenger spending	2.231 (6.480)
Incumbent is Democrat = 1, 0 otherwise	0.515 (0.500)
Incumbent seniority, in years	3.347 (2.799)
Percent of popular vote in previous election	69.72 (16.67)
Contribution limit for individuals = 1, 0 otherwise	0.714 (0.452)
Professionalism in legislature (Legislator salary per days in session), in hundreds of dollars	2.926 (2.082)
Open primary = 1, 0 otherwise	0.547 (0.498)
Percent of popular vote of presidential candidate with the same party affiliation as the incumbent – if presidential election	47.11 (8.169)
Percent of popular vote of gubernatorial candidate with the same party affiliation as the incumbent – if gubernatorial election	45.42 (14.71)
State per capita income, in thousands of dollars	16.063 (2.288)
Term limit = 1, 0 otherwise	0.438 (0.496)
Cost of radio advertising, in real 2000 dollars	83.46 (116.6)
<i>N</i>	3,962

Notes: Campaign expenditures measured in 10,000 of dollars in real 2000 dollars. Data are for races to state lower Houses, 1996–2000

take place in states that have individual contribution limits. Incumbents win contested races by obtaining on average sixty-six percent of the vote share. As noted previously, spending by incumbents and challengers in states without limits is significantly higher than in states without limits.

To examine whether the raw data suggest any differences in the competitiveness of election, I compared the mean vote share by incumbents in states with individual contribution limits to the mean in states that do not have such limits. The average vote share for incumbents in states with individual contribution limits is 67.2 percent and it is 65.0 percent in states without limits. The difference is statistically significant at the one percent level. Further in states without an individual contribution limits incumbents' reelection rate is 96.2 percent and it is 94.7 percent in states with limits on individual contributions. This difference is statistically significant at the five percent level.¹¹

The OLS results in the first three columns of Table 2 show that the coefficients on incumbent and challenger spending are quantitatively and qualitatively similar to those in

¹¹ I determined whether the incumbent was the winner by whether he or she had a larger vote share than the challenger with the largest vote share among all challengers.

Table 2 Explaining vote percentages of incumbents and challengers ordinary least square estimates robust standard errors in parentheses below coefficient estimates

Dependent variable	ln(Vote pct.)		Vote pct.		Vote pct.	
	(i) Linear spending	(ii) Log spending	(iii) Square root spending	(iv) Linear spending	(v) Log spending	(vi) Square root spending
Spending by incumbent	-0.004 (0.004)	0.010 (0.006)	0.009 (0.146)			
Spending by challenger	-0.437 (0.125)	-0.107 (0.010)	-4.778 (0.786)			
Spending by incumbent – no limits (β_1)				-0.007 (0.006)	-0.009 (0.005)	-0.251 (0.137)
Spending by incumbent – limits (β_2)				0.073 (0.040)	0.026 (0.007)	1.072 (0.361)
p -value that $\beta_2 \neq \beta_1$				0.048	0.001	0.001
Spending by challenger – no limits (β_3)				-0.317 (0.078)	-0.088 (0.011)	-3.548 (0.602)
Spending by challenger – limits (β_4)				-1.205 (0.160)	-0.125 (0.005)	-7.525 (0.645)
p -value that $|\beta_4| \neq |\beta_3|$				0.001	0.005	0.001
Incumbent is Democrat = 1, 0 otherwise	1.920 (0.504)	0.026 (0.007)	1.939 (0.473)	1.951 (0.517)	0.026 (0.007)	1.949 (0.498)
Vote pct. in previous election	0.269 (0.026)	0.003 (0.0003)	0.234 (0.024)	0.257 (0.025)	0.003 (0.0003)	0.226 (0.023)
Indicators for election cycles	YES	YES	YES	YES	YES	YES
R -squared	0.36	0.49	0.42	0.39	0.49	0.44

Notes: $N = 3,962$. All standard errors are adjusted to allow for non-independence of observations within a state. The unit of observation is a race to a state lower House in the 1996, 1998, and 2000 general elections. Expenditures are measured in 10,000 of (real 2000) dollars. All regressions include whether the state has an individual campaign contribution limit, a term limit, state per capita income, the vote percentage of presidential candidate, the vote percentage of gubernatorial election, whether the state has an open primary, the professionalism of the legislature, and whether the state has a contribution limit for individuals, and the incumbent's party affiliation and seniority

previous literature: the effect of incumbent spending is negative and not different from zero, and challenger spending is productive in reducing the incumbents' vote shares. For challengers, a 10,000 increase in spending increases vote shares by 0.4 percentage points (Table 2, column 1). The log-spending and the square root of spending specifications also show that incumbent spending is ineffective in increasing incumbents' vote shares but that challenger spending is effective to increase challengers' vote shares. For example, the square root specification indicates that a challenger's vote share rises by 1.6 percentage points when he or she spends an extra \$10,000.

Among the control variables in Table 2, the vote share in the previous elections is statistically significant in all regressions, suggesting that partisan leanings are important in explaining election outcomes. All specifications indicate that Democrat incumbents, on average, receive about two percentage points more at the polls than Republican incumbents. To save space, the point estimates of the remaining control variables are not reported in the tables.

Among these point estimates the coefficient on the variable measuring professionalization of a legislature is positive and statistically significant, showing support for the hypothesis that a more professional legislature helps incumbents receive a larger vote share. Further, lower incumbents' vote shares are associated with campaign contribution limits. This finding is consistent the findings by Stratmann and Aparicio-Castillo (2006) on the effect of contribution limits on electoral competition. However, term limits have no statistically significant effect on incumbents' vote shares. The coefficients on state per capita income are always positive and statistically significant, indicating that incumbents are doing better at the polls when voters are doing well in terms of per capita income. Whether incumbents run for reelection in states with or without open primaries does not affect their vote shares. Finally, the results show that coattail effects exist with respect to votes cast in presidential races, but not with respect to votes cast in gubernatorial races. An increase in the presidential candidate's popular vote by one percentage point results in a 0.2 percentage point increase in the incumbent's vote share when he or she belongs to the same party as the presidential candidate.

The last three columns of Table 2 show the OLS estimation results when one allows the productivity of incumbent and challenger spending to differ according to whether contribution limits curtail their fundraising ability or not. In all three specifications, incumbent spending is ineffective in increasing their vote shares when they run for reelection in states without contribution limits; the coefficients are negative and statistically insignificant. However, incumbent spending is productive in helping them get reelected when they run in states with contribution limits. The difference in the productivity of incumbent spending in states with and without limits is statistically significant in all three specifications. The result from the linear specification shows that a \$10,000 increase in incumbent spending leads to an almost 0.1 percentage point increase in the popular vote, while the square root specifications indicates an increase by 0.17 percentage points, when evaluated at the mean incumbent spending.

Challenger spending remains more productive than incumbent spending (Table 2, columns 4 to 6). Similar as incumbent spending, challenger spending is more productive in states with contribution limits. The difference in the productivity of spending is statistically significant regardless of whether the campaign expenditure variable is measured in linear form, as the log, or as the square root. While the magnitude of the point estimates on incumbent spending in states with contribution limits remains small, the result for challenger spending in states with limits implies that a \$10,000 increase in spending increases vote shares between 1.2 percentage points (Table 2, column 4) and 2.5 percentage points (Table 2, column 6). The log-log specification results show that a one percent increase in challenger spending in contribution limit states increases their vote shares by 0.13 percent. Challengers' vote shares increase by 0.09 percent in states without contribution limits.

In summary, the results are consistent with the hypothesis that incumbent contributions and challenger contributions are more effective in increasing vote shares when they face contribution limits. Similar as some of the findings in the previous literature, these regression results suggest that the marginal effect of incumbent spending is significantly lower than that of the challenger. To further investigate this issue I estimate the regressions using 2SLS.

Table 3 reports the 2SLS estimates, controlling for the endogeneity of incumbent and challenger campaign spending. The corresponding first stage estimates for the incumbent expenditure regressions are reported in the Appendix Table A2. Those estimates show that advertising costs are a statistically significant determinant of campaign spending. A one-hundred dollar rise in the cost per rating point increases incumbent spending by eleven percent (Table A2, column 2). Thus, the instrument is valid with respect to being able to explain variation in the endogenous incumbent campaign spending variable. The estimates

Table 3 Explaining vote percentages of incumbents and challengers two stage least squares estimates robust standard errors in parentheses below coefficient estimates

Dependent variable	ln(vote pct.)		Vote pct.		In(vote pct.)	
	(i) Linear spending	(ii) Log spending	(iii) Square root spending	(iv) Linear spending	(v) Log spending	(vi) Square root spending
Spending by incumbent – no limits (β_1)	0.154 (0.093)	0.041 (0.022)	1.900 (0.938)	0.203 (0.167)	0.109 (0.084)	3.662 (2.409)
Spending by incumbent – limits (β_2)	3.205 (1.018)	0.160 (0.047)	13.800 (3.758)	3.710 (2.297)	0.250 (0.170)	18.871 (10.437)
p -value that $\beta_2 \neq \beta_1$	0.001	0.001	0.002	0.103	0.125	0.066
Spending by challenger – no limits (β_3)	-1.673 (0.464)	-0.135 (0.019)	-9.246 (1.785)	-1.653 (0.482)	-0.151 (0.029)	-9.708 (2.008)
Spending by challenger – limits (β_4)	-5.730 (0.695)	-0.193 (0.017)	-18.719 (1.730)	-5.505 (1.159)	-0.196 (0.034)	-18.556 (3.317)
p -value that $|\beta_4| \neq |\beta_3|$	0.001	0.011	0.001	0.005	0.136	0.014
Vote pct. in previous election	0.160 (0.039)	0.003 (0.0003)	0.172 (0.030)	0.181 (0.059)	0.003 (0.0006)	0.197 (0.046)
State regional indicators	NO	NO	NO	YES	YES	YES
Indicators for election cycles	YES	YES	YES	YES	YES	YES

Notes: $N = 3,962$. All standard errors are adjusted to allow for non-independence of observations within a state. The unit of observation is a race to a state lower House in the 1996, 1998, and 2000 general elections. Expenditures are measured in 10,000 of (real 2000) dollars. All regressions include whether the state has an individual campaign contribution limit, a term limit, state per capita income, the vote percentage of presidential candidate, the vote percentage of gubernatorial election, whether the state has an open primary, the professionalism of the legislature, and whether the state has a contribution limit for individuals, and the incumbent's party affiliation and seniority

on advertising costs remain statistically significant when I include state regional indicators.¹² First stages for the challenger spending regressions are not reported because by construction the rank of challenger spending is correlated with challenger spending.

The first three columns of Table 3 report the 2SLS results when one allows the productivity of spending to differ depending on whether candidates run in states with or without contribution limits. This set of regressions includes no regional indicators. Columns four to six include regional indicators. The results now show that spending is productive for incumbents in both types of states, although incumbents' productivity of spending is significantly higher when they run in states that limit contributions. A \$10,000 increase in spending increases incumbents' vote share by 0.2 percentage points in states without limits and by 3.2 percentage points in states with limits (Table 3, column 1). The corresponding estimates for the square root specification are 0.4 and 2.5 percentage points. In all specifications the difference in

¹² In come specification I am including regional indicators instead of state indicator in the incumbent regression because over forty percent of the variation in advertising costs is due to differences in cost per state. State indicators would absorb much of this difference, making the instrument unable to identify the effect of spending on vote shares.

incumbent spending productivity in states with and without contribution limits is statistically significant.

The results show that challenger spending is more productive in states with limits than without limits. Relative to the OLS estimates, all point estimates on challenger spending are larger when estimating the regression equation with 2SLS. In the linear specification the estimates show that challenger spending is approximately three times more productive in garnering votes in states with limits than in states without limits.

The magnitudes of the 2SLS coefficients in the log-log specification show that increasing expenditures by one percent leads to a 0.17 percent increase in the vote share for incumbents and a 0.19 percent increase for challengers when they run in states without contribution limits (Table 3, column 2).

The 2SLS results show that challenger spending is approximately as productive as incumbent spending when both candidates run in states with contribution limits. The coefficients on spending by both candidates in states with contribution limits are not statistically different from each other, and thus I cannot reject the hypothesis that their spending productivity is equal in absolute value.¹³ Interestingly, in states without contribution limits challenger spending is almost twice as productive as incumbent spending, and this difference is statistically significant (Table 3, columns 1 to 3).

The regressions show that the advertising instrument works in the way that was anticipated: OLS underestimates the effect of incumbent campaign spending. A Republican incumbent running for reelection in a district with unobserved preferences for a Republican representative, for example, will receive a high vote share even if he or she has few campaign expenditures. This unobserved and thus unmeasured preferences lead to a downward bias on the coefficient on incumbent spending. The results in Table 3 are consistent with the hypothesis that OLS introduces a downward bias in incumbent spending productivity.

The inclusion of regional indicators (Table 3, columns 4 to 6) leads to an increase in the standard errors. However the point estimates remain statistically significant. The effectiveness of challengers spending in states with limits remains significantly larger than in states without limits. Also the point estimates for incumbent spending are larger in states with limits than in states without limits, although the difference in productivity is statistically significant only in the square root specification.

To test for the robustness of the results and address the concern that the pool of incumbent and challengers may differ between high and low cost advertising districts, I examine high advertising cost districts separately. I defined high advertising cost districts as those districts which have larger advertising costs than the median cost of the entire sample. I chose this sample because most of the variation in costs comes from the high cost sample, while there is only a little variation in costs in the low cost sample. When testing the hypothesis using only the high cost advertising sample, the results are very similar to those in Table 3.

5. Conclusions

This paper shows that campaign advertising is more productive when candidates' spending ability is curtailed by contribution limits. In races with incumbents and challengers, both candidates have the same marginal product of spending when they run in states with contribution limits. In these states, campaign spending is effective for increasing vote shares.

¹³ Related to this finding is the study by Gerber (1998) who found that challenger and incumbent spending in U.S. Senate races is equally productive.

Productivity of spending is significantly smaller in states without contribution limits for both incumbents and challengers.

The results are consistent with the view that incumbents tend to operate on a flatter part of the “election production function” when they are relatively uninhibited in spending. These findings help explain why previous research has found little effect of incumbent campaign spending on their vote shares. While incumbents outspend challengers in states without limits by four to one, incumbents outspend challengers by a factor of 2.5 in states with individual contribution limits. The difference in these ratios is consistent with the finding that the gap in the productivity of spending between incumbents and challengers is lower in states with limits than in states without limits.

Appendix

Table A1 Differences in means:

Races with incumbents	Spending by incumbents	Spending by challengers
States without contribution limits	18.879 (1.632)	3.916 (0.326)
States with contribution limits	4.735 (0.135)	1.555 (0.056)

Expenditures are measured in 10,000 (real 2000) dollars

Table A2 First stage estimates for incumbent expenditures standard errors in parentheses below coefficient estimates

	(i) Linear	(ii) Log	(iii) Square root	(iv) Linear	(v) Log	(vi) Square root
Media advertising cost (in 2000 \$)	0.036 (0.005)	0.0011 (0.0001)	0.002 (0.0002)	0.036 (0.005)	0.0005 (0.0001)	0.002 (0.0002)
Controls as in Table 4 (also see footnote to Table 4) and instrument for challenger spending?	YES	YES	YES	YES	YES	YES
State regional indicators	NO	NO	NO	YES	YES	YES
Indicators for election cycles	YES	YES	YES	YES	YES	YES
R-squared	0.13	0.44	0.35	0.17	0.60	0.44

Notes: $N = 3,962$. The dependent variable is the incumbent expenditure in a race to a state lower House in the 1996, 1998, and 2000 general elections. Expenditures are measured in 10,000 of (real 2000) dollars

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 154

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SOCIAL DILEMMAS

◆324

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CONTENTS

INTRODUCTION TO THE LOGIC OF SOCIAL DILEMMAS	170
PROPOSALS FOR ELICITING COOPERATIVE BEHAVIOR	174
<i>Changing the Payoffs</i>	174
<i>From Payoffs to Utilities</i>	175
<i>Altruism</i>	176
<i>Conscience and norms</i>	177
THE MATHEMATICAL STRUCTURE OF DILEMMA GAMES	178
<i>The "Take Some" Game</i>	179
<i>The "Give Some" Game</i>	179
REVIEW OF THE LITERATURE ABOUT EXPERIMENTAL N-PERSON	
DILEMMA GAMES	182
<i>Findings</i>	183
<i>Involvement</i>	183
<i>Communication</i>	185
<i>Group size</i>	186
<i>Public disclosure of choice versus anonymity</i>	187
<i>Expectations about others' behavior</i>	187
<i>Moralizing</i>	188
A FINAL HYPOTHESIS ABOUT ELICITING COOPERATIVE BEHAVIOR....	188

Interest in social dilemmas—particularly those resulting from overpopulation, resource depletion, and pollution—has grown dramatically in the past 10 years among humanists, scientists, and philosophers. Such dilemmas are defined by two simple properties: (a) each individual receives a higher payoff for a socially defecting choice (e.g. having additional children, using all the energy available, polluting his or her neighbors) than for a socially cooperative choice, no matter what the other individuals in society do, but (b) all individuals are better off if all cooperate than if all defect. While

¹This paper was written while I was a James McKeen Cattell Sabbatical Fellow at the Research Center for Group Dynamics at the Institute for Social Research at the University of Michigan and at the psychology department there. I thank these institutions for their assistance and especially all my friends there who helped.

many thinkers have simply pointed out that our most pressing societal problems result from such dilemmas, most have addressed themselves to the question of how to get people to cooperate. Answers have ranged from imposition of a dictatorship (Leviathan) to “mutual coercion mutually agreed upon,” to appeals to conscience.

This paper reviews the structure and ubiquity of social dilemma problems, outlines proposed “solutions,” and then surveys the contributions of psychologists who have studied dilemma behavior in the context of N -person games ($N > 2$). The hypothesis that follows from this survey and review is that there are two crucial factors that lead people to cooperate in a social dilemma situation. First, people must “think about” and come to understand the nature of the dilemma, so that moral, normative, and altruistic concerns as well as external payoffs can influence behavior. Second, people must have some reason for believing that others will not defect, for while the difference in payoffs may always favor defection no matter what others do, the absolute payoff is higher if others cooperate than if they don’t. The efficacy of both factors—and indeed the possibility of cooperative behavior at all in a dilemma situation—is based upon rejecting the principle of “nonsatiety of economic greed” as an axiom of actual human behavior. And it is rejected.

INTRODUCTION TO THE LOGIC OF SOCIAL DILEMMAS

Social dilemmas are characterized by two properties: (a) the social payoff to each individual for defecting behavior is higher than the payoff for cooperative behavior, regardless of what the other society members do, yet (b) all individuals in the society receive a lower payoff if all defect than if all cooperate.

Examples abound. People asked to keep their thermostats low to conserve energy are being asked to suffer from the cold without appreciably conserving the fuel supply by their individual sacrifices; yet if all keep their thermostats high, all may run out of fuel and freeze. During pollution alerts in Eugene, Oregon, residents are asked to ride bicycles or walk rather than to drive their cars. But each person is better off driving, because his or her car’s contribution to the pollution problem is negligible, while a choice to bicycle or walk yields the payoff of the drivers’ exhausts. Yet all the residents are worse off driving their cars and maintaining the pollution than they would be if all bicycled or walked. Soldiers who fight in a large battle can reasonably conclude that no matter what their comrades do they personally are better off taking no chances; yet if no one takes chances, the result will be a rout and slaughter worse for all the soldiers than is taking

chances. Or consider the position of a wage earner who is asked to use restraint in his or her salary demands. Doing so will hurt him or her and have a minute effect on the overall rate of inflation; yet if all fail to exercise restraint, the result is runaway inflation from which all will suffer. Women in India will almost certainly outlive their husbands, and for the vast majority who can't work, their only source of support in their old age is their male sons. Thus each individual woman achieves the highest social payoff by having as many children as possible. Yet the resulting overpopulation makes a social security or old-age benefit system impossible, so that all the women are worse off than they would have been if they had all practiced restraint in having children. Untenured assistant professors are best off publishing every article possible, no matter how mediocre or in how obscure a journal. (The deans' committees never actually read articles.) Yet the result is an explosion of dubious information and an expectation that anyone worthwhile will have published 10 or 15 articles within 5 years of obtaining a PhD, a result from which we all suffer (except those of us who own paper pulp mills).

Some of these examples come from the three crucial problems of the modern world: resource depletion, pollution, and overpopulation. In most societies, it is to each individual's advantage to use as much energy, to pollute as much, and to have as many children as possible.² (This statement should not be interpreted as meaning that these three phenomena are independent—far from it.) Yet the result is to exceed the “carrying capacity” (Hardin 1976) of “spaceship earth,” an excess from which all people suffer, or will suffer eventually. These problems have arisen, of course, because the checks on energy use, pollution, and population that existed until a hundred years or so ago have been all but destroyed by modern technology—mainly industrial and medical. And use of new energy sources or new agricultural techniques for increasing harvests often exacerbate the problems (see Wade 1974a,b). While many societies throughout history have faced their members with social dilemmas, it is these dilemmas that are particularly global and pressing that have attracted the most attention among social thinkers (from an extraordinarily wide variety of fields).

Perhaps the most influential article published recently was Garrett Hardin's “Tragedy of the Commons,” which appeared in *Science* in 1968. In it Hardin argued that modern humanity as the result of the ability to overpopulate and overuse resources faces a problem analogous to that faced by herdsmen using a common pasture (1968, p. 1244).

²People in affluent or in Communist societies do not contribute to world overpopulation, but in most societies in the world the payoff remains greatest for having as many children as possible.

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously he asks, "What is the utility to *me* of adding one more animal to my herd?" This utility has one negative and one positive component.

1 The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility is nearly +1

2 The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1

Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another, and another. . . . But this is the conclusion reached by every rational herdsman sharing the commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons.^{3,4}

The gain-to-self harm-spread-out situation does indeed result in a social dilemma, although not all social dilemmas have that precise form (Dawes 1975).

Contrast Hardin's analysis of herdsmen rushing toward their own destruction with Adam Smith's (1776, 1976) analysis of the individual worker's unintended beneficence in a laissez-faire capitalistic society.

It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages (Book 1, p. 18).

As every individual, therefore, endeavors as much as he can both to employ his capital in the support of domestic industry, and so to direct that industry that its produce may be of the greatest value; every individual necessarily labors to render the annual revenue of the society as great as he can By preferring the support of domestic to that of foreign industry, he intends his own security; and by directing that industry in such a manner as its produce may be for the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention (Book 4, p. 477).

³Actually, the negative payoff must be more negative than -1 for a true dilemma to exist. Hardin clearly implies a greater value when he discusses the destruction of the commons. If, for example, the commons can maintain 10,000 pounds of cattle when 10 1000-pound bulls are grazed on it, but only 9900 pounds when 11 bulls are grazed, then the herdsman who introduces an additional bull has two 900-pound bulls—a gain of 800 pounds over one 1000-pound one—while the total wealth of the commons has decreased by 100 pounds.

⁴Hardin uses the term "utility" to refer to social economic payoff. As will be emphasized in the next section of this article, there may be other utilities that determine behavior, so it does not follow from his analysis that "freedom in a commons brings ruin to all" (1968, p. 1244)

Hardin and Smith are not social theorists with diametrically opposed views about the effects of self-interested behavior. Rather, they are discussing different situations. Hardin's is a dilemma situation in which the external consequences of each herdsman's trying to maximize his profits are negative, and the negative consequences outweigh the positive ones to him. [Hardin specifically "exorcises" Smith's "invisible hand" in resolving population problems (p. 1244).] Smith's situation is a nondilemma one, in which maximizing individual profit does not hurt others more than it benefits the individual; in fact, it helps them. This difference is captured in the economic concept of an *externality* (Buchanan 1971, p. 7): "we can define an externality as being present whenever the behavior of a person affects the situation of other persons without the explicit agreement of that person or persons." In Hardin's commons the externalities are negative and greater than the individual's payoffs; in Smith's Scotland they are positive.

To define social dilemmas in terms of magnitudes of externalities would, however, involve interpersonal comparisons of payoffs. In most cases such a comparison is simple, but not in all. For example, it is difficult to compare the drivers' positive payoffs for driving during a pollution alert to the bike riders' negative payoffs for breathing polluted air. In contrast, the definition of a social dilemma proposed at the beginning of this paper involves payoff comparison only *within* an individual (who receives a higher payoff for defecting but whose payoff for universal defection is lower than that for universal cooperation). It is enough to note that most economic writing about negative externalities that has come to my attention has in fact been about dilemma situations.

Finally, Platt's (1973) concept of *social traps* is closely related to the concept of a dilemma. He defines a social trap as occurring when a behavior that results in immediate reward leads to long-term punishment. For example, many observers have noted that many modern technological advances may be traps; e.g. the good effects of DDT usage were immediately evident, while the disastrous effects took years to ascertain. Moreover, even when the long-term ill effects are known at the beginning, they may be "time discounted." ("If we're still around, we'll jump off that bridge when we come to it.") On an individual level, cigarette smoking, overeating, and excessive alcohol ingestion are traps. On the social level, most social dilemmas are social traps. But again not all—for dilemmas exist in which even defecting behavior is punished (because enough other people are bound to defect)—although not as badly as cooperative behavior would be. Further, not all social dilemmas involve a time lag.

We return then to the original definition of a social dilemma. Each individual receives a higher payoff for a socially defecting choice than for

a socially cooperative one, yet all individuals have a higher payoff if all cooperate than if all defect. All the examples discussed earlier meet these two conditions.

Given the ubiquity of social dilemmas—and the global importance of some of them—the question arises of how individuals and societies can deal with them. One answer is that they can't. The role of the social theorist is to point out where dilemmas exist and then to watch everyone defect—verifying the hypothesis that a social dilemma indeed is there. A far more common answer has been to propose mechanisms by which cooperation may be engendered in people facing social dilemmas.

PROPOSALS FOR ELICITING COOPERATIVE BEHAVIOR

Changing the Payoffs

Social dilemmas are defined in terms of the social payoff structure. The simplest proposal for eliciting cooperative behavior is to change that structure. That is, when analysis reveals that a social dilemma exists, an effort can be made to obliterate it by appropriate choices of rewards and punishments for cooperative and defecting behavior respectively. Then it is no longer a social dilemma.

The simplicity of this approach is appealing until we ask who will change the payoffs and how. The almost universal answer to the first question is government, and—somewhat surprisingly given the cultural background of the writers—the most common answer to the second question is: through coercion. Thus, for example, Hardin (1968, p. 1247) advocates “mutual coercion mutually agreed upon,” and Ophuls (1977) and Heilbroner (1974) advocate coercion from an authoritarian government in order to avoid the most pressing social dilemmas. These solutions are essentially the same as Hobbes's (1651) *Leviathan*, constructed to avoid the social dilemma of the “warre of all against all.” But there is *empirical* evidence that those societies where people are best off—currently at any rate—are those whose governments correspond least to Hobbes's authoritarian *Leviathan* (Orbell & Rutherford 1973). The counterargument (Robertson 1974) is that these societies are those that have been fortunate enough to have ample natural resources, or to have evolved from a more authoritarian state originating at a time when pressing social dilemmas did in fact exist. And if new dilemmas—in the form of overpopulation, pollution, and energy depletion—come as expected, *Leviathan* will again be necessary.

Most of us would prefer reward to coercion, although there are those who are willing to pay complex and expensive governmental bureaucracies to make sure that only the “deserving” achieve governmental rewards, rather

than to allow “giveaways.” The problem with both reward and coercion, however, is that they are very costly. The society faced with the potential dilemma must deplete its resources either to reward those tempted to defect, or to establish a policing authority that is sufficiently effective that those tempted will not dare do so. This depletion is paid by some or all society members. In effect, the dilemma has been turned into a new situation where everyone must cooperate but where the payoffs to everyone are less than they would be if everyone were to cooperate freely in the original situation. Sometimes, in fact, it is not even possible to avoid a dilemma by reward or coercion, because the costs of rewarding people for cooperating or effectively coercing them to do so exceed the gain the society derives from having everyone cooperate rather than defect.

Moreover, societal change in the payoffs by introducing rewards and punishments can be terribly inefficient. Consider, for example, the worker on a collective farm whose productivity is used in part to pay for a police agent whose job is to make sure that that worker does not sell the farm produce privately. Not only does that result in wasted productivity of the worker, but this police agent himself could instead be doing something productive for the society—such as working on the farm. Finally, coercive systems—and some governmental reward systems—apparently create, or at least exacerbate, a motivation to get around the rules.

From Payoffs to Utilities

Many of us would not rob a bank, even if we knew that we could get away with it, and even if we could be assured that none of our friends or neighbors would know. Many of us give money to public television or to the United Fund, even though we know that our paltry contribution will make no difference in terms of the services rendered. Most of us take the trouble to vote, even though we know that the probability that an election will be decided by a single ballot is effectively zero. And some couples desiring a large family do in fact limit its size not out of desire but out of a belief that it is not moral to have too many children.

All these behaviors involve rejecting a payoff that is larger for one that is smaller. The potential bank robbers could be wealthy, the contributors could save their money, the voters could save themselves inconvenience, and the couples who want children could have them. The point is that the people making these decisions have *utilities* that determine their behavior, utilities associated with aspects of their behavior other than the external payoffs they would receive. The question of whether all behavior is “ultimately selfish” because it reflects *some* utilities is beside the point, just as the question of whether such selfishness is a primary human motivator is irrelevant to the question of whether society members facing a dilemma are

doomed to defect. The point is that if a person chooses action A over action B, then A must (by definition) have greater utility; if simultaneously action B provides a higher social payoff in terms of economic benefits or security, then (again by definition) other utilities must be guiding the individual's choice. The problem is to assess what these utilities are and to study their role in encouraging cooperative behavior.

Thus it is possible to have a social dilemma represented by a payoff structure and yet have people cooperate. The reason would be that the individuals' utilities do not present them with a dilemma. The utilities most important in eliciting cooperation are those associated with altruism, following social norms, and obeying dictates of conscience. These will be considered in turn.

ALTRUISM It is a demonstrable fact that people take account of others' payoffs as well as of their own in reaching decisions. Good Samaritans exist. (Whether this behavior is "ultimately selfish" in light of some hope of Heaven is again irrelevant.) Few of us would accept \$500 with nothing for our friend in lieu of \$498 for each of us. The importance of payoffs to others has been demonstrated experimentally by Messick and McClintock (Messick & McClintock 1968, Messick 1969, McClintock et al 1973)—albeit in some competitive experimental contexts where subjects apparently wish to minimize the payoffs to others, or at least to maximize the discrepancy between own and others' payoffs (Messick & Thorngate 1967).

The question is whether altruism can lead to cooperative behavior in the face of a social dilemma. If concern for others' payoffs is merely a *tactical* consideration for obtaining future rewards from that other, then utility for behaving altruistically cannot be counted upon as a factor that could outweigh external social payoffs. In most social dilemmas, individuals must behave privately, and the problem occurs because the social outcome results from the aggregate social behavior across a large number of people who do *not* interact. Thus, few people would be motivated to cooperate by tactical altruism.

Does altruism exist other than as a tactic? That question is difficult to answer experimentally, or on the basis of naturalistic observation, but it has been addressed recently by sociobiologists and others interested in the implications of evolutionary theory for modern human behavior. They do not agree about altruism. On the one hand, some see it as occurring in the face of natural genetic selection toward pure selfishness, because societies support the long-term reproductive success of altruists, even though altruistic behavior itself would be deleterious in a context outside the society. Thus, Campbell (1975), for example, believes in a "social evolution" toward altruistic and cooperative norms and morals, one that must be carefully

guarded against rampant individualism and the consequent genetic success of those most selfish. Blaylock (1976) notes that for whatever reason (the selfish interests of those shaping a society's beliefs?) women in all societies prefer men who are altruistic and brave to those who are self-centered and cowardly. So socially trained sexual preference may involve a social breeding of altruistic traits, again those that might not fare well in a "warre of all against all." Finally, Trivers (1971) proposes that altruism is a tactical advantage due to socially imposed norms of reciprocity.

In contrast, other sociobiologists hypothesize mechanisms by which altruism in and of itself may result in genetic propagation, even if not through direct propagation. Those proposing that such survival works through "group selection" ultimately benefiting the individual currently (1980) have few adherents. Many others (e.g. Alexander 1980) have proposed "kin altruism" as a plausible genetic link to all altruism. People share genes with their close relatives, and to the degree to which they—even in the celibate roles of priest and maiden aunt—help relatives survive, they enhance the probability that their own genes are propagated. Evidence for such kin altruism is most easily found in a mother's sacrifice for her children. Hence, to the degree to which altruistic concern is focused primarily on close kin ("nepotistic") and partially genetically based, it would be expected to increase through genetic selection. Whether such kin altruism would lead to a general altruistic concern for surrounding people, or for a whole tribe or society, is a moot question.

This literature does not provide a clear indication of whether altruism is purely tactical—nor does any other literature to my knowledge. Nevertheless, it may not be limited to tactical concerns, in which case it could be an important factor in leading people to cooperate in a social dilemma situation. There is one important proviso: people have to *know* about the payoffs to others if altruistic utilities are to be effective. This proviso is not trivial.

CONSCIENCE AND NORMS Even though conscience may often be only "the inner voice which warns us that someone may be looking" (Mencken, quoted in Cooke 1955), it has been a powerful force throughout history in motivating human behavior. People die for it. Tyrants use it to demand behavior of people that other people believe unconscionable. Desperate appeals are made to it—sometimes successfully—by potential victims of aggression.

Hardin (1968, pp. 1246–47) specifically dismisses appeals to conscience as a means of eliciting cooperative behaviors in social dilemmas. He first hypothesizes that such an appeal is a "double bind," because the person making the appeal may regard the person swayed as a "simpleton." Not necessarily so. For if the person making the appeal also has a regard for his

own “clear conscience” (perhaps as his “only sure reward”), then he is equally bound. A second argument of Hardin’s confuses morality with neurotic guilt and concludes that appeals to conscience are “psychologically pathogenic” (and may, like everything else, be misused by unscrupulous individuals).

But Hardin’s is the main discussion of appeals to conscience in the literature—or at least in the literature which has come to my attention. Psychologists, economists, political scientists, and sociobiologists do not tend to use “conscience” as an explanatory construct, perhaps because it is often considered secondary to other factors. But secondary or not, it does appear to have an important place in determining everyday behavior, and as one paper to be reviewed in the fourth section of this article suggests, it may be efficacious in eliciting cooperation.

Norms are somewhere between conscience and coercion. Most norms that exist may elicit punishment if violated. But norms have the ability to motivate people in the absence of any threat of censure. If we fight bravely because we are in Caesar’s Legions, it is true that we may be decimated if we do not. But it is not the fear of decimation that leads most of us to fight bravely. We fight because of what we are. Similarly, people may cooperate in social dilemmas because of what they are; they are not “the kind of people” who profit at others’ expense, or who contribute to a holocaust.

THE MATHEMATICAL STRUCTURE OF DILEMMA GAMES

A game is simply a system of payoffs depending on the combination of choices made by the players. (An additional “choice” may be made by a random element that receives no payoff.) In dilemma games, each player makes one of two choices: D (for defecting) or C (for cooperating). The payoff to each player depends wholly on his or her choice of D or C and on the number of other players who choose C or D.

Let $D(m)$ be the payoff to the defectors in an N -person game where m players cooperate, and let $C(m)$ be the payoff to the cooperators when m players (including themselves) cooperate. A social dilemma game is characterized by two simple inequalities.

1. $D(m) > C(m + 1)$

That is, the payoff when m other people cooperate is always higher for an individual who remains a defector than for one who becomes the m plus first cooperator (m goes from 0 to $N - 1$).

2. $D(0) < C(N)$

That is, universal cooperation among the N players leads to a greater payoff than does universal defection.

The statement of condition No. 1 in game theory language is that defection *is a dominating strategy*. But if everyone chooses that dominating strategy, the outcome that results is one that is less preferred by all players to at least one other (e.g. that resulting from universal cooperation). Since according to game theory all players should choose a dominating strategy, the result is termed an *equilibrium*. (No player would want to switch his or her choice.) Because the outcome dictated by the dominating strategy is less preferred by all players to the outcome of unanimous cooperation, this outcome is termed *deficient*. Hence, *a dilemma game is one in which all players have dominating strategies that result in a deficient equilibrium*. Two games developed for experimental research are illustrative.

The “Take Some” Game

Each of three players simultaneously holds up a red or blue poker chip. Each player who holds up a red chip receives \$3.00 in payoff, but each of the three players *including that player* is fined \$1.00 for that choice. This is the negative externality. Each player who holds up a blue chip receives \$1.00 with no resultant fine. Three blue chips being held up provides a \$1.00 payoff to all players (and a social product of \$3.00) while three red chips being held up provides a zero payoff for all (and a zero social product). At the same time, however, each player reasons that he or she is best off holding up a red chip, because that increases the fines he or she must pay by only \$1.00 while increasing the immediate amount received by \$2.00 (\$3.00 – \$1.00). In effect, the player gets \$2.00 from the other two players’ \$1.00 fines. In this game, one can *take some* from others. Such a choice is analogous to that involved in the decision to pollute (Dawes, Delay & Chaplin 1974).

The “Give Some” Game

Each of five players may keep \$8.00 from the experimenter for himself or herself, or give \$3.00 from the experimenter to each of the other players. Again it is a dilemma because if all *give*, all get \$12.00 ($4 \times \3.00) while if all *keep*, all get \$8.00; yet it is clearly in each player’s individual interest to keep. In fact, each player is getting \$8.00 more by keeping than by giving. This game is based on the research of Bonacich (1972). The *give some* game presents the subjects with a choice analogous to that of deciding whether to contribute to a public good (Olsen 1965). (Each of us can reap the benefit of others’ contributions while withholding ours.)

The “take some” and “give some” games can be presented in matrix form displaying the payoffs to defectors and cooperators as a function of the number of cooperators (Table 1).

Table 1 Payoffs for the two games

The "Take Some" Game			The "Give Some" Game		
Number of cooperators	Payoffs to defectors	Payoffs to cooperators	Number of cooperators	Payoffs to defectors	Payoffs to cooperators
3	—	\$1.00	5	—	\$12.00
2	\$2.00	0	4	\$20.00	\$ 9.00
1	\$1.00	-\$1.00	3	\$17.00	\$ 6.00
0	0	—	2	\$14.00	\$ 3.00
			1	\$11.00	0
			0	\$ 8.00	—

In addition to properties 1 and 2 (above), the "take some" and the "give some" games have three further properties:

- A. $D(m + 1) - D(m) = c_1 > 0$
- B. $C(m + 1) - C(m) = c_2 > 0$
- C. $D(m) - C(m + 1) = c_3 > 0$

In the "take some" game, $c_1 = \$1.00$, $c_2 = \$1.00$, and $c_3 = \$1.00$. In the "give some" game, $c_1 = \$3.00$, $c_2 = \$3.00$, and $c_3 = \$8.00$.

If we were to plot the payoffs for defection and cooperation as a function of the number of cooperators, properties A and B state that both functions are straight lines with positive slopes (see Schelling 1973, Hamburger 1973). Property C states that these slopes are equal. Condition No. 1 (that an additional cooperator makes less than had he or she remained a defector) follows directly from property C, and condition No. 2 states that the right hand extreme of the cooperating function is above the left hand extreme of the defecting function.⁵ Graphically, a social dilemma exists when the D payoff function is above the C function for its entire length and the right extremity of the C function is higher than the left extremity of the D function. It is apparent that a very wide range of configurations will meet this specification. Schelling (1973) has discussed many such configurations and has given a host of imaginative examples.

Hamburger (1973) has shown that dilemma games having properties A through C are equivalent to games in which each participant simultaneously

⁵Properties A and B do not imply property C unless $c_1 = c_2$, because it is possible that payoffs for cooperation and defection are linear but do not have equal slopes. On the other hand, properties A and C not only imply property B, but that c_1 is equal to c_2 as well. Properties B and C yield the same implication. Property C by itself has no implication other than condition No. 1, because it does not specify that the payoff functions need be straight lines

plays identical two-person prisoners' dilemma games having property C (termed "separable" in the literature) against each of the remaining $N - 1$ participants. Dawes (1975) has shown that they are also equivalent to the algebraic expression of the "commons dilemma" described by Hardin (1968). Figure 1 plots the payoffs for the "take some" game and the "give some" game respectively.

In the literature to be described here, most of the dilemma games have properties A-C. We shall term these *uniform games*, following Kahan (1973) and Goehring & Kahan (1976). One group of experimenters, working primarily at Arizona State University in the 1970s, uses much different games—those in which subjects may draw points from a pool that can "replenish itself" (i.e. be increased by the experimenter) at varying intervals in amounts depending upon the subjects' behavior (e.g. restraint or self-sacrifice). This paradigm, which defies a simple mathematical description, is similar to a card game devised by Rubenstein in his doctoral dissertation (cf Rubenstein et al 1975). Such games will be referred to as *variable*.

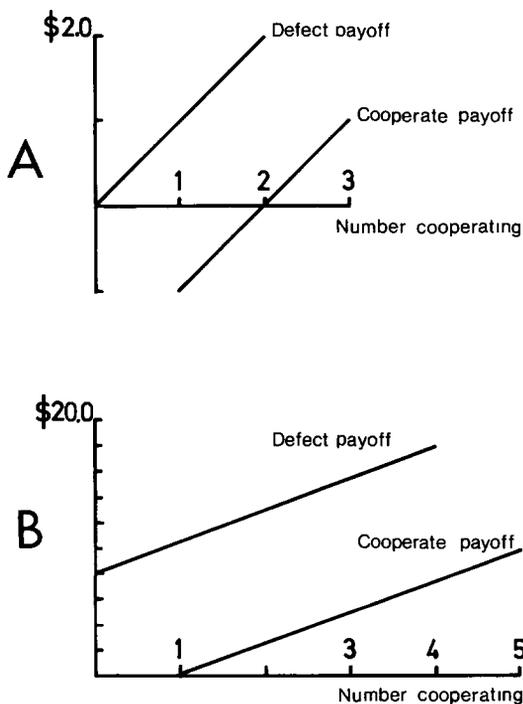


Figure 1 Graphs of payoffs for the two games.

REVIEW OF THE LITERATURE ABOUT EXPERIMENTAL N-PERSON DILEMMA GAMES

The *prisoner's dilemma* is a two-person dilemma game. The name derives from an anecdote concerning two prisoners who have jointly committed a felony and who have been apprehended by a District Attorney who cannot prove their guilt. The District Attorney holds them incommunicado and offers each the chance to confess. If one confesses and the other doesn't, the one who confesses will go free while the other will receive a maximum sentence. If both confess they will both receive a moderate sentence, while if neither confesses both will receive a minimum sentence. In this situation, confession is a dominant strategy. (If the other confesses, confession leads to a moderate sentence rather than to a maximum one; if the other doesn't, it leads to freedom rather than to a minimum sentence.) But confession leads to a deficient equilibrium, because dual confession results in moderate sentences, whereas a minimum sentence could be achieved by neither confessing. Hence, the dilemma.

In the experimental gaming literature prisoner's dilemmas are often played repeatedly. That leads to an additional constraint on the payoffs so that the players cannot take turns playing the defecting strategy. (The sum of the payoffs for one defecting and one cooperating choice must be less than the sum for two cooperating choices.) Uniform dilemma games satisfy this constraint, but so do many others.

The overwhelming majority of experimental investigations of behavior in social dilemma games have studied subjects' responses in two-person prisoner's dilemmas that are played repeatedly by the same subjects (or by subjects who believe that they are playing against the same other subject—who may be a computer program). Payoffs for these two-person games have usually been in small amounts of money (e.g. cents); in virtually all experiments, subjects have been told that their purpose should be to maximize their own gain—although we suspect that many other motives such as maximizing relative gain (Messick & Thorngate 1967) or minimizing boredom may have been involved. There may well be over 1000 experiments reported in the psychological literature documenting how college students behave in such iterated prisoner's dilemmas.

The two-person iterated prisoner's dilemma has three characteristics, however, that make it unique—and hence unrepresentative of the social dilemmas discussed in this article.

1. In the two-person prisoner dilemma (iterated or not) all harm for defection is visited completely on the other player; harm is focused rather than spread out. In most social dilemmas in contrast, harm for defecting behavior is diffused over a considerable number of players.

2. In most social dilemmas defecting behavior may be anonymous; it is not necessarily so, but the possibility is there. (In the two-person iterated game, in contrast, each player knows with certainty how the other has behaved. This necessary knowledge is unique to the two-person situation.)

3. Each player has total reinforcement control over the other in the iterated two-person dilemma. That is, each player can “punish” the other for defection or cooperation (behavior that is socially optimal if individually suboptimal) by choosing defection on the subsequent choice, and can “reward” the previous choice of the other by choosing cooperation. Thus, each player can attempt to shape the other’s behavior by choice of defection and cooperation, while partially determining his or her own outcome by that same choice. The situation is very complicated. Each “game” is analogous to a play in chess which has meaning only within the metagame of the entire match. In fact, Amnon Rapoport (1967) has shown that if subjects really can influence each others’ subsequent choices, then the iterated prisoner’s dilemma isn’t a dilemma at all! So if subjects believe that they have such influence it is not a dilemma to them. This characteristic is unique to the two-person iterated dilemma; when there are more people involved it is not possible to attempt to shape a particular other person’s behavior by judicious (or believed to be judicious) choice of one’s own behavior. (There may be some element of such attempted shaping when the number of people involved approaches two—i.e. three or four—but the potential effectiveness of doing so is clearly diluted.)

Due to the specificity of harm, the lack of possible anonymity, and the potential use of one’s own behavior as a strategy to shape the other, two-person iterated prisoner’s dilemmas cannot be considered to be representative social dilemmas *in general*. The review of the literature and its findings that follow will be limited to investigations of dilemmas involving three or more people.

Findings

INVOLVEMENT While any correlation between the “ecological validity” of an experiment and the degree of subject involvement is far from perfect, the assessment of such involvement is certainly an important factor in evaluating a domain of studies. When social dilemma games are played for substantial amounts of money, subjects are *extremely* involved. (In 1972, Bonacich ran two conditions of 5-person “give some” games; in both conditions $c_1 = c_2 = \$.25$; in a “low temptation” condition c_3 ranged from \$.01 to \$.20 across five trials, while in a “high temptation” condition it ran from \$.01 to \$.75, with a special trial at the end where subjects could win up to

\$16 by betraying their groups.) In both conditions, communication was allowed, and the subjects made ample use of evaluative terms (“cheat,” “screw,” “greed,” “fink” being the four most common). In a later study (1976) Bonacich used larger amounts of money, which resulted in even more striking involvement. All subjects, in 5-person groups, played two games; in the first $c_1 = c_2 = c_3 = \$0.30$, while in the second, which was not a uniform game, any defection resulted in no payoff to cooperators and a payoff as high as \$9.00 to a single defector.

Bonacich writes (1976, p. 207):

During the coding of the tapes we noticed occasional joking threats about what the group would do to a noncooperator, he would not leave the place alive, they would push him down the stairs as he left, they would beat him up, they would write a letter to the student newspaper exposing his perfidy, or they would take him to small claims court. These threats could be intimidating and could suggest how angry the group would be toward the noncooperator

(Dawes, McTavish & Shaklee (1977) conducted an experiment involving even larger amounts of money; subjects played just once. Total cooperation resulted in \$2.50 for each member of their 8-person groups, total defection resulted in no payment to anyone, $c_1 = c_2 = \$1.50$, and $c_3 = \$8.00$, a substantial monetary incentive to defect. Some groups could communicate while others could not. Dawes, McTavish & Shaklee (p. 7) write:

One of the most significant aspects of this study, however, did not show up in the data analysis. It is the extreme seriousness with which the subjects take the problems. Comments such as, “If you defect on the rest of us, you’re going to have to live with it the rest of your life,” were not at all uncommon. Nor was it unusual for people to wish to leave by the back door, to claim that they did not wish to see the “sons of bitches” who double-crossed them, to become extremely angry at other subjects, or to become tearful)

The affect level was so high that we are unwilling to run intact groups because of the effect the game might have on the members’ feelings about each other. The affect level also mitigates against examining choice visibility [NB in experiments involving high stakes] In pretesting we did run one group in which choices were made public. The three defectors were the target of a great deal of hostility (“You have no idea how much you alienate me!,” one cooperator shouted before storming out of the room); they remained after the experiment until all the cooperators were presumably long gone.

Experimenters whose payoffs consist of points to be converted to trivial amounts of cash or course credits do not report the affect level of their subjects. It may also be high, but I suspect that if it were it would be mentioned.

Whether or not high stakes and affect are necessary to reach valid conclusions about behavior in social dilemmas is a question that cannot be answered a priori, but depends in part upon a general finding of congruent or

disparate results across high involvement and low involvement studies. As yet there are not enough investigations in the field to know.

Certainly most of the dilemma situations in which we are interested involve high affect—e.g. that experienced by the author during the 1973 gasoline crisis as friend and neighbor after friend and neighbor finked out to become a “regular customer” of some service station.

COMMUNICATION The salutary effects of communication on cooperation are ubiquitous. In the first experiment by Bonacich reported above, communication was allowed in all groups, and 93% of the choices were cooperative. In the second experiment, there was a 94% cooperation rate. Bonacich did not run a no-communication control group (because he was not studying the effects of communication per se), but Dawes, McTavish, and Shaklee did. They found 72% cooperation in their communicating groups (which consisted of two different types to be described shortly) as opposed to 31% in their no-communication groups (which also consisted of two types).

Using points as payoffs, Rapoport et al (1962) and Bixenstine et al (1966) found that communicating groups cooperated more.⁶ Using variable games with points taken from a replenishing pool, Brechner (1977), Edney & Harper (1978, 1979), and Harper (1977) all found that groups able to communicate cooperated more, with the result that more points were “harvested” from the pool.)

o (Using a hypothetical uniform business game (in which manufacturers could cooperate against consumers), Jerdee & Rosen (1974) found that communication enhanced cooperation, but in a uniform game in which subjects “should act as if each point were worth \$1,” Caldwell (1976) did not. Caldwell did find, however, that a communication condition in which subjects could sanction defectors resulted in greater cooperation.) Moreover, he found that communication per se did yield higher cooperation, although not significantly so, and as he wrote (p. 279), “Perhaps with real money subjects would be less inclined to treat the experiment as a competitive game.”

What is it about communication that leads to more cooperation? While most of the studies mentioned above simply pitted communication against

⁶These results require qualification. The communication that was effective in the Rapoport et al study was unintended; it occurred during a break between two 3–4 hour sessions, and because the experimenters’ (p. 40) “main interest was in the distribution of choices in the absence of communication;” the results after the break were ignored except for noting the high degree of cooperation. The game in the Bixenstine et al study was not strictly a dilemma, because there were some points at which defection did not dominate cooperation.

no communication, Dawes, McTavish, and Shaklee attempted to study the effects of various aspects of communication. (They argued that there is a hierarchy of at least three aspects involved in any face-to-face communication about dilemma problems.) First, subjects get to know each other as human beings (humanization); second, they get to discuss the dilemma with which they are faced (discussion); third, they have the opportunity to make commitments about their own behavior, and to attempt to elicit such commitments from others (commitment). Commitment entails discussion, and discussion in turn entails humanization.) What Dawes, McTavish, and Shaklee did was to run four types of groups: those that couldn't communicate at all, those that communicated for 10 minutes about an irrelevant topic (they were asked to estimate the proportion of people at various income levels in Eugene, Oregon), those that could discuss the problem but couldn't ask for public commitments, and those that were required to "go around the table" and make public commitments after discussion. The first two types yielded cooperation rates of 30% and 32% respectively, while the last two had rates of 72% and 71%. Thus, humanization made no difference—at least not personal acquaintance based on a 10 minute discussion (the average amount of time that the discussion and commitment groups spent on the problem). Surprisingly, commitment made no difference, but it must be remembered that this commitment was one forced by the experimenters rather than one arising spontaneously from the group process. (Moreover, every subject promised to cooperate, which is the only reasonable statement to make no matter what one's intentions.)

GROUP SIZE \ All experimenters who have made explicit or implicit comparisons of dilemma games with varying number of players have concluded that subjects cooperate less in larger groups than in smaller ones.) Rapoport et al (1962) and Bixenstine et al (1966) simply noted the low degree of cooperation in their three- and six-person games and stated that it is less than in comparable two-person prisoner's dilemmas. But they had no strict criterion of comparability. Marwell & Schmidt (1972) studied two- and three-person uniform games with c_3 equal in each and found less cooperation in the three-person game. Unfortunately, c_1 and c_2 were not equated, being twice as large in the two-person as in the three-person game (which resulted in the "expected values" of cooperation and defection being identical if the other players were to respond in a 50–50 random manner). Harper et al (unpublished) compared one-, three-, and six-person groups in the variable dilemma involving pool replacement; they found (cooperation decreased with group size, but it is not clear what the results were for a "one-person group" test—other than the intellectual ability of a single

individual to solve the replenishment problem in an optimal manner given the experimenter's replenishment rule.⁷

The problem is, of course, how to "equate" N and N' person dilemma games, or even whether such an equating is desirable (from the standpoint of "ecological validity"). Could it not be argued, for example, that the motive to defect (e.g. c_3) should "naturally" increase with more players because the harm from defection—i.e. negative externality—should be diffused among more people?

The most careful job of equating we have found is in one game from a larger study by Bonacich et al (1976). These investigators set c_1 , c_2 , and c_3 equal in three-, six-, and nine-person games, and they (discovered that cooperation decreased with increasing size (contrary to their theoretical expectations, which was that these parameters alone would determine rate of defection).)

PUBLIC DISCLOSURE OF CHOICE VERSUS ANONYMITY Three studies have compared private with public choice (Bixenstine et al 1966, Jerdee & Rosen 1974, Fox & Guyer 1978); all found higher rates of cooperation when choice was public. While the difference between anonymity and public disclosure in these studies is not striking, they used minimal payoffs—and given the involvement obtained with significant amounts of money, we suspect that the difference would be much greater were the payoffs more significant.

EXPECTATIONS ABOUT OTHERS' BEHAVIOR There are three studies that collected subjects' expectations about whether others playing the games would cooperate or defect (Tyszka & Grzelak 1976, Dawes, McTavish & Shaklee 1977, Marwell & Ames 1979). (There are two possible predictions. To the degree to which a subject believes others *won't* defect, he or she may feel it is possible to obtain a big payoff without hurting others too much. This desire to be a "free rider" [or "greed" as Coombs (1973) terms it] could result in a negative correlation between the propensity to cooperate and beliefs that others will. To the degree to which a subject believes that others *will* defect, he or she may feel that it is necessary to avoid a big loss by defecting himself or herself. The desire to "avoid being a sucker" [or "fear" as Coombs (1973) terms it] could result in a positive correlation

⁷Interestingly, there is an optimal solution for harvesting animals in their natural environment. Determine the maximal population size where there is no harvesting, and then keep the population at precisely half that size. See Dawes, Delay & Chaplin (1974) and Anderson (1974).

188 DAWES between the propensity to cooperate and beliefs that others will.) In fact, all three studies report strong *positive* correlations. This finding is compatible with those reviewed by Pruitt & Kimmel (1977) in the area of iterated games.

There is one other interesting finding in the Dawes et al and the Tyszka and Grzelak studies. Defectors are more accurate at predicting cooperation rates than are cooperators. But Dawes, McTavish, and Shaklee found that they were *not* more accurate at predicting specifically who would cooperate and who would not. This apparent discrepancy between base rate accuracy and specific accuracy can be best understood by considering the predictions of the outcome of coin tosses. A person who predicts heads 50% of the time will be correct only 50% of the time despite a perfect base rate accuracy; a person who predicts heads 100% of the time will also be correct 50% of the time despite making the worst possible base rate prediction. In fact, in the Dawes, McTavish, and Shaklee study subjects were *very* poor at predicting who would and who would not cooperate.

MORALIZING ^r Noting that the subjects in the Dawes, McTavish, and Shaklee study often raised moral issues in the discussion and commitment groups Dawes et al (unpublished) ran two experiments in which the experimenters themselves moralized at the subjects. These two studies, one conducted at Santa Barbara, California, and one conducted at Eugene, Oregon, contrasted a no-communication condition with a no-communication condition in which the experimenter delivered a 938 word sermon about group benefit, exploitation, whales, ethics, and so on. At both locations, the sermon worked—yielding rates of cooperation comparable to those found in the discussion and commitment groups of the earlier experiments. Of course, these sermons confounded logic, social pressure, experimental demand, emotional appeal, and so on..

A FINAL HYPOTHESIS ABOUT ELICITING COOPERATIVE BEHAVIOR

The experiments reviewed in this article are lousy *simulations* of the social dilemmas with which most of us are concerned. In our current overpopulated world, the dilemmas of greatest import involve thousands to millions of people, large-scale communication or public disclosure is impossible, and most of the people choosing do not share the cultural background of American high school or college students. Findings about how small groups of such students behave in contrived situations cannot be generalized to statements about how to save the world (even though as part of our

own research-finding dilemma game, we often pretend that they can, thereby leading granting agencies to expect such statements).

(What must be assumed is that the psychological and social factors that lead to defection or cooperation in small-scale dilemmas are roughly the same as those that influence behavior in large dilemmas.) (Of course, small N dilemmas may be studied in their own right, in which case no such assumption is necessary.) This assumption cannot be based purely on the formal (i.e. mathematical) identity of small and large dilemmas. Rather, such an assumption must be based on broader theoretical ideas about human behavior—ideas that imply what might lead people to cooperate or defect in general, and which may then be tested in the small dilemma situation. Most of the studies reviewed in this article are based on such ideas. (Those, for example, that merely examine the effect of changing mathematical parameters in the experimental situation have been omitted.)

This distinction between experimental dilemmas as simulations and as hypotheses-testing devices is not just one of regard. For example, most simulation studies vary parameters of the dilemma itself (following the precedent of numerous iterated prisoner's dilemma studies); such studies are based on the assumption that these parameters (e.g. a mathematically defined "degree of conflict") have counterparts in the "real world," although it is difficult if not impossible to identify them with any precision. In contrast, those studies that investigate variables outside the structure of the game—e.g. communication, public disclosure, moralizing—vary these; such studies are based on the assumption that the experimental dilemma is (just) another "real" dilemma to the subjects, and that their behavior will be affected by these variables in the same way (more or less) as it would be affected in other dilemma situations.⁸ And the expectation that these variables will affect behavior must always be based on some theoretical orientation or belief.

The analysis and literature reported thus far support a very simple theoretical proposition, one derived from extensive literature documenting that people have very limited abilities to process information on a conscious level, particularly social information. This ability is "limited" relative to what we naively believe; that is, study after study has shown a surprising inability to process information correctly on what appear to be the simplest tasks, provided they are not overlearned or automatic. The literature supporting this limited processing phenomenon is too vast to be referenced here without doubling the bibliography, but see Dawes (1976).

⁸I grant that it is always possible to attempt to construct a meta-game incorporating such variables, although their exact role and parameterization is extremely difficult to determine.

Such cognitive limitation may often result in an inability to understand or fully grasp the utilities in a social dilemma situation other than those that are most obvious, i.e. those connected with the payoffs. But it is precisely the payoff utilities that lead the players to defect, while the other utilities—e.g. those connected with altruisms, norms, and conscience—lead the players to cooperate. It follows that manipulations that enhance the salience and understanding of these utilities should increase cooperation. Communication (with or without commitment), public disclosure, and moralizing are precisely such manipulations.

Moreover, there are two additional studies—one mentioned briefly and one involving an iterated game—that support this hypothesis that greater knowledge yields greater cooperation. Marwell & Ames (1979) contacted high school students both by telephone and mail and asked them to invest a number of “tokens” supplied by the experimenter in either a “private” or “public” stock. The tokens invested in the private stock resulted in a fixed monetary yield per token. Those invested in the public stock resulted in a payoff to *all* members of the subject’s group (of 4 or 80 members whom the subject didn’t know); this payoff was an accelerating function of the number of people who invested their tokens in this public stock. The dilemma occurred because subjects received money from the public investment whether or not they personally contributed tokens to it. (It was not, however, strictly a dilemma situation, because if enough other group members invested in the public stock a “provision point” was reached, beyond which the public stock was also personally more rewarding than was the private stock.)

Marwell and Ames obtained a much higher rate of cooperation (public investment) than would be predicted from economic theory; their subjects were as much concerned with “fairness” as with monetary return. Why? The hypothesis proposed here suggests that the concern with the internal utility of fairness could have been brought about by the *length of time* the subjects had to consider their choice. They had a minimum of 3 days. (The time in the typical no-communication experiment is 10 minutes.) It follows that they had time to think about factors other than the external payoffs—e.g. to think about “fairness.” Note that this study was done under a condition of total anonymity, a factor most common in large-scale social dilemmas.

The other study supporting the general hypothesis presented here is that of Kelley & Grzelak (1972). When interviewing subjects who had played an iterated social dilemma game in groups of 13 subjects, these investigators found that subjects who had made a (relatively) high proportion of cooperative responses were better able to identify the response best for the group than were those who made a low proportion of cooperative responses. While

the hypothesis stated here is the converse of that finding, direction (not magnitude) of statistical association is symmetric.

Is knowledge *all* that is necessary? No, for while utilities associated with altruism, norms, and conscience may be made salient by knowledge, they do not necessarily overwhelm those associated with the payoffs. Repugnant as it may be from a normative point of view, moral and monetary (or survival) utilities combine in a compensatory fashion for most people.

He: Lady, would you sleep with me for 100,000 pounds?

She: Why, yes. Of course.

He: Would you sleep with me for 10 shillings?

She: (angrily) What do you think I am, a prostitute?

He: We have already established that fact, madam. What we are haggling about is the price.

Everyone may not have his or her price, but it does not require a systematic survey to establish that most people in the world will compromise his or her altruistic or ethical values for money or survival. Thus, the negative payoffs for cooperative behavior must not be too severe if people are to cooperate. It may be for precisely this reason that the expectation that others will cooperate is so highly correlated with cooperation itself. If others cooperate, then the expected payoff for cooperation is not too low, even though—in a uniform game, for example—the *difference* between the payoff for cooperation and that for defection is still quite large. People may be greedy, may prefer more to less, but their greed is not “insatiable” when other utilities are involved.

Thus, three important ingredients for enhancing cooperation in social dilemma situations may be: knowledge, morality, and trust. These ancient virtues were not discovered by the author—or by the United States Government, which invested millions of dollars in research grants over the years to have subjects play experimental games. But the above analysis indicates that they may be the particular virtues relevant to the noncoercive (and hence efficient) resolution of the social dilemmas we face.

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 155



"Paul Sherman"
<psherman@ij.org>
09/18/2008 10:03 AM

To <shajjar@fec.gov>, <RBonham@fec.gov>,
<GWilson@fec.gov>, <gmueLLer@fec.gov>,
<kdeeley@fec.gov>
cc "Bert Gall" <bgall@ij.org>, "Steve Simpson"
<SSimpson@ij.org>, "Robert Frommer" <rfrommer@ij.org>
bcc
Subject Rodney Smith Subpoena Responses

Gentlemen:

Attached is an additional file that is responsive to the FEC's subpoena duces tecum of Rodney Smith. Please let me know if you have any questions.

Best,



Paul Sherman Email and Draft of Smith Report (IJ024430).PDF

From: **Rodney Smith** <rodneyasmith@comcast.net>
Date: Mon, Aug 4, 2008 at 6:18 PM
Subject: RE: call today
To: Steve Hoersting <shoersting@campaignfreedom.org>

Steve & Steve

Attachment 829-08 is a draft of my statement for your trial. Please give me your thoughts.

Good luck

Rod

From: hoersting@gmail.com [mailto:hoersting@gmail.com] **On Behalf Of** Steve Hoersting

Sent: Monday, July 28, 2008 1:40 PM
To: Rodney Smith
Cc: Steve Simpson
Subject: Re: call today

Sounds good, Rod. We will do that. Thanks,

Steve

On Mon, Jul 28, 2008 at 11:34 AM, Rodney Smith <rodneyasmith@comcast.net> wrote:

Steve

3:30 today is probable as good as time as any. Call me here at my office (202) 237-8313.

Thanks

Rod

From: hoersting@gmail.com [mailto:hoersting@gmail.com] **On Behalf Of** Steve Hoersting
Sent: Monday, July 28, 2008 10:11 AM
To: rodneymith@comcast.net
Subject: Fwd: call today

Rod,

Are you available at 3:30 today? We did not receive your reply last week?

Thanks,

Steve

----- Forwarded message -----

From: Steve Simpson <SSimpson@ij.org>
Date: Mon, Jul 28, 2008 at 9:00 AM
Subject: call today
To: "Steve Hoersting (E-mail 2)" <shoersting@campaignfreedom.org>

Steve:

I've heard from everyone about the call today but Rodney Smith. Can you contact him and make sure 3:30 is okay (or maybe you already know it is). Let me know if we are good to go and I'll confirm it with everyone and send around the conference call info. Thanks.

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

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Steve Hoersting
Vice President
CENTER FOR COMPETITIVE POLITICS

Political Fundraising

The Current Reality

By Rodney A. Smith

Congress shall make no law...abridging the freedom of speech.

• The Constitution

America's competitive political process is at a crossroads. Its life-blood, political fundraising, is under siege. Technological, legislative and market changes have emerged almost simultaneously to undermine political fundraising and exponentially increase its complexity and cost. Under the best of circumstances, political fundraising is a hard sell.

These forces of change have made it infinitely more difficult for non-wealthy candidates, start-up advocacy groups and other political organizations to raise regulated, hard dollars. In fact, it has become a practical impossibility for start-up advocacy groups on both the left or on the right to raise the seed money they need to sustain themselves. The single most devastating blow to hit political fundraising is the financial stranglehold imposed by Buckley v Valeo in 1976. It has only been made worse by the passage and approval by the Supreme Court of the BCRA in 2002.

Without an adequate, continuous supply of money, the political process that was once the best in the world, in fact

the best in history, is falling victim to "pie-in-the-sky" campaign finance reform.

The discussion here is not intended to be a comprehensive analysis, but rather an overview of some of today's realities. As a direct result of campaign finance reform, political fundraising has shifted from a low volume, high dollar collection process to a high volume, lower dollar collection process.

Almost every aspect of industry and business has been diligently attempting to reinvent itself to meet the new technological challenges of the 21st century. One notable exception is the business of politics, and more specifically, the business of political fundraising. Compared to the magnitude and variety of change taking place elsewhere, political fundraising has, for the most part, continued to operate in the same old way. This stagnation has tended to institutionalize modes of fundraising that are becoming obsolete in the evolving world of contribution limits and high technology.

While the contribution limits imposed by campaign finance reform has mandated fund raising changes, none of the finance reform laws provide a funding mechanism to pay for the development of systems needed to operate new forms of fundraising.

To draw an analogy with the commercial world, what campaign finance reform has done to political fundraising is similar to

what would happen if high-priced jewelry was outlawed and Tiffany's had to immediately become a Wal-Mart, without having access to the financial resources needed to develop the elaborate support systems that enable Wal-Mart to function effectively and efficiently. In other words, political fundraising is an industry like any other that requires a capital investment in order to go into production. Unfortunately campaign finance reform has destroyed the ability of start-up advocacy groups and non-wealthy challengers to secure the capital investment needed to effectively communicate with voters in a meaningful way.

**** Why People Give ****

Human beings are not angels who give away their hard earned money for nothing. The big question in the back of every donor's mind (political, charitable or religious) is always, "What's in it for me if I respond to this request?"

In truth, people trade money to satisfy a basic human need or desire. They trade money to get something. In fundraising, that something is usually an intangible.

Money comes slowly to most people and is usually acquired through hard work and sacrifice. Few people have enough. For most people, making a contribution is a serious matter. Spending or giving money in one direction usually means skimping in another. Consequently, people want value. They want something

worth more to them than the same amount spent in another way.
That's why political fundraising is so tough.

Where is the value in giving money to a start up political organization or to some stranger running for public office? Under campaign finance reform the few people that a non-wealthy candidate or new start-up advocacy group can persuade to make contribution cannot give enough money on their own to benefit the candidate or organization in any meaningful way. As a consequence, most start-up advocacy groups and non-wealthy candidates are effectively out of business before they ever start trying to raise money.

The Donor Matrix below shows a breakdown of the people nationwide who made a political donation during the 1999-2000 Election Cycle.

Donor Matrix
Approximate Number of Political Donors Nationwide*
1999 - 2000 Election Cycle

Category	Giving Range	Total Number of Donors	Average Per Congressional District		
			435 Districts	600,000 Population	350,000 Households
A	\$1,000 +	339,526	780	0.1%	0.2%
B	\$200 - \$999	439,214	1,010	0.2%	0.3%
Subtotal	\$200 +	778,740	1,790	0.3%	0.5%
C	Under \$200	2.7 Million**	6,200	1%	2%
TOTAL	All	3.5 Million^{1&2}	8,000	1.3%	2.5%

* Source: Federal Election Commission

** Based on dividing estimated average contribution into gross receipts

This chart shows that approximately 3.5 million Americans made a political contribution at the federal level during the 1999-2000 election cycle. This figure represents only about 1.2% of the total U.S. population and about 1.7% of the total voting age population. Eighty percent of these donors, or roughly 2.7 million people, gave less than \$200. These smaller contributions are the most time-consuming and expensive to raise.

In terms of \$200+ donors, there is roughly one donor

(Republican, Democrat or Independent) for every 350 people (i.e. 1 in 350 or 0.3%) or one donor out of every 200 households (i.e. 1 in 200 or 0.5%) in the average congressional district. What this all means from the point of view of fundraising under the mandated contribution restrictions is that trying to raise significant amounts of money in any given congressional district for a new political organization or a non-wealthy candidate is not unlike trying to find a finite number of needles in the proverbial haystack. And for challengers without wealth or a start up advocacy group, the task of raising enough money from donors to support themselves is something that ranges between nearly undoable to almost impossible.

**** The Changing Political Fundraising Market ****

At the time of Buckley v. Valeo in 1976, the dominant political fundraising audience in America was the "Patriot Generation" consisting of people born before 1925.

Over 60 million Americans born prior to 1925 were alive in 1976. Subsequent to Buckley v. Valeo, this Patriot Generation audience became the broad-base financial backbone for most political organizations via mass marketing. Prior to the Buckley decision, most political support was received via a smaller number of larger contributions. That was and still is the least expensive way to quickly raise substantial sums of money.

Now at the start of this new century, most of the Patriot

Generation has disappeared. As a consequence, that source of revenue for political organizations is also substantially gone. Most of the political financial support being generated right now is coming from the Depression/World War II generation (i.e., people born between 1926 and 1945). The problem with this Transition Generation in terms of fundraising is its size; it only represents about 12% of the adult market. So as a source of political funding, their potential is limited.

The most important fundraising market today is the huge "Baby Boomer" Generation (70 plus million), whose propensity for giving to political organizations and candidates is still largely unknown. Equally troubling is the fact that the marketing techniques and tools to entice "Boomers" to make political contributions are also largely undeveloped.

"Boomers" were told life is a voyage of self-discovery and that they could do anything they wanted. The data suggest that they are inherently optimistic and imbued with a sense of entitlement to the good life, which tends to make them self-centered. They grew up watching lots of television and using the telephone extensively. They tend to buy first, pay later, use credit cards and like monthly payment plans. They accept the phone and TV as methods of transacting business. In short, the psycho-graphic profile of the Baby Boomer Generation is far different from the psycho-graphic profile of their Patriot

Generation elders.

**** The Changing Techniques of Marketing ****

What this shift in psycho-graphic profiles from the Patriot Generation to the Baby Boomer Generation means, in terms of broad-based political fundraising, is that the old fundraising methodology of mass marketing, including mass media, mass mail, and even mass telemarketing, is giving way to a radically new marketing paradigm specifically targeted at "Boomers" and the younger emerging markets.

To meet these new marketing demands and this emerging marketing paradigm, political organizations, candidates and start up advocacy groups will have to be able to access communication systems that provide the ability to interact with people on the issues that are important to each individual via the medium preferred by the person.

Unfortunately, campaign finance laws block access to the financial resources and cooperative business relationships necessary for candidates and political committees to effectively maximize the development of such highly sophisticated marketing systems.

**** Volume Changes Form ****

As the average contribution declines and the number of contributions received increases, the cost of generating the additional contributions also increases. This is a mathematical

certainty. This principle of "volume changing form" impacts every aspect of fundraising, particularly as political fundraising scrambles to offset the loss of large contributions. As a consequence to make up for lost revenue resulting from the imposition of contribution limits, the volume of smaller contributions must increase as the average contribution amount declines. This dynamic results in unavoidable higher fundraising cost. In fact, there is an inverse functional relationship between fundraising costs and average contribution. The higher the average contribution, the lower fundraising costs will be as a percentage of gross receipts. The reverse is also true. The lower the average contribution, the higher the fundraising cost will be.

Chart-1 shows four different ways to raise one million dollars.

Chart-1
Raising \$1 Million
Assumed Cost Per Gift = \$5
Alternative Examples

Example	Number of Donors	Average Gift	Total Amount Raised	Cost Per Gift	Total Cost	Cost %
1	1	\$1 Million	\$1,000,000	\$5	\$5	.0005%
2	1,000	\$1,000	\$1,000,000	\$5	\$5,000	.5%
3	10,000	\$100	\$1,000,000	\$5	\$50,000	5%
4	100,000	\$10	\$1,000,000	\$5	\$500,000	50%

Each of the examples in Chart-1 has its own special fundraising challenge. In Example 1 - attempting to get \$1 million from one person is a radically different fundraising challenge than attempting to get \$10 from 100,000 people as shown in Example 4. The human effort, the cost, the mode of fundraising used, the support systems needed, the time involved, all these things are different for each and every example shown. In addition, the interactive relationship between cost, volume and the average contribution also differs for each mode of fundraising.

**** Donor Acquisition ****

The cost dynamic of fundraising is further complicated because every fundraising organization must also spend money "acquiring" new donors. This process is commonly referred to as "prospecting." The goal in prospecting is to break even, which means the first contribution received from each new donor is used to fund the entire cost of an organization's growth. However, breaking even at prospecting is a difficult objective to realize. In such situations, an organization's growth must be partially funded out of general operating funds. If there are no operating funds then it is impossible for the organization to grow which is, in fact, the case for most start-up groups.

The fact that money must be consumed to acquire new donors exacerbates the cost dynamics of fundraising. Unfortunately, few

people understand this aspect of the job, which invariably leads to a misperception of "unnecessarily high fundraising costs."

There are only two ways a fundraising operation can grow. One is by increasing the average contribution. The other is by prospecting for more donors. Because the mandated contribution limits imposed by campaign finance reform severely limit every political organization's ability to increase its average contribution amount, the only alternative available to candidates and political organizations that want and/or need to generate additional revenue is by acquiring more donors.

Chart-2 below is similar to Chart-1, in that it demonstrates four ways to raise one million dollars. However, Chart-2 also incorporates an assumed \$10 acquisition cost per donor in addition to the assumed \$5 per donor fundraising cost.

Chart-2
Raising \$1 Million
Assumed Cost Per Gift = \$5
Assumed Acquisition Cost Per Donor = \$10
Alternative Examples

Example	Number of Donors	Average Gift	Total Amount Raised	Cost Per Gift	Total Gift Cost	Acquisition Cost Per Donor	Total Donor Acquisition Cost	Combined Total Cost	Cost %
1	1	\$1 Million	\$1 Million	\$5	\$5	\$10	\$10	\$15	.0015%
2	1,000	\$1,000	\$1 Million	\$5	\$5,000	\$10	\$10,000	\$15,000	1.5%
3	10,000	\$100	\$1 Million	\$5	\$50,000	\$10	\$100,000	\$150,000	15%
4	100,000	\$10	\$1 Million	\$5	\$500,000	\$10	\$1,000,000	\$1,500,000	150%

Example 1 shows a \$15 or .0015% cost to raise \$1 million

dollars. Dirt cheap! But when the exact same cost dynamics of \$5 per gift and \$10 for acquisition are applied to 100,000 donors (example 4) the total fundraising cost of \$1.5 million, or 150%, seems outrageous. Yet none of the elements have changed. What changed are the average contribution and the volume of gifts.

The reason for the huge variance between Example 1 and Example 4 is the unavoidable functional relationship between cost, volume and the average contribution. As volume and the average contribution amount change, so do the cost and the form of the fundraising challenge. As these examples clearly demonstrate, the aggregate fundraising cost as a percentage of gross receipts increases as volume increases and the average contribution drops.

**** Mathematical Realities ****

What campaign finance reform has done by imposing contribution limits on candidates and political groups is to mandate a lower average contribution amount, which necessitates a need to significantly increase volume in order to make up the lost revenue. Thus, the imposed financial restrictions and limits have increased every political institution's fundraising cost. It has also elevated incumbents and deep pockets to a new kind of "Patrician" political class while decreasing everyone else's access to the political process.

**** Internet ****

Because the Internet is evolving so rapidly, it is difficult to evaluate its ultimate impact on political fundraising. At the present time, email is the single-most powerful tool on the Internet. It is a cheap, efficient way to deliver content. It's also a great way for people of similar interest to communicate. And while there have been a number of notable Internet fundraising successes, most of the big money raised via the Internet has been the direct result of candidates and/or causes benefiting from a huge amount of free, unpaid publicity which makes raising money via the Internet out of reach for the vast majority of non-wealthy candidates and start-up political organizations.

Thanks to campaign finance reform, as the Internet continues to evolve and gain in complexity and sophistication, it is going to be a real struggle for political organizations and candidates to find the "extra" money to invest in this kind of cutting edge technology.

Given that all non-wealthy candidates and start-up advocacy groups are faced with these various fundraising challenges, it should be obvious why incumbents, deep pocket forces, and wealthy candidates do and will continue to dominate the new political landscape created by campaign finance reform and why the competitive nature of elections in America is disappearing.

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 156

SpeechNow.org et al. v. FEC

Report of Rodney A. Smith

Introduction

I have been asked by the Institute for Justice and the Center for Competitive Politics to provide my opinion concerning the impact of contribution limits on the ability of groups like SpeechNow.org to raise funds to finance advertisements for the election or defeat of candidates. I understand that SpeechNow.org is an independent group of citizens that raises funds in order to produce and broadcast advertisements for the election of candidates who support free speech and the defeat those who do not. The group intends to run these ads during the election seasons in states and districts where their targeted candidates are running for office. SpeechNow.org is organized as a 527 group under the IRS code. It accepts no corporate or union contributions and it makes no contributions to candidates nor does it coordinate its activities with any candidate or party committee.

I have been a fulltime consultant and fundraiser in politics for over 30 years. Much of the information in this report is based on portions of my book, Money, Power, and Elections: How Campaign Finance Reform Subverts American Democracy, which was published in 2006. A copy of my resume is attached to this report.

As further explained below, my opinions can be summarized as follows:

1. Communicating a political message to large groups of voters is an expensive proposition that requires a significant amount of money for it to be heard.
2. Due to contribution limits mandated by campaign finance reform, political fundraising has shifted from a low-volume, high-dollar process to a low-dollar, high-volume process. This has forced fundraising costs to skyrocket for most political organizations and candidates,

particularly non-wealthy challenger candidates and small start-up advocacy groups like SpeechNow.org.

3. There are only two ways any fundraising entity can grow. One way is by increasing its average contribution, which contribution limits mandated by campaign finance reform severely limits. The other way is by acquiring new donors. Because the cost of acquiring a new donor is often greater than the amount received from a new donor, small groups and non-wealthy challenger candidates usually start in the red and stay there until they go into debt and/or cease to exist.

4. Under the existing contributions limits mandated by campaign finance reform, it is virtually impossible for a start-up group like SpeechNow.org to raise enough money to have any meaningful impact on any election. Unless a group happens to be advocating or opposing some red-hot issue that is receiving tens of millions of dollars of free publicity via the national media, or has some special connection to a corporation or labor union, they are simply out of luck.

Overview

America's competitive political process is at a crossroads. Its life-blood, political fundraising, is under siege. Technological, legislative and market changes have emerged almost simultaneously to undermine political fundraising and exponentially increase its complexity and cost. Under the best of circumstances, political fundraising is a hard sell.

These forces of change have made it infinitely more difficult for non-wealthy candidates, start-up advocacy groups and other political organizations to raise regulated, hard dollars. In fact, it has become a practical impossibility for start-up advocacy groups on both the left and the right to raise the seed money they need to sustain themselves. The single most devastating blow

to hit political fundraising is the financial stranglehold imposed by the contribution limits upheld in Buckley v Valeo in 1976. It has only been made worse by the passage and approval by the Supreme Court of the BCRA in 2002.

Without an adequate, continuous supply of money, the political process that was once the best in the world, in fact the best in history, is falling victim to “pie-in-the-sky” campaign finance reform.

The discussion here is not intended to be a comprehensive analysis, but rather an overview of some of today’s realities. As a direct result of campaign finance reform, political fundraising has shifted from a low-volume, high-dollar collection process to a high-volume, lower-dollar collection process.

Almost every aspect of industry and business has been diligently attempting to reinvent itself to meet the new technological challenges of the 21st century. One notable exception is the business of politics and, more specifically, the business of political fundraising. Compared to the magnitude and variety of change taking place elsewhere, political fundraising has, for the most part, continued to operate in the same old way. This stagnation has tended to institutionalize modes of fundraising that are becoming obsolete in the evolving world of contribution limits and high technology.

While the contribution limits imposed by campaign finance reform have mandated fundraising changes, none of the finance reform laws provide a funding mechanism to pay for the development of systems needed to operate new forms of fundraising.

To draw an analogy with the commercial world, what campaign finance reform has done to political fundraising is similar to what would happen if high-priced jewelry was outlawed and Tiffany’s had to immediately become a Wal-Mart, without having access to the financial

resources needed to develop the elaborate support systems that enable Wal-Mart to function effectively and efficiently. In other words, political fundraising is an industry like any other that requires a capital investment in order to go into production. Unfortunately campaign finance reform has destroyed the ability of start-up advocacy groups and non-wealthy challengers to secure the capital investment needed to effectively communicate with voters in a meaningful way.

Why People Give

Human beings are not angels who give away their hard-earned money for nothing. The big question in the back of every donor's mind (political, charitable or religious) is always, "What's in it for me if I respond to this request?"

In truth, people trade money to satisfy a basic human need or desire. They trade money to get something. In fundraising, that something is usually an intangible such as the ability to actively participate in the political process, support candidates and organizations that share their beliefs and ideas, and to actively promote or oppose issues and causes of special importance to them.

Money comes slowly to most people and is usually acquired through hard work and sacrifice. Few people have enough. For most people, making a contribution is a serious matter. Spending or giving money in one direction usually means skimping in another. Consequently, people want value. They want something worth more to them than the same amount spent in another way. That's why political fundraising is so tough.

Where is the value in giving money to a start-up political organization or to some stranger running for public office? Under campaign finance reform the few people that a non-wealthy candidate or new start-up advocacy group can persuade to make contributions cannot

give enough money on their own to benefit the candidate or organization in any meaningful way. As a consequence, most start-up advocacy groups and non-wealthy candidates are effectively out of business before they ever really get started.

The Donor Matrix below shows a breakdown of the people nationwide who made a political donation during the 1999-2000 Election Cycle.

Donor Matrix
Approximate Number of Political Donors Nationwide*
1999 - 2000 Election Cycle

Category	Giving Range	Total Number of Donors	Average Per Congressional District		
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Subtotal	\$200 +	778,740	1,790	0.3%	0.5%
C	Under \$200	2.7 Million**	6,200	1%	2%
TOTAL	All	3.5 Million	8,000	1.3%	2.5%

* Source: Federal Election Commission

** Based on dividing estimated average contribution into gross receipts

This chart shows that approximately 3.5 million Americans made a political contributions at the federal level during the 1999-2000 election cycle. This figure represents only about 1.2% of the total U.S. population and about 1.7% of the total voting-age population. Eighty percent of these donors, or roughly 2.7 million people, gave less than \$200. These smaller contributions are the most time-consuming and expensive to raise.

In terms of \$200+ donors, there is roughly one donor (Republican, Democrat or Independent) for every 350 people (i.e. 1 in 350 or 0.3%) or one donor out of every 200 households (i.e. 1 in 200 or 0.5%) in the average congressional district. What this all means from the point of view of fundraising under the mandated contribution restrictions is that trying

to raise significant amounts of money in any given congressional district for a new political organization or a non-wealthy candidate is not unlike trying to find a finite number of needles in the proverbial haystack. And for challengers without wealth or for a start-up advocacy group, the task of raising enough money from donors to support themselves is something that ranges between nearly undoable to almost impossible. The reason for this is that the contribution limits mandated by campaign finance reform severely cripple their ability to accumulate enough cash reserves to effectively finance their growth.

The Changing Political Fundraising Market

At the time of Buckley v. Valeo in 1976, the dominant political fundraising audience in America was the “Patriot Generation” consisting of people born before 1925. Over 60 million Americans born prior to 1925 were alive in 1976. Subsequent to Buckley v. Valeo, this Patriot Generation audience became the broad-base financial backbone for most political organizations via mass marketing. Prior to the Buckley decision, most political support was received via a smaller number of larger contributions. That was and still is the least expensive way to quickly raise substantial sums of money. Now at the start of this new century, most of the Patriot Generation has disappeared. As a consequence, that source of revenue for political organizations is also substantially gone.

The most important fundraising market today is the huge “Baby Boomer” Generation (70 plus million), whose propensity for giving to political organizations and candidates is still largely unknown. Equally troubling is the fact that the mass-marketing techniques and tools to entice “Boomers” to make political contributions are also largely undeveloped.

“Boomers” were told life is a voyage of self-discovery and that they could do anything they wanted. The data suggest that they are inherently optimistic and imbued with a sense of

entitlement to the good life, which tends to make them self-centered. They grew up watching lots of television and using the telephone extensively. They tend to buy first, pay later, use credit cards and like monthly payment plans. They accept the phone and TV as methods of transacting business. In short, the psycho-graphic profile of the Baby Boomer Generation is far different from the psycho-graphic profile of their Patriot Generation elders.

The Changing Techniques of Marketing

What this shift in psycho-graphic profiles from the Patriot Generation to the Baby Boomer Generation means, in terms of broad-based political fundraising, is that the old fundraising methodology of mass marketing, including mass media, mass mail, and even mass telemarketing, that worked with the “Patriot Generation” is now giving way to a radically new marketing paradigm specifically targeted at “Boomers” and the younger emerging markets.

To meet these new marketing demands and this emerging marketing paradigm, political organizations, candidates and start-up advocacy groups must be able to access communication systems that provide the ability to interact with people via the medium each person prefers.

Unfortunately, campaign finance laws block access to the financial resources and cooperative business relationships necessary for candidates, political committees and advocacy groups to effectively maximize the development of highly sophisticated marketing techniques and technology.

Volume Changes Form

As the average contribution declines and the number of contributions received increases, the cost of generating the additional contributions also increases. This is a mathematical certainty. This principle of “volume changing form” impacts every aspect of fundraising, particularly as political fundraisers scramble to offset the loss of large contributions. As a

consequence, to make up for lost revenue resulting from the imposition of contribution limits, the volume of smaller contributions must increase as the average contribution amount declines. This dynamic results in unavoidably higher fundraising costs. In fact, there is an inverse functional relationship between fundraising costs and average contribution. The higher the average contribution, the lower fundraising costs will be as a percentage of gross receipts. The reverse is also true. The lower the average contribution, the higher the fundraising cost will be.

Chart-1 shows four different ways to raise one million dollars.

Chart-1
Raising \$1 Million
Assumed Cost Per Gift = \$5
Alternative Examples

Example	Number of Donors	Average Gift	Total Amount Raised	Cost Per Gift	Total Cost	Cost %
1	1	\$1 Million	\$1,000,000	\$5	\$5	.0005%
2	1,000	\$1,000	\$1,000,000	\$5	\$5,000	.5%
3	10,000	\$100	\$1,000,000	\$5	\$50,000	5%
4	100,000	\$10	\$1,000,000	\$5	\$500,000	50%

Each of the examples in Chart-1 has its own special fundraising challenge. In Example 1, attempting to get \$1 million from one person is a radically different fundraising challenge than attempting to get \$10 from 100,000 people, as shown in Example 4. The human effort, the cost, the mode of fundraising used, the support systems needed, the time involved, all these things are different for each and every example shown. In addition, the interactive relationship between cost, volume and the average contribution also differs for each mode of fundraising.

Donor Acquisition

The cost dynamic of fundraising is further complicated because every fundraising organization must also spend money “acquiring” new donors. This process is commonly

referred to as “prospecting.” The goal in prospecting is to avoid losing money. If an organization is fortunate enough to break even in its prospecting, then it can use the first contribution it receives from a new donor to finance to cost of acquiring that donor. If this cannot be done, then an organization’s growth must be partially funded out of general operating funds. If an organization has no operating cash reserves, then there is no way for it to finance its growth. This effectively means that most non-wealthy challenger candidates and start-up advocacy groups are out of business before they ever get started.

The fact that money must be consumed to acquire new donors exacerbates the cost dynamics of fundraising. Unfortunately, few people understand this aspect of fundraising, which invariably leads to a misperception of “unnecessarily high fundraising costs.”

There are only two ways a fundraising operation can grow. One is by increasing the average contribution. The other is by prospecting for more donors. Because the mandated contribution limits imposed by campaign finance reform severely limit every political organization’s ability to increase its average contribution amount, the only alternative available to candidates and political organizations that want and/or need to generate additional revenue is to acquire more donors. This is virtually impossible to do without adequate cash reserves or a donor-acquisition program that can be operated on a break-even basis, which, given the cost dynamics of today’s mass marketing techniques, is very difficult to do.

Chart-2, below, is similar to Chart-1, in that it demonstrates four ways to raise one million dollars. However, Chart-2 also incorporates an assumed \$10 acquisition cost per donor in addition to the assumed \$5 per donor fundraising cost.

Chart-2
Raising \$1 Million
Assumed Cost Per Gift = \$5
Assumed Acquisition Cost Per Donor = \$10
Alternative Examples

	Number of Donors	Average Gift	Total Amount Raised	Cost Per Gift	Total Gift Cost	Acquisition Cost Per Donor	Total Donor Acquisition Cost	Combined Total Cost	Cost %
1	1	\$1 Million	\$1 Million	\$5	\$5	\$10	\$10	\$15	.0015%
2	1,000	\$1,000	\$1 Million	\$5	\$5,000	\$10	\$10,000	\$15,000	1.5%
3	10,000	\$100	\$1 Million	\$5	\$50,000	\$10	\$100,000	\$150,000	15%
4	100,000	\$10	\$1 Million	\$5	\$500,000	\$10	\$1,000,000	\$1,500,000	150%

Example 1 shows a \$15 or .0015% cost to raise \$1 million dollars from one donor. Dirt cheap! But when the exact same cost dynamics of \$5 per gift and \$10 for acquisition are applied to 100,000 donors (example 4) the total fundraising cost of \$1.5 million, or 150%, seems outrageous. Yet none of the elements have changed. What has changed are the average contribution and the volume of gifts.

The reason for the huge variance between Example 1 and Example 4 is the unavoidable functional relationship between cost, volume and the average contribution. As volume and the average contribution amount change, so do the cost and the form of the fundraising challenge. As these examples clearly demonstrate, the aggregate fundraising cost as a percentage of gross receipts increases as volume increases and the average contribution drops.

Mathematical Realities

What campaign finance reform has done by imposing contribution limits on candidates and political groups is to mandate a lower average contribution amount, which necessitates a need to significantly increase volume in order to make up the lost revenue. Thus, the imposed

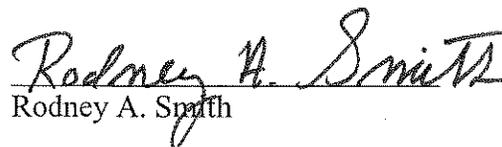
financial restrictions and limits have increased every political institution's fundraising cost. It has also elevated incumbents and deep-pocketed candidates to a new kind of "Patrician" political class while decreasing everyone else's access to the political process.

The Internet

Because the Internet is evolving so rapidly, it is difficult to evaluate its ultimate impact on political fundraising. At the present time, email is the single most powerful tool on the Internet. It is a cheap, efficient way to deliver content. It's also a great way for people of similar interests to communicate. And while there have been some of notable Internet fundraising successes, such as Barack Obama's presidential campaign, most of the big money raised via the Internet has been the direct result of a candidate and/or a cause benefiting from a huge amount of free publicity. This makes raising money via the Internet out of reach for the vast majority of non-wealthy candidates and start-up political organizations.

Thanks to campaign finance reform, as the Internet continues to evolve and gain in complexity and sophistication, it is going to be a real struggle for political organizations and candidates to find the "extra" money to invest in this kind of cutting-edge technology.

Given that all non-wealthy candidates and start-up advocacy groups are faced with these various fundraising challenges, it should be obvious why incumbents, wealthy individuals and wealthy candidates do and will continue to dominate the new political landscape created by campaign finance reform and why the competitive nature of elections in America is disappearing.


Rodney A. Smith

August 8, 2008

RODNEY A. SMITH
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Rodney Smith received his CPA Certificate in February of 1971, from the Maryland State Board of Public Accountancy, Certificate No. 3042. He accepted a Masters of Business Administration Degree in June 1966, from the University of Maryland with a major concentration in Finance and Accounting.

Currently, Smith is developing a new business concept - Tele-Town Hall - an innovative system linking politicians to their constituents. Prior to starting his new company, Smith was a **marketing and fundraising consultant**. His clients have included the NRCC, NRSC, RNC, National Rifle Association, U.S. Chamber of Commerce, National Federation of Independent Businesses, U.S. English, American Express, Reynolds Tobacco and a number of other political candidates, committees, and non-profit organizations.

For two years (1995-1996), he was the **National Finance Director** for the National Republican Congressional Committee. In this capacity, he raised over \$100 million, which enabled the Republican Party to hold its control of the U.S. House of Representatives for the first time in nearly 70 years.

For two years (1987-1988), he was the **National Finance Director** for the Jack Kemp for President Campaign with the ultimate responsibility for all fundraising. When he took over in January 1987, the campaign was in a negative cash flow position, had no effective internal fundraising structure, and had less than 10,000 useful donor names. In addition, the campaign was handicapped by the fact that our candidate was never able to move above 6% on any national poll. Under Smith's direction, and despite these difficulties, the Kemp Campaign raised over \$18 million from 100,000 donors at a cost of slightly less than 40%.

For two years (1985-1986), Smith was asked by Senator John Heinz to return as the **Treasurer and Finance Director** of the National Republican Senatorial Committee. During this single two-year election cycle, he directed programs that generated over \$96 million at a cost of less than 40%, which was, and still is, an all-time record--both in terms of gross and net dollars raised by the Committee. In addition, he developed a new donor-conducting program that enabled the NRSC to direct \$15 million in a new money campaign to candidates.

From 1983-1984, Smith was **Finance Director** for the Re-elect Jesse Helms Campaign. During the Helms campaign, he had the full responsibility of running the fundraising direct mail program and personally wrote most of Helms' fundraising direct mail copy. The campaign ended up raising \$16.5 million, mostly through direct mail, which at the time set an all-time record for a United States Senate campaign.

Smith spent six years (1977-1982) as **Treasurer and Finance Director** of the National Republican Senatorial Committee, with the ultimate responsibility for the development and operation of all the Committee's fundraising programs. Beginning with no contributor base, no cash reserves, and no existing fundraising programs, Smith designed, developed, and directed a series of ongoing fundraising programs that generated over \$80 million for the Committee for the period of January 1, 1977 to December 31, 1982. During his six-year tenure, 29 new Republican

Senators were elected, only three incumbents were defeated, and the Republican Party gained control of the United States Senate for the first time in 26 years.

For two years (1975-1976), Smith was the **Finance Director** at the Republican National Committee, with the primary responsibility for the RNC's Direct Mail Program. During these two years as Finance Director, Smith tripled the RNC's direct mail receipts.

From 1973 to 1974, Rodney Smith was the **Comptroller** for the Republican National Committee, where he had the overall responsibility for the Committee's accounting and budgeting functions. This included the selection, development, and implementation of an entirely new computerized accounting system.

In 1972, Smith was the **Assistant to the Treasurer** at the Financial Committee to Re-elect the President.

For two years (1969-1971), Smith was an **auditor** with Ernst & Young, a national public accounting firm. At Ernst & Young, Smith's most interesting assignment was to audit the financial records of the 1968 Nixon/Agnew Campaign.

From 1966 to 1968, Smith served in the United States Marine Corps.

For a period of seven years (1970-1976), Smith served on the faculty of the University of Maryland as a part-time Professor in Accounting and Business Management.

In 1996, Rodney Smith was honored by winning the "Pollie Award", given out by the American Association of Political Consultants, as the "Most Valuable Player in a Campaign" in the Republican Party for the work he accomplished for the NRCC. He is the only finance professional ever to be given this award.

Rod has written a book about the unintended consequences of campaign finance reform. Titled "Money, Power & Elections: How Campaign Finance Reform Subverts American Democracy," published by LSU Press and the Reilly Center for Media & Public Affairs at Louisiana State University. The book was released in the spring of 2006.

In December of 1997, Rodney was asked by the International Republican Institute to be the keynote speaker for the Turkish Conference on Ethics held in Istanbul, Turkey. The Democratic Turkish Party sponsored the conference.

Special Note (1): In addition to his experience in national committees and in presidential campaigns, Rodney Smith has also been significantly involved in the fundraising efforts of well over 50 Senate campaigns.

Special Note (2): Rod has developed and successfully patented an electronic fund transfer recruitment process titled, "Automatic Fund Collection and Payment Processing Method and Apparatus," U.S. Application No. S/N431,184.

Special Note (3): Rod has developed and applied for two patents on a phone dialing system that enables a single star speaker to connect thousands of pre-selected individuals to a large-scale outbound mass meetings by phone via a voice IP (Internet Protocol) connection titled "Tele-Town Hall" U.S. Application No. 10/954,837. & 11/350,194.

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

SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	

FEC EXHIBIT 157

Report on *SpeechNow.Org et al. v. FEC*

Jeffrey Milyo, Ph.D.

I have been asked by counsel for the plaintiffs to analyze the impact of contribution limits on the ability of independent political groups like SpeechNow to raise funds for the purpose of making independent expenditures. I will be compensated \$12,000 for this report; in addition, I will be paid \$250 per hour for any subsequent testimony.

In this report, I first describe my qualifications as an expert in Section 1; I then present my analysis in Sections 2-8. Below I briefly summarize the conclusion from each of the analytical sections of the report.

Summary

Section 2: The imposition of limits on contributions to groups like SpeechNow is logically inconsistent with other key provisions of federal campaign finance law; there is no anti-corruption rationale for limits on contributions to groups that exist solely to engage in independent expenditures.

Section 3: It is a well-known and empirically well-supported result from game theory that the potential for collusion decreases with the presence, size and independence of groups. Yet current law as interpreted by the FEC places relatively more restrictions on groups that make independent expenditures than individuals that make independent expenditures.

Section 4: Basic economic theory indicates that limits on contributions to political groups restrict the amount and effectiveness of political expression by these groups, as well as the amount and effectiveness of political expression by individuals that wish to contribute to such groups.

Section 5: There is no scientific evidence that contribution limits reduce either corruption or the appearance of corruption. But there is evidence that contribution limits reduce political expenditures; further lower campaign spending is associated with less informed citizens and lower voter turnout.

Section 6: The California Fair Political Practices Commission estimates that if limits on campaign contributions covered political groups making independent expenditures in California, then spending on independent expenditures in that state would have been 97.6% lower.

Section 7: Data on the size distribution of contributions to prominent 527 organizations and PACs confirm that limits on contributions to political groups are (or would be) constraints that impede most groups ability to raise funds. Further, in most cases, 80-99%

of the individual contributions to 527 groups were in amounts greater than \$5,000, and a majority of these funds were contributed in amounts of \$100,000 or more.

Section 8: Case studies of two prominent 527 groups confirm that limits on contributions to political groups are likely to be particularly harmful to new and independent political organizations.

Conclusion

My analysis applies several lessons from well-established theoretical and empirical results in the relevant social science literature; in addition I examine recent data on the patterns of individual contributions to political groups. From this, I conclude without reservation that in general, limits on contributions to political groups like SpeechNow constrain the ability of such groups to make independent expenditures.

Not only this, but contribution limits reduce the amount and effectiveness of political speech, the effectiveness of political organizations, and are particularly detrimental to the formation of new political groups. All of this diminishes the associational and speech rights of not only citizens that wish to make large contributions, but also of citizens of lesser means who are denied the opportunity to join together with political entrepreneurs, patrons and highly effective political organizations of their choosing.

Perhaps the most disturbing aspect of these findings is that these unintended consequences of contribution limits are the product of an irrational application of campaign finance regulations; limits on contributions to independent groups like SpeechNow that exist only to make independent expenditures are logically inconsistent with other key features of campaign finance law. Finally, there is no evidence that such limits on contributions to groups like SpeechNow reduce either corruption or the appearance of corruption.

1. Qualifications

1.1) I am the Frederick A. Middlebush Chair of Social Science at the University of Missouri, where I am also a tenured full professor in both the Truman School of Public Affairs and the Department of Economics, as well as an adjunct professor in the department of Political Science. I have several additional academic and professional affiliations; these include: the Hanna Family Scholar in the Center for Applied Economics at the University Of Kansas School Of Business; academic advisor to the Center for Competitive Politics in Arlington, Virginia; and senior fellow at the Cato Institute, a leading public policy think tank in Washington, D.C. Previously, I have been on the faculties of the Harris School of Public Policy at the University of Chicago and Tufts University in Massachusetts. I have also been a visiting scholar at the Massachusetts Institute of Technology, Washington University, Yale University and most recently, Stanford University. A current vita is attached as Exhibit A.

1.2) My area of academic expertise is American political economy, including the empirical analysis of the effects of political regulations and institutions. My scholarly research has been published in a number of leading peer-reviewed journals, including, the *American Economic Review*, the *Quarterly Journal of Economics*, the *Journal of Law and Economics*, the *Journal of Public Policy Analysis and Management*, *State Politics and Policy Quarterly* and the *Election Law Journal*. I frequently serve as a peer-reviewer for the leading journals in both economics and political science, including the *American Economic Review*, the *American Political Science Review*, the *American Journal of Political Science*, the *Journal of Human Resources*, the *Journal of Law and Economics*, the *Journal of Law, Economics and Organization*, the *Journal of Political Economy*, the *Quarterly Journal of Political Science*, the *Journal of Politics*, and several others.

1.3) I have been awarded several highly competitive grants and fellowships in recognition and support of my scholarly research; these include grants from the National Science Foundation and the Robert Wood Johnson Foundation, and a post-doctoral fellowship in political economics from Harvard University and M.I.T. My research has been recognized outside of academia, as well; my work has been cited numerous times in the national media.

1.4) During my career, I have taught several graduate and undergraduate courses in American politics, political economics, public economics, and law and economics; I have also served as a thesis advisor to several graduate students in economics, political science and public policy.

1.5) I have served as an unpaid expert witness for two Congressional committees; I provided oral and written testimony on the empirical evidence regarding the effects of election laws relating to voter identification.

1.6) I have also served as a paid consultant and expert witness in election and campaign finance litigation, although I have only been deposed once and I have never testified in court; I have written four expert reports:

i) In 2003, I produced an expert report in an election dispute in the New Jersey state courts (Re: *The Contest of the Democratic Primary Election of June 3, 2003 for the Offices of Assembly and Senate, 31st Legislative District Docket No. HUD L-3947-03 and HUD-L-3948-03 (Consolidated)*); my report described the impact of illegal campaign contributions on the outcome of several races in the Democratic primary in New Jersey.

ii) In 2006, I co-produced an expert report in a dispute over voter I.D. laws in the Missouri state courts (*Kathleen Weinschenk et al. v. State of Missouri et al. and Jackson County, Missouri v. State of Missouri (Consolidated)*); my report described the number of legal voters that might be deterred from voting under Missouri's recently enacted (and subsequently overturned) law requiring photo identification at polling places.

iii) In 2006, I produced an expert report in a dispute over monetary damages in the New Hampshire state courts (*Buckley, et al. v. New Hampshire Republican State Committee, et al.*); my report was in regard to the amount of damages resulting from the illegal jamming of several phones in the headquarters of the New Hampshire Democratic Party on Election Day in November, 2002.

iv) In 2007, I produced an expert report in a dispute over the state campaign finance disclosure laws in ballot measure elections in Colorado (*Sampson v. Coffman*); my report examined the ability of ordinary citizens to comply with Colorado's disclosure requirements for issue committees.

2. On the Illogic of Limits on Contributions to Political Groups That Exist Solely to Engage in Independent Expenditures

2.1) It is my understanding from the recent advisory opinion of the Federal Election Commission (FEC) with respect to SpeechNow (Advisory Opinion 2007-32) that there is a fundamental inconsistency in the way that federal law treats independent expenditures made by individuals versus political organizations that exist solely to make independent expenditures. Apparently, an individual may spend unlimited amounts of money on independent expenditure activities, but an independent group seeking to finance its own independent expenditure activities is restricted to raising contributions in limited amounts of only \$5,000 annually from any individual (and further subject to aggregate biennial limits). This distinction between independent expenditures made by individuals versus those made by independent issue-oriented groups like SpeechNow is irrational for several reasons.

2.2) First, restrictions on political association and speech, like limits on contributions to candidates for elective office, are permissible only for the purpose of preventing corruption or the appearance of corruption. For this reason, under current federal law, an individual or political committee wishing to contribute to the campaign of a candidate for office may do so, but only up to a limited amount; the purpose of this limit is to restrict the corrupting influence of direct donations to candidates. On the other hand, an individual wishing to engage in express advocacy may spend any amount of money on such activities, provided that the individual conducts these activities independently. This is because under the precedent established in *Buckley*, it is unconstitutional for the government to restrict the amount of money that an individual may spend on independent expenditures, because the **independence** of those expenditures is sufficient safeguard against corruption or the appearance of corruption. However, the independence of a political group making independent expenditures is apparently somehow not sufficient safeguard against corruption or the appearance of corruption, according to the FEC.

2.3) The distinction between in-kind or non-monetary contributions and independent expenditures underscores the importance of the independent status of an individual or group in preventing corruption. An individual or group engaging in express advocacy that is coordinated with a candidate campaign is considered to have made an in-kind contribution; such contributions are limited under federal law. However, an individual or group engaging in the exact same express advocacy except that it is not coordinated with a candidate campaign has not made an in-kind contribution; such independent expenditures may not be limited by law. The difference is clearly in the dimension of coordination versus independence. Yet this all important distinction apparently is somehow irrelevant for groups like SpeechNow; this is a logical inconsistency in the law, as interpreted by the FEC.

2.4) Aside from this inconsistency, why should an independent group engaging in independent expenditures be limited in the amounts of money that it raises for this

purpose? Who is corrupted by contributions to an independent expenditure campaign? The existing distinction between contributions to candidates, in-kind contributions to candidates and independent expenditures already establishes that candidates cannot be corrupted by independent expenditures. So are contribution limits on groups like SpeechNow intended to prevent the corruption of the principals of SpeechNow? From my reading of the FEC advisory opinion, this is clearly not the intent of such limits; further, such a purpose is presumably incompatible with First Amendment protection of speech and association. Given this, there is no anti-corruption rationale for contribution limits on independent groups like SpeechNow.

Summary of Section 2: The imposition of limits on contributions to groups like SpeechNow is logically inconsistent with other key provisions of federal campaign finance law; there is no anti-corruption rationale for limits on contributions to groups that exist solely to engage in independent expenditures.

3. A Game-Theoretic Perspective on Contribution Limits and Independent Expenditures

3.1) The illogic of imposing limits on contributions to groups like SpeechNow but not individuals' expenditures is compounded by the fact that it is a well-established result in game theory and human subject experiments that collusive behavior is, in general, *less* likely to occur when the number of persons involved in the collusive arrangement increases (e.g. Dawes 1980). In other words, there is less reason to be concerned that a political candidate and a group will establish and maintain a potentially corrupt cooperative relationship than there is for a political candidate and a single person.¹ Yet, under current law (as interpreted by the FEC) independent expenditures by an individual are unlimited, but groups engaging in independent expenditures are burdened by the requirement that they raise funds subject to contribution limits. Hence, this greater suspicion directed at independent groups --- simply because they are a group and for no other reason --- is entirely misguided (and therefore an unnecessary restriction of basic associational rights).

¹ Social scientists have modeled potential corruption among office-holders and favor-seeking contributors as an indefinitely repeated Prisoners' Dilemma game (e.g., Calvert 1989 and Milyo 1997); in such a setting, implicit cooperation may occur without explicit contracting mechanisms. However, the parameters for which cooperation is feasible become more restrictive with more noisy environments as well as with size of the group; human subject experiments have repeatedly confirmed this theoretical insight (e.g., Dawes 1980). For example, consider a hypothetical interest group at least some of whose members are open to engaging in political corruption; such a group may be viewed as a "player" in a Prisoners' Dilemma game. However, the extent to which any single group member is responsible for the actions of the group can never be as transparent as when only a single individual is the "player." Further, any political favors directed by an office holder to some members of the group may not be equally valued by all members of the group, or even recognized by all members of the group; again, this contrasts with the situation when favors are directed at a unitary "player."

3.2) There is yet another inconsistency in that this greater suspicion toward groups is not reflected in the contribution limits that restrict individual donations to candidates versus donations made by political committees (PACs) to candidates. Individuals face lower contribution limits for donations to candidates than do political committees, and individuals face biennial aggregate limits on donations, while PACs do not. Thus, the greater suspicion directed at political groups engaging in independent expenditures described above is not solely attributable to a misguided mistrust of groups; it is the combination of the attributes of “independence” and “group” that apparently somehow triggers a greater degree of suspicion.

3.3) This contradiction goes to the heart of the concept of independent expenditures; how can a group making independent expenditures necessitate more restrictions than an individual making independent expenditures, while at the same time a group making direct contributions to a candidate necessitates fewer restrictions than an individual making direct contributions?

3.4) The differential treatment of groups making independent expenditures also runs counter to the well-established result from game theory and human subject experiments that restrictions on coordination and communication (i.e., independence) reduce the potential for collusion (e.g., Dawes 1980).

Summary of Section 3: It is a well-known and empirically well-supported result from game theory that the potential for collusion decreases with the presence, size and independence of groups. Yet current law as interpreted by the FEC places relatively more restrictions on groups that make independent expenditures than individuals that make independent expenditures.

4. An Economic Perspective on Contribution Limits and Independent Expenditures

4.1) *Buckley v. Valeo* clearly establishes that governments may not limit the ability of groups to engage in independent expenditures; however, basic economic theory indicates that limits on contributions to political groups do restrict the ability of such groups to make independent expenditures.

4.2) First, the “The Equi-Marginal Principle” implies that any binding constraint on fundraising will lower a group’s ability to make independent expenditures. An intuitive explanation follows:

Consider a political group that wishes to raise funds from contributors for the purpose of making independent expenditures. For the moment, assume that there are no contribution limits on such donations. For purpose of illustration, assume that the group may solicit contributions from two pools of donors, small donors and large donors. A purposeful organization that seeks to maximize its independent expenditures will allocate its time and resources so as to equate the fund-raising cost per marginal dollar raised from each

pool of donors. To see this, consider the counterfactual; if the fundraising cost per dollar raised is greater for small donors, then the political group can re-allocate effort toward recruiting large donors and thereby increase its total funds available for independent expenditures. This is a simple illustration of the equi-marginal principle; it is a ubiquitous lesson that also goes by any of several other names in undergraduate intermediate microeconomics textbooks (e.g., Mankiw 2007).

The law of increasing opportunity costs implies that the cost of raising funds from either pool of donors will increase with the amount of money already raised from either pool of donors (i.e., increasing marginal costs of fundraising). Given this, it follows that any binding constraint on raising funds from large donors forces a group to allocate greater effort to raising funds from small donors at a greater marginal cost per dollar raised. This violates the equi-marginal principle, meaning the total funds available for independent expenditures must be lower than they would be if the group was unconstrained.²

4.3) Second, the concept of “Revealed Preference” also implies that any binding constraint on fundraising will restrict a group’s ability to make independent expenditures. An intuitive explanation follows:

Consider again a political group that wishes to raise funds from contributors for the purpose of making independent expenditures. Again, for the moment, assume that there are no contribution limits on such donations and that the group may solicit contributions from two pools of donors, small donors and large donors. If the group is purposeful in its actions, it will choose an allocation of effort that maximizes independent expenditures per fundraising effort. Thus in the unconstrained environment, the mix of donations from small and large contributors represents the groups maximal ability to raise funds for independent expenditures.

Of course, some organizations will be better at raising funds from small donors and some better at raising funds from large donors; but the pattern of contributions for each organization in the unconstrained environment can be assumed to represent the organization’s best effort at maximizing funds available for independent expenditures.

It follows then that any contribution limit that generates a deviation from the pattern of contributions that would be observed in the unconstrained environment must be binding (i.e., an actual impediment) and so must yield a less preferred outcome for the group; that is, lower independent expenditures. Consequently, if we observe that political groups raise money from large contributors when permitted to do so, we can conclude by “revealed preference” that limits on contributions that disallow those large donations do in fact harm the organization and result in less spending on independent expenditures.

² This illustration may be recognized by some readers as a simple application of what is sometimes referred to as the “Le Chatelier Principle” in the mathematical and physical sciences; that is the notion that any binding constraint on an optimization problem must yield a suboptimal result. Graduate microeconomic textbooks sometimes refer to this broader concept as the Le Chatelier-Samuelson principle after the Nobel prize winning economist Paul Samuelson (e.g., see Samuelson 1960 and 1967).

4.4) In the subsequent sections of this report, I present evidence that contribution limits do in fact alter the pattern of contributions to political groups; hence by revealed preference it is apparent that contribution limits have the effect of restricting independent expenditures by groups like SpeechNow.

4.5) These theoretical insights also suggest that limits on contributions will make the activities of political organizations less effective. Consider a group that may engage in a variety of speech and activities; for simplicity, assume that these activities are either express advocacy, or other speech. As above, a purposeful group will allocate its resources among these activities so as to maximize its total impact on the public debate. However, it has already been shown that binding contribution limits restrict the funds available for independent expenditures; this constraint necessarily results in a suboptimal allocation of effort among express advocacy and other speech; in other words, the organization is rendered less effective by the introduction of binding contribution limits.

4.6) The detrimental effect of contribution limits on independent expenditures is compounded when we consider that not only are potential donors limited in the amounts that they may contribute to any one political organization, but individuals are also limited in the total amount of political contributions that they may make to candidates and committees in a given year. This means that limits on contributions to organizations like SpeechNow force such groups to compete for scarce hard money dollars from donors; this constraint also implies that political groups like SpeechNow will receive fewer contributions and hence restricts the ability of such groups to engage in independent expenditures.

4.7) Basic economic theory also suggests that limits on contributions from individuals to groups like SpeechNow also infringe on the associational rights of donors.

Consider that an individual engaged in independent express advocacy may spend unlimited amounts of money not just on political messages, but also on consultants to help develop the message and advise the individual of how and where to deliver the message. But if instead of hiring consultants, the individual joins with these other persons in a voluntary association; it would be illegal for the individual to spend more than \$5,000 on these very same political messages.

Not only does the very concept of associational rights imply that there is some value to voluntary associations, the basic economic concepts of specialization and division of labor do as well. Some individuals have a comparative advantage in funding a cause, some in articulating a message for a cause, and some for developing a strategy for disseminating that message. For this reason, individuals that come together as political groups do so precisely because such a voluntary association makes them more effective in their cause (by revealed preference, again).

It follows then that the effect of a contribution limit on groups like SpeechNow is to punish individuals that associate in groups for the purpose of advocating for or against

political causes, while dissuading some individuals from participating in political groups. Instead such individuals must “go it alone” or even abandon their desire for political expression, when in the absence of contribution limits they would have been more effective as part of a group.

4.8) The final lesson from economic theory is that limits on contributions to groups like SpeechNow are especially pernicious for start-up groups and grassroots organizations. In addition to the detrimental effects of contribution limits on speech and association described above; contribution limits interfere with the role of political patrons and political entrepreneurs that are critical to the quality of democracy in a free society (Hayek 1960).

Consider an individual that desires to give money in support of a particular cause, but is concerned that the group conducting independent expenditures in furtherance of that cause is a relatively new organization. This potential donor may worry about the competence or stability of such an organization (e.g., “Will they collect enough funds to subsequently hire sufficient staff and other resources to be an effective advocate?”). In the presence of such doubts, some donors will instead choose to give their money to other groups that have more established reputations even though those groups may not represent the donors’ most favored cause.

Any start up political organization must deal with such reluctance among potential contributors. However, in an environment of unlimited contributions, a well-known patron may endow the start up organization with substantial seed funding; this sends an unambiguous signal to potential donors that the new organization has the potential to be effective and resolves the uncertainty of potential donors who would otherwise either not contribute or would be forced to “play it safe” and give to other (less favored) groups.

On a related note, consider a world in which many individuals are of a similar mind and several different groups with the same mission are created. This duplication of effort is wasteful, since each group must cover its overhead; economies of scale in political communication mean that one large group can be more effective than many small groups. Every potential contributor knows this, and all potential contributors would prefer to coordinate and focus their giving to one group; but which one?

The ability of a political patron to make a large initial contribution to one group in this environment sends an unambiguous signal to other potential contributors as to which group to focus their giving on. This facilitates the ability of individuals to associate more effectively and to articulate their political opinions more effectively.

4.9) Limits on contributions to groups like SpeechNow prevent political patrons from either seeding new groups or helping to coordinate individuals into joining and supporting more effective political groups. In the subsequent sections I demonstrate that newly formed and highly effective political groups were indeed started by large contributions from political patrons (e.g., America Coming Together and Swift Vets & POWs for Truth).

Summary of Section 4: Basic economic theory indicates that limits on contributions to political groups restrict the amount and effectiveness of political expression by these groups, as well as the amount and effectiveness of political expression by individuals that wish to contribute to such groups.

5. A Political Science Perspective on Contribution Limits and Independent Expenditures

5.1) The scholarly literature on the role of money in politics holds several relevant lessons for this case. First and foremost, there is simply no systematic or scientific evidence that campaign contribution limits reduce political corruption. In fact, the most recent and best evidence from the political science literature suggests that campaign contributions made directly to candidates have very little to no discernable impact on public policy (e.g., Ansolabehere and Snyder 2003), let alone any undue or corrupt influence. Some scholars (e.g., Hall and Wayman 1990) hold that campaign contributions buy access to office holders, but there is also little to no systematic evidence that access influences public policy (Tripathi, et al. 2002 and Milyo 2002).

5.2) Further, nearly all studies of the potential undue influence of money in American politics focus on contributions to candidates; I am unaware of a single scientific study that even attempts to explore the relationship between independent expenditures and public policy, let alone any undue or corrupt influence on policy.

5.3) I am aware of only one scientific study that examines the effects of campaign contribution limits on the appearance of corruption. Primo and Milyo (2006) analyze 50 years of public opinion data and find that campaign contribution limits in candidate elections do not improve citizens' views of government. This is the only systematic study to date that puts to the test the claim that campaign finance regulations reduce the appearance of corruption in American politics.

5.4) Consequently, there is no scientific empirical evidence to support the contention that limits on contributions to groups like SpeechNow have any impact whatsoever on either corruption or the appearance of corruption.

5.5) It is worth noting that limits on contributions to political committees that advocate for or against ballot measures are unconstitutional, because the text of a ballot measure cannot be corrupted. Again, there is no scientific evidence that unlimited contributions to ballot issue committees have any relation to political corruption or the appearance of corruption. In fact, the best and most recent evidence suggests that despite the ability of interested persons and groups to make unlimited contributions for or against ballot measures, there is no evidence that public policy in states with ballot measures is systematically different from what would have existed without ballot measures (e.g., Matsusaka 2004). In other words, unlimited contributions to ballot issue committees do

not appear to exert much influence on public policy, let alone any “undue” influence. Given this, it is harder still to understand how contributions to groups that make independent expenditures can be corrupting.

5.6) In section 3 above, I discussed the relationship between office-holders and interest groups in the context of an indefinitely repeated Prisoners Dilemma game, in which repeated interaction may facilitate mutual cooperation. However, it is a long standing and well known empirical regularity that issue-oriented or ideological PACs do not appear to be engaged in a favor-trading relationship with office-holders; instead, such PACs tend to simply support like-minded candidates (e.g., Snyder 1992). Given this, there is all the more reason to doubt that contributions to independent issue-oriented groups like SpeechNow that engage in independent expenditures have a corrupting influence on candidates.

5.7) In section 4 above, I discussed the lessons from economic theory that suggest that limits on contributions reduce political expenditures. Recent empirical work by Stratmann (2006) confirms that state legislative candidates spend significantly less on their campaigns in states with contribution limits, all else constant. In the next two sections, I present additional evidence that limits on contributions to groups like SpeechNow reduce funds available for independent expenditures.

5.8) Finally, it is usually the case that discussions of the effects of money in American politics ignore any salutary role that political spending may have on the quality of democracy. For example, special interest groups are an important check on the “Tyranny of the Majority” (e.g., Milyo 1999); further, greater campaign spending is associated with both better informed citizens and higher voter turnout (e.g., Coleman and Manna 2000 and Freedman et al. 2004). Consequently, limits on contributions to groups like SpeechNow may have unintended and undesirable consequences.

Summary of Section 5: There is no scientific evidence that contribution limits reduce either corruption or the appearance of corruption. But there is evidence that contribution limits reduce political expenditures; further lower campaign spending is associated with less informed citizens and lower voter turnout.

6. Independent Expenditures in California

6.1) The California Fair Political Practices Commission (FPPC) recently produced a report on independent expenditures by political groups in that state (“Independent expenditures: ...” 2008). This report is relevant in several respects to the present case.

6.2) First, it is fair to characterize the FPPC as a group that favors more stringent regulation of campaign finance; not surprisingly then, the report advocates for increased regulation of groups that engage in independent expenditures in California.

6.3) It is notable that the FPPC report nowhere even attempts to demonstrate that independent expenditures increase either actual political corruption or the appearance of political corruption in California; the main objection to independent expenditures is instead that they are a growing phenomena that makes a “joke” of contribution limits on donations to candidates.

6.4) Most relevant to this case, the FPPC argues that if limits on contributions were applied to groups engaged in independent expenditures, then those groups would have spent dramatically less on independent expenditures. In fact, the FPPC estimates that had contribution limits applied to groups making independent expenditures, then total independent expenditures from the top 25 groups in California would have been lowered by 97.6%! To be clear, the FPPC seems to think that this is a desirable outcome, but the more relevant point is that this government agency confirms the arguments made to this point that limits on contributions to groups like SpeechNow would reduce such groups’ ability to make independent expenditures.

6.5) It is difficult to read the FPPC report and come away with any other conclusion than that the FPPC desires to reduce independent expenditures, without concern for how this might impact individual rights of association and speech, or the overall quality of democracy. In this respect, the FPPC report is similar to the FEC advisory opinion on SpeechNow.

Summary of Section 6: The California Fair Political Practices Commission estimates that if limits on campaign contributions covered political groups making independent expenditures in California, then spending on independent expenditures in that state would have been 97.6% lower.

7. Evidence on the Effects of Limits on Contributions to Political Groups

7.1) As a further demonstration that contribution limits hinder the ability of groups to raise money, I first examine the pattern of individual contributions to the top 10 non-party Federally focused 527 organizations in 2003-2004; these groups are listed in Table 1, at the end of this section.³ Throughout this section, I limit this investigation to the 2004 electoral cycle, since this is the most recent electoral cycle for which detailed contributor data is readily available.⁴ I also limit my attention to groups that report itemized individual contributions (only contributions totaling more than \$200 in a given year must be itemized and reported to the IRS).

³ This listing is from Center for Responsive Politics at: (<http://www.opensecrets.org/527s/527cmtes.php?level=C&cycle=2004>).

⁴ The Center for Public Integrity has collected this data from IRS disclosure forms and made it available in tab delimited text files at <http://projects.publicintegrity.org/527/>; however, the data do not extend beyond 2005.

7.2) This investigation of prominent 527 political organizations is relevant for several reasons. First, these groups raised funds from donors in unlimited amounts; this allows me to observe the “revealed preference” in contributor patterns for political organizations. Second, several of these organizations were associated with active federal PACs; this permits a comparison of the unconstrained fundraising patterns of the 527 group to that of its associated PAC (which is constrained by limits on contributions from individuals). For this reason, I focus on contributions to 527 political groups from individuals. Second, several of the 527 political groups examined are highly prominent and successful groups that were newly formed; this allows me to describe the role of large contributions from patrons in starting those groups. Finally, the activities of these and similar 527 political groups has come under closer scrutiny by federal and state regulators and may now be subject to federal limits on contributions from donors. For example, several of the top 527 political organizations from 2004 (e.g. America Coming Together, Progress for America, Swift Vets, etc.) were fined by the FEC for failing to abide by limits on contributions (consistent with the advisory opinion from the FEC regarding SpeechNow).

7.3) In Table 2, I describe both the number of contributors and the average contribution by year to each of these 527 political groups. It should be noted however that these data are based upon itemized contributions and have not been aggregated by contributor within each year. Therefore the figures in Table 2 understate the size of the average contribution from any one contributor in a given year. Even so, half of these groups received average contributions that are well-above the \$5,000 limit for PACs, including several groups with average contributions of \$100,000 to more than \$500,000.

7.4) To get a better idea of how limits on contributions from individual donors might have impacted these groups in the 2004 election cycle, I report the size distribution of individual contributions to each of these 527 groups.

7.5) I first examine the size distribution of the top 527 organizations that also have associated federal PACs; I compare contributions to both the 527 and its associated PAC side-by-side in Tables 3-6. What is striking about this comparison is that for all four of these 527 organizations, the majority of their funds from individuals came from contributions in amounts greater than \$5,000; further, three of these 527 organizations raised far more money from individuals than their associated (and contribution limited) PACs.⁵

7.6) To illustrate the nature of the constraint on fundraising for PACs, consider what would happen if those contributors who “maxed out” in giving to the America Coming Together PAC had been able to make unlimited contributions. If those 271 maximum contributions exhibited a similar distribution across contribution amounts as do the large contributions to the America Coming Together 527 organization, then the PAC would

⁵ The PAC contributor data are also taken from the Center for Responsive Politics at: <http://www.opensecrets.org/pacs/index.php>.

have raised over \$22 million more dollars than it did in 2003-2004 (or about a 66% increase).

7.7) In 2003-2004, large individual contributions (those over \$5,000) accounted for 98.3% of the funds from individual contributors to the America Coming Together 527 organization. Similar comparisons reveal that large individual contributions made up 79.7% of the contributions to MoveOn.Org, 88.6% of contributions to the New Democrat Network, and 76.5% of contributions to the Club for Growth. Further, between 48% and 82% of the individual contributions to these groups were in amounts of \$100,000 or more. In other words, most of the funds raised by these organizations were in amounts that would have exceeded the annual limit on individual donor contributions to political committees, as well as the biennial aggregate limit on individual donors.

7.8) These data confirm that limits on contributions would greatly reduce the funds available for these organizations, since they choose to raise so much of their funds from large contributors when permitted to do so (i.e., by revealed preference).

7.9) It is also apparent from Tables 3-6 that the PACs associated with these 527 organizations had many contributors that were constrained by the \$5,000 limit on contributions. In fact, 563 persons made contributions of \$5,000 (or more) to these PACs; given the distribution of contributions to the associated 527 organizations it is reasonable to assume that many of these donors would have given larger amounts had they been allowed to do so (i.e., the constraint on contributions to PACs is binding).⁶ This is further evidence that limits on contributions to groups like SpeechNow reduce the funds available for independent expenditures.

7.10) Of course, it is possible that 527 political groups with associated PACs are an unusual sample; for this reason, I also report the size distribution of contributions to top 527 political organizations without PACs in Table 7. Four of these six groups raised more than 99% of their funds from individual contributors in amounts greater than \$5,000; in fact, all but one of these groups raised most of its funds from individual contributors in amounts of \$100,000 or more. Only one group, the College Republican National Committee, raised a majority of its individual contributions in amounts less than \$5,000. Again, these data confirm that limits on contributions to political groups would greatly reduce the funds available to these groups.

7.11) Finally, it is possible that these top 527 political groups are unrepresentative of the size distribution of contributions. On the one hand, this is irrelevant for the issue at hand, which is whether limits on contributions affect fundraising; this has already been demonstrated. However, for the sake of being thorough, I have also selected six more 527 political organizations in a manner that generates an essentially random sample. The size distribution of individual contributions to these groups is reported in Table 8. Once again, the great majority of individual contributions to these six groups are raised in amounts of \$5,000 or more.

⁶ I have also confirmed that many contributors "max out" their contributions to the top 5 non-labor PACs (ranked by contributions to candidates).

7.12) Taking all of the data presented in Tables 2-8 into consideration, this exercise unambiguously demonstrates that limits on contributions to political organizations greatly reduces the ability of those groups to raise funds from individual contributors.

Summary of Section 7: Data on the size distribution of contributions to prominent 527 organizations and PACs confirm that limits on contributions to political groups are (or would be) binding constraints for most groups. Further, in most cases, 80-99% of the individual contributions to 527 groups were in amounts greater than \$5,000, and a majority of these funds were contributed in amounts of \$100,000 or more.

(Tables 1-8 follow)

Table 1: Top 10 Federally Focused 527 Organizations, 2003-2004

	Total Receipts ^a	Associated Federal PAC
America Coming Together	\$79,040,480	Yes
Joint Victory Campaign 2004	71,811,086	No
Media Fund	59,414,183	No
Progress for America	44,929,178	No
Swift Vets & POWs for Truth	17,008,090	No
MoveOn.org Voter Fund	12,956,215	Yes
College Republican National Committee	12,780,126	No
New Democrat Network	12,726,158	Yes
Citizens for a Strong Senate	10,853,730	No
Club for Growth	10,645,976	Yes

^aThese totals do not include transfers (e.g., Joint Victory Campaign (JVC) was a combined fundraising effort by America Coming Together and the Media Fund; transfers from JVC to the parent groups are not counted as receipts here to avoid double counting).

Source: The list of top 527 groups by receipts and associated PACs is from the Center for Responsive Politics

(<http://www.opensecrets.org/527s/527cmtes.php?level=C&cycle=2004>).

Table 2: Timing and Amount of Itemized Contributions to Top 527 Organizations

	2003 Contributions		2004 Contributions	
	Number	Average per contribution	Number	Average per contribution
<i>Panel A: Contributions from all sources</i>				
America Coming Together	23	\$544,130	925	\$72,736
Joint Victory Campaign 2004	25	317,847	323	197,726
Media Fund	-	-	116	530,338
Progress for America	-	-	602	74,633
Swift Vets & POWs for Truth	-	-	18,807	904
MoveOn.org Voter Fund	9,364	513	3,635	2,134
College Republicans National Committee	121,988	37	175,385	42
New Democrat Network	912	2,962	1,565	6,406
Citizens for a Strong Senate	-	-	84	258,422
Club for Growth	1,664	1,800	1,436	3,623
<i>Panel B: Contributions from individuals</i>				
America Coming Together	19	\$499,211	693	\$47,736
Joint Victory Campaign 2004	24	201,924	312	200,250
Media Fund	-	-	37	175,389
Progress for America	-	-	570	74,483
Swift Vets & POWs for Truth	-	-	18,761	895
MoveOn.org Voter Fund	9,364	513	3,633	2,127
College Republicans National Committee ^a	121,988	37	175,395	47
New Democrat Network	799	852	1,440	4,208
Citizens for a Strong Senate	-	-	64	304,335
Club for Growth	1,657	1,798	1,432	3,625

^aBecause of the large number of itemized contributions to the College Republicans National Committee, I have only screened organizational donors from among itemized contributions over \$5,000; all smaller donors to this group are assumed to be individuals.

Source: Contribution data are from the Center for Public Integrity:
<http://projects.publicintegrity.org/527/>.

Table 3: America Coming Together, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	36	1,032	0.0	n.a.	17,788,351	53.3
200-4,999	167	229,806	0.5	35,630	14,228,276	95.9
5,000	99	495,000	1.7	267	1,335,000	99.9
5,001- 10,000	125	1,152,649	4.4	4*	36,589	100
10,001-99,999	198	6,503,610	19.7	0	0	100
100,000 or more	87	34,184,000	100	0	0	100
Total individual contributions	712	42,566,097		>125,290	33,386,667	

*I have not investigated whether amounts contributed above the legal limit were returned to these contributors.

Table 4: MoveOn.org, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<\$200	7,891	641,789	5.1	n.a.	22,966,505	72.8
200-4,999	5,034	1,759,486	19.2	181,012	7,973,895	98.1
5,000	29	145,000	20.3	118	590,000	99.9
5,001- 10,000	12	114,500	21.2	3	22,450	100
10,001-99,999	17	540,999	25.6	0	0	100
100,000 or more	14	9,326,442	100	0	0	100
Total individual contributions	12,997	12,528,216		>296,542	31,552,850	

Table 5: New Democrat Network, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	1,431	81,971	1.2	n.a.	831	0.7
200-4,999	651	458,212	8.0	13	20,745	18.5
5,000	46	230,000	11.4	19	95,000	100
5,001- 10,000	32	315,035	16.1	0	0	100
10,001-99,999	56	1,586,000	39.6	0	0	100
100,000 or more	23	4,069,429	100	0	0	100
Total individual contributions	2,239	6,740,647		>36	116,576	

Table 6: Club for Growth, 2003-2004 (individual contributions only)

Size of individual contribution (\$)	527 Organization			Political Action Committee		
	Number	Sum	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	650	63,392	0.8	n.a.	300,317	16.0
200-4,999	2,183	1,370,258	17.5	1,256	817,750	59.5
5,000	97	485,000	23.5	151	755,000	99.6
5,001- 10,000	80	736,500	32.5	1	7,500	100
10,001-99,999	58	1,665,490	52.9	0	0	100
100,000 or more	21	3,850,000	100	0	0	100
Total individual contributions	3,089	8,170,640		>2,916	1,880,567	

Table 7: To top 527's without associated PACs (individual contributions only)

Size of individual contribution (\$)	Joint Victory Campaign 2004			Media Fund		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	0	0	0.0	0	0	0.0
200-4,999	152	111,600	0.2	10	11,875	0.2
5,000	41	205,000	0.5	3	15,000	0.4
5,001- 10,000	18	163,737	0.7	3	30,000	0.8
10,001-99,999	62	2,216,915	4.0	8	157,500	3.3
100,000 or more	63	64,626,912	100	13	6,275,000	100
Total individual contributions	336	67,324,164		37	6,489,375	
Size of individual contribution (\$)	Progress for America			Swift Vets & POWs for Truth		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	33	2,850	0.0	9,595	897,767	5.3
200-4,999	379	160,130	0.4	9,058	3,922,975	28.7
5,000	22	110,000	0.6	35	175,000	29.7
5,001- 10,000	26	257,000	1.2	30	279,001	31.4
10,001-99,999	43	1,475,500	4.7	21	770,612	36.0
100,000 or more	67	40,450,000	100	22	10,750,001	100
Total individual contributions	570	42,455,480		18,761	16,795,356	
Size of individual contribution (\$)	College Republican National Committee			Citizens for a Strong Senate		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	288,241	8,149,748	68.2	0	0	0.0
200-4,999	9,111	3,437,110	96.9	4	5,600	0.0
5,000	6	30,000	97.2	2	10,000	0.1
5,001- 10,000	10	87,468	97.9	8	80,000	0.5
10,001-99,999	1	75,000	98.5	22	640,000	3.8
100,000 or more	4	700,000	100	28	18,741,859	100
Total individual contributions	297,373	12,479,326		64	19,477,459	

Table 8: Other 527's (individual contributions only)

Size of individual contribution (\$)	Marijuana Policy Project			International Brotherhood of Electrical Workers		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	0	0	0	480	37,435	0.6
200-4,999	0	0	0	826	949,808	16.2
5,000	0	0	0	78	390,000	22.6
5,001- 10,000	0	0	0	115	1,002,757	39.1
10,001-99,999	0	0	0	125	3,151,148	91.0
100,000 or more	2	485,000	100	4	550,000	100
Total individual contributions	2	485,000		1,628	6,081,148	
Size of individual contribution (\$)	League of Conservation Voters			Young Democrats		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	0	0	0.0	53	2,567	0.2
200-4,999	6	13,000	0.2	5	2,160	0.4
5,000	4	20,000	0.5	0	0	0.4
5,001- 10,000	7	64,500	1.5	0	0	0.4
10,001-99,999	26	1,013,000	16.9	1	25,000	2.7
100,000 or more	19	5,442,000	100	5	1,075,000	100
Total individual contributions	62	6,552,500		64	1,104,727	
Size of individual contribution (\$)	Ocean Champions Voter Education Fund			Justice for America		
	Number	Sum (\$)	Cumulative % of dollars	Number	Sum (\$)	Cumulative % of dollars
<200	0	0	0.0	0	0	0.0
200-4,999	7	5,250	1.9	0	0	0.0
5,000	9	45,000	18.3	0	0	0.0
5,001- 10,000	2	19,892	25.5	0	0	0.0
10,001-99,999	6	204,860	100	0	0	0.0
100,000 or more	0	0	100	1	125,000	100
Total individual contributions	24	275,002		1	125,000	

8. Evidence on the Importance of Large Individual Contributors as Patrons of New Political Groups

8.1) Reconsider the data on average contributions presented in Table 2; another striking aspect of these data is that newly formed 527 political organizations tend to raise funds from a few large contributors, compared to more established 527 organizations.

8.2) For example, with the exception of the Swift Vets & POWs for Truth, those 527's with the smallest average contributions (and most numerous contributors) were all either established prior to 2003, or are associated with a well-established organization. In contrast, newer groups, such as America Coming Together and the Joint Victory Fund (both created in the summer of 2003), or the Media Fund, Progress for America, and Citizens for a Strong Senate, all rely on relatively few large contributors. Also, notice that in 2003, contributions to America Coming Together and the Joint Victory Campaign were particularly few and large, compared to contributions to these groups in 2004.

8.3) To further demonstrate the important role of large contributors as patrons, consider the case of America Coming Together. In the first month of this group's existence (and prior to any public announcement in the media as to this group's existence), this group was seeded by large contributions from Peter Lewis (\$995,000), George Soros (\$1,000,000), and two other donors (\$5,000 and \$25,000, respectively). Over the next three weeks, the group received four more contributions: Soros and Lewis contributed another \$2,000,000 each, and two other contributors donated \$45,000 and \$120,000 respectively. This seed funding was widely reported in the media and served the purpose of quickly and effectively assuring potential donors of the credibility and competence of this new organization, while at the same time signaling that among the many competing groups that would be working to support progressive ideals and candidates, this was one that potential contributors should focus on.

8.4) As a final example, consider the remarkable rise of Swift Vets & POWs for Truth in 2004; this group was founded in the second quarter of 2004 with \$158,750 from a handful of contributions. Nearly all of this seed funding (\$150,000) came from three donors, including Bob Perry (\$100,000) and John O'Neal (\$25,000); the remainder was from a smattering of contributions ranging from \$250 to \$2,000. These small contributors included three retirees and a homemaker; however, within a few months, this group had managed to raise upwards of 17 million dollars from more than 18,000 contributors.

8.5) It is difficult to imagine either America Coming Together or Swift Vets becoming such major political players in the 2004 elections without the ability to raise large start up funds from wealthy patrons. Of course, many Americans either love or hate these two groups, but one would be hard-pressed to describe the motives of these organizations as anything but ideological and issue-oriented. The supporters of these organizations were passionate about their opinions; these individuals were not motivated by venal purposes, but instead by love for their country. Yet, given the recent record fines levied by the FEC

against these groups, it is just such laudable participation that is taken up in the maw of federal campaign finance regulation.

8.6) If political entrepreneurs and patrons are prevented from seeding new political groups, it is not just those individuals that are harmed. It is also small donors and volunteers to start-up and grass-roots organizations that have their rights to free speech and association diminished. Without large initial contributions, new political organizations, especially those that are issue-oriented and do not benefit from an association with some pre-existing trade association or labor union, are less effective participants in the public debate.

Summary of Section 8: Case studies of two prominent 527 groups confirm that limits on contributions to political groups are likely to be particularly harmful to new and independent political organizations.

Conclusion

My analysis applies several lessons from well-established theoretical and empirical results in the relevant social science literature; in addition I examine recent data on the patterns of individual contributions to political groups. From this, I conclude without reservation that in general, limits on contributions to political groups like SpeechNow constrain the ability of such groups to make independent expenditures.

Not only this, but contribution limits reduce the amount and effectiveness of political speech, the effectiveness of political organizations, and are particularly detrimental to the formation of new political groups. All of this diminishes the associational and speech rights of not only citizens that wish to make large contributions, but also of citizens of lesser means who are denied the opportunity to join together with political entrepreneurs, patrons and highly effective political organizations of their choosing.

Perhaps the most disturbing aspect of these findings is that these unintended consequences of contribution limits are the product of an irrational application of campaign finance regulations; limits on contributions to independent and issue-oriented groups like SpeechNow that exist only to make independent expenditures are logically inconsistent with other key features of campaign finance law. Finally, there is no evidence that such limits on contributions to groups like SpeechNow reduce either corruption or the appearance of corruption.

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- (12) "Re-Examining the Ecological Association Between Income Inequality and Health," 2001 (with Jennifer Mellor); *Journal of Health Politics, Policy and Law*, 26(3): 485-518 [lead article; also, most cited article in *JHPPL* as of 8/1/06].
- (11) "What Do Candidates Maximize (and Why Should Anyone Care)?" 2001; *Public Choice*, 109(1/2): 119-139.
- (10) "A Problem with Euclidean Preferences in Spatial Models of Politics," 2000; *Economics Letters*, 66(2): 179-182.
- (9) "Logical Deficiencies of Spatial Models: A Constructive Critique," 2000; *Public Choice*, 105(3/4): 273-289.
- (8) "Gender Bias and Selection Bias in House Elections," 2000 (with Samantha Schosberg); *Public Choice*, 105(1/2): 41-59.
- (7) "Corporate PAC Campaign Contributions in Perspective," 2000 (with Tim Groseclose and David Primo); *Business and Politics*, 2(1): 75-88.
- (6) "Is Income Inequality Bad for Your Health," 2000 (with Jennifer Mellor); *Critical Review*, 13(3/4): 359-372.
- (5) "The Effects of Price Advertising on Prices: Evidence from 44 Liquormart," 1999 (with Joel Waldfogel); *American Economic Review*, 89(5): 1081-1096. Reprinted in *The Economics of Advertising*. Edited by Kyle Bagwell. Edward Elgar Publishing: London.
- (4) "The Electoral Effects of Incumbent Wealth," 1999 (with Tim Groseclose); *The Journal of Law and Economics*, 42(2): 699-722.
- (3) "The Political Economics of Campaign Finance," 1999; *The Independent Review*, 3(4): 537-548.
- (2) "The Economics of Political Campaign Finance: FECA and the Puzzle of the Not Very Greedy Grandfathers," 1997; *Public Choice*, 93: 245-270.

- (1) “Electoral and Financial Effects of Changes in Committee Power: Gramm-Rudman-Hollings, the Tax Reform Act of 1986, and the Money Committees in the House,” 1997; *The Journal of Law and Economics*, 40(1): 93-112.

CONTRIBUTIONS TO EDITED VOLUMES:

- (4) “Campaign Finance,” 2007; in the *Concise Encyclopedia of Economics*, 2nd Edition. D. Henderson, Editor. Liberty Press (Indianapolis, IN).
- (3) “State Campaign Finance Reforms, Competitiveness and Party Advantage in Gubernatorial Elections,” 2006 (with Tim Groseclose and David Primo); in *The Marketplace of Democracy*. John Samples, Editor. (Cato-Brookings: Washington, DC).
- (2) “Do Liberals Play Nice? The Effects of Political Party and Ideology in Public Goods and Trust Games,” 2005 (with Lisa Anderson and Jennifer Mellor); in *Advances in Applied Microeconomics: Experimental and Behavioral Economics*. John Morgan, Editor. (JAI Press: Stamford, Connecticut).
- (1) “Reform without Reason: the Scientific Method and Campaign Finance,” 2005 (with David Primo); in *Taxpayer Financing of Political Campaigns*. John Samples, Ed. Cato Institute: Washington, DC.

COMMENTS, COMMUNICATION AND REVIEWS:

- (6) “On the Use of Age-Adjusted Mortality Rates in Studies of Income Inequality and Population Health,” 2002 (with Jennifer Mellor); *Journal of Health Politics, Policy and Law*, 27(2): 293-296.
- (5) “Bribes and Fruit Baskets: What Does the Link Between PAC Contributions and Lobbying Mean?” 2002; *Business and Politics*, 4(2): 157-160.
- (4) “Exploring the Relationships Between Income Inequality, Socioeconomic Status, and Health: A Self-Guided Tour?,” 2002 with Jennifer Mellor; *International Journal of Epidemiology*, 31(3):685-687
- (3) “Income Distribution, Socioeconomic Status and Self-Rated Health in the United States,” 1999; *British Medical Journal*, 318: 1417.
- (2) Review of Brown, Powell and Wilcox, *Serious Money: Fundraising and Contributing in Presidential Nomination Campaigns*, 1997. *Political Science Quarterly*, 112(2): 321.
- (1) Review of Alesina and Rosenthal, *Partisan Politics, Divided Government, and the Economy*, 1996. *Journal of Politics*, 58:559-561.

POLICY REPORTS:

- (8) "The Effects of Photographic Identification on Voter Turnout in Indiana: A County-Level Analysis," 2007. Institute for Public Policy, Truman School of Public Affairs (University of Missouri: Columbia, MO).
- (7) "Campaign-Finance Red Tape: Strangling Free Speech and Political Debate," 2007. Institute for Justice (Washington, D.C.).
- (6) "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," 2007. Federal Communication Commission (Washington, D.C.).
- (5) "Public Financing of Campaigns," 2006 (with David Primo). Federalist Society for Law and Public Policy Studies (Washington, DC).
- (4) "The Effects of Traditional Versus Web-Assisted Instruction on Learning and Student Satisfaction," 2006 (with Pamela Benoit and William Benoit). University of Missouri and the Andrew Mellon Foundation.
- (3) "Social Capital and Support for Public Funding of the Arts," 2004; Cultural Policy Center, University of Chicago.
- (2) "What Does Academic Research Tell Us About the Role of Money in American Politics?" 2002; Federalist Society for Law and Public Policy Studies (Washington, DC).
- (1) "The Electoral Effects of Campaign Spending in House Elections," 1998; Citizens' Research Foundation: Los Angeles.

RESEARCH GRANTS

Institute for Justice, 2007; "Measuring Campaign Finance Disclosure Costs," (PI; \$30,000)

University of Missouri Research Board, 2005-2006; "The Effects of Social Capital on the Well-Being of Young Adults" (PI; \$20,000)

Robert Wood Johnson, Substance Abuse Policy Research Program, 2004-2005; "Estimating the Effects of Political Contributions on State Alcohol and Tobacco Policies," with Myoung Lee (Co-PI; \$17,500)

Robert Wood Johnson, Substance Abuse Policy Research Program, 2004-2005; "The Effects of State Campaign Finance Reforms on Tax Policy toward Alcohol and Tobacco," with Jeff Kubik and John Moran (PI; \$40,000)

National Science Foundation, 2003-2005; "A Theoretical and Empirical Investigation of the Returns to Legislative Oversight," with Sean Gailmard. (PI; \$181,525)

Cultural Policy Center, University of Chicago, 2003; "Social Capital and Support for the Arts" (PI; \$5,000)

Tufts University, Faculty Research Fund, 1998-1999; "Electoral Effects of Incumbent Wealth" (PI; \$1,000)

CONSULTING PROJECTS

I have conducted statistical evaluation studies on the following topics: i) cross-ownership of broadcast television stations and local newspapers (for the Federal Communication Commission); ii) medical case management workers in a migrant farming community (for the Legal Aid of Western Missouri), Internet assisted learning (for the University of Missouri), the cost of undergraduate instruction (for the University of Missouri). I have also advised corporate clients (through the Gerson Lehrman Group) on the potential economic consequences of changes in state alcohol regulations.

I have served as an expert witness in several election-related disputes, providing statistical analysis to state courts in Colorado, Missouri, New Hampshire, and New Jersey, as well as to two US Congressional committees.

MEDIA APPEARANCES

INTERVIEWS AND CITATIONS:

I have been interviewed or cited in connection with my scholarly research and as a policy expert more than 125 times in the major electronic and print media. Most recent electronic media appearances include interview segments on FOX News and MSNBC, and citations to my research on CNN, CSPAN, FOX News, National Public Radio and the *Drudge Report*. Major newspaper and news magazine citations include the *New York Times*, *Washington Post*, *USA Today*, *Los Angeles Times*, *Chicago Tribune*, *Boston Globe*, *Dallas Morning News*, *San Francisco Chronicle*, *San Jose Mercury News*, *St. Louis Post Dispatch*, *Detroit News*, *Rocky Mountain News*, the *Investors' Business Daily*, *Business Week*, *National Review*, the *Weekly Standard*, *Roll Call*, and *Congressional Quarterly Weekly Report*.

OPINION ESSAYS:

- (12) "The Votes Are In," *Columbia Tribune*, January 20, 2008.
- (11) "Barring Citizens from Politics," *New York Post*, November 6, 2007.
- (10) "California Focus: False Promise of Public Financing," with John Samples; *Orange County Register*, October 20, 2006.
- (9) "Promises about Prop. 89 All a Dream," with John Samples; *San Jose Mercury News*, October 18, 2006.
- (8) "The High Court, Hoodwinked on Finance Data," with David Primo; *Roll Call*, June 15, 2006.
- (7) "Contribution Limits Silence Missouri Voters," with John Samples; *Columbia Daily Tribune*, June 13, 2006.
- (6) "Clean Elections Offer False Hope," *Connecticut Post*, February 20, 2005 (p. B2).
- (5) "The Political Process Works," *USA Today*, October 2, 2002 (p. 19A).
- (4) "Not Enough of a Good Thing," *Chicago Sun Times*, January 26, 2001 (p. 39).
- (3) "Reform the Debate," *IntellectualCapital.Com*, September 9-16, 1999.
- (2) "Money Walks: Why Campaign Contributions Aren't as Corrupting as You Think," (1997); *Reason*, 29(3): 47-49. Reprinted in *Stand! American Government* (2000). Edited by Denise Scheberle. Coursewise Publishing, Inc.: Madison, WI.
- (1) "Lost Shepard," (1996) with Tim Groseclose; *The American Spectator*, 29(4): 55.

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 158

No. 02-1674

In The
Supreme Court of the United States

MITCH McCONNELL, SENATOR, et al.,

Appellants,

v.

FEDERAL ELECTION COMMISSION, et al.,

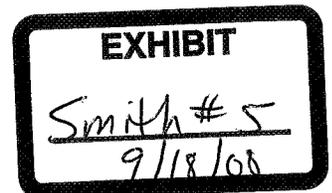
Appellees.

**On Appeal From The United States District Court
For The District Of Columbia**

**BRIEF OF RODNEY A. SMITH AS
AMICUS CURIAE IN SUPPORT OF APPELLANTS**

CLARK BENSEN
3112 Cave Court
Lake Ridge, Virginia 22192
(703) 690-4066
(Counsel of Record)

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831



- The average personal money spent by winners over losers was \$1,929,725 to \$460,441, or a 4.2 to 1 advantage.

National Party Committees

Chart M shows the total "Hard" and "Soft" money raised by the three Republican and three Democrat national party committees combined for the 2001-02 Election Cycle. See Appendix Chart M. "Soft money" represented approximately 43% of the net money raised by Republicans and 57% of the net money raised by Democrats. The passage of the Bipartisan Campaign Reform Act has stripped away all this "soft" money (roughly \$250 million) from each political party.

The Fundraising Matrix (see Appendix Chart N) shows within various giving ranges the approximate number of new donors each party would have to find in order to make up for the loss in "soft" dollars mandated by law. When these numbers are compared to the figures shown in Chart A: Donor Matrix, it becomes crystal clear that it is a practical impossibility for either party to recruit enough new donors to make up for the loss of "soft" dollars. Both political parties would literally have to double their existing donor bases. Absent the occurrence of some cataclysmic event, doubling the size of either party's donor base is simply impossible.

In fact, the heightened level of fundraising competition that is certain to occur within each party as a result of the loss of "soft dollar" revenue is more likely to shrink rather than expand either party's existing donor base. Why? Because the increased intensity in inter-party competition for dollars within both political parties is more

likely to turn-off proven donors faster than new donors can be recruited. In other words, over the long run, in an attempt to recover the lost “soft dollar” revenue, it is almost certain that the internal fight for dollars will result in “smothering by over solicitation” a large number of the “geese” that have traditionally supplied the “golden eggs,” supporting the activities of both parties.

As already noted, the fundraising market for both political parties is simply too small and the new restrictions too severe for all the candidates and party committees to prosper under the new law. Over time, both parties are likely to shrink in size and influence – and shrink significantly. Many reformists have worried that some loophole might be discovered that would undermine their handiwork. To the contrary, the wolves of “reform” did their work well. There are no escape hatches or loopholes. And contrary to popular belief, this is not good news for America.

Part 3

The charts in this section graphically demonstrate that the restrictions imposed by Congress have been counterproductive, empowering the rich and reducing the competitiveness of the political arena. These unintended consequences of *Buckley v. Valeo* are thus contrary to the spirit of the Preamble of the Constitution which begins with the words, “We the people,” meaning, “we the sovereigns” not “we the subjects.” To the Framers, sovereignty meant the right of citizens to govern themselves free from the interference of some oppressive central authority. As stated by James Monroe, “*The introduction, like a preamble to a law, is the Key of the Constitution. Whenever*

Chart A: Donor Matrix

Total Number of Political Donors Nationwide
1999 - 2000 Election Cycle

Category	Giving Range	Total Number of Donors	Average Per Congressional District		
			435 Districts	600,000 Population	350,000 Households
A	\$1,000 +	339,526	780	0.1%	0.2%
B	\$200 - \$999	439,214	1,010	0.2%	0.3%
Subtotal	\$200+	778,740	1,790	0.3%	0.5%
C	Under \$200	2.7 Million	6,200	1%	2%
TOTAL	All	3.5 Million ^{1,2}	8,000	1.3%	2.5%

Source: Federal Election Commission

Based on dividing estimated average contribution into gross receipts

1a

¹ In a 2000 post-election survey conducted by McLaughlin and Associates, the base Republican vote for the 2000 Presidential Election was 38%, or roughly 40 million. The base Democrat vote for the 2000 Presidential Election was 41%, or roughly 43 million. This survey also identified known Republican donors to be approximately 5% of the Republican base (or about 2 million) and the known Democratic donors to be approximately 3% of the Democrat base (or about 1.5 million for a combined Republican/Democrat Donor base of approximately 3.5 million.)

² This number excludes people participating in the voluntary presidential check-off box on individual tax returns administered by the Internal Revenue Service.

**Chart N: Fundraising Matrix
 New Additional Donor Base Needed
 Contributions Needed to Raise \$250 Million
 Republican or Democrat National Party Committees**

Example	Giving Range	Average Contribution	Number of Contributors	Gross Dollars
1	\$10,000	\$15,000	16,700	\$250 Million
2	\$1,000 – \$9,999	\$2,500	100,000	\$250 Million
3	\$200 – \$999	\$500	500,000	\$250 Million
4	Under \$200	\$100	2.5 Million	\$250 Million

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FEDERAL ELECTION COMMISSION)	FEC Exhibits
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)	
Defendant.)	
_____)	

FEC EXHIBIT 159

washingtonpost.com

Kerry Capitalizing on Party Resources to Fill Coffers

By Jim VandeHei and Thomas B. Edsall
Washington Post Staff Writers
Friday, March 19, 2004; Page A06

Sen. John F. Kerry is setting the stage to raise as much as \$100 million for his presidential campaign by seizing control of his party's fundraising machinery, winning the support of top money people for vanquished rivals, and attracting thousands of new small donors via the Internet, according to officials inside and outside his campaign.

Advertisement

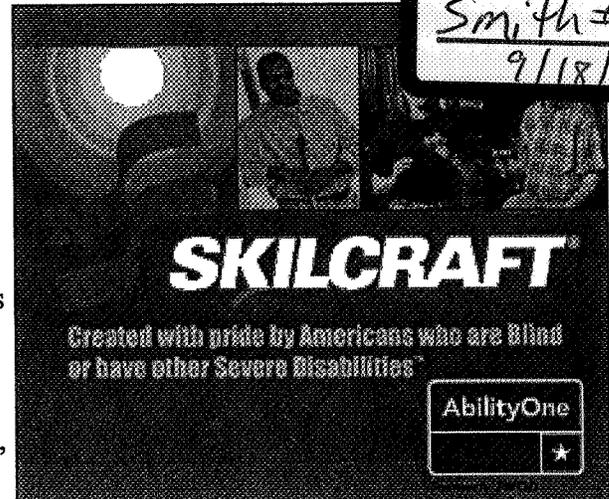


EXHIBIT
Smith #6
9/18/08

In the two months since the Jan. 19 Iowa caucuses, the Massachusetts Democrat's campaign has pulled in more than \$26 million, including \$18 million over the Internet, aides said. Just two weeks ago, the campaign had announced a goal of raising \$80 million -- and was greeted with initial skepticism among some party fundraisers.

Kerry, who appears to be capitalizing more on animosity toward President Bush than on excitement for his own candidacy, is positioning himself for a big financial lift heading into his party's summer convention, the officials said.

Although Bush is virtually certain to raise more money than Kerry -- and perhaps double -- Democrats are no longer concerned that the president will spend the Democratic nominee into the ground even before most voters tune into the race months from now. Some Republicans privately express concern that Bush's money advantage will not prove invincible, as they had once believed.

Kerry's fundraising success is crucial to his campaign: He faces a Bush campaign that has already raised more than \$150 million and has \$104 million in the bank.

"It's like a funnel coming to a head to support John Kerry," said Terry Lierman, a Montgomery County Democrat and Kerry fundraiser. "I have no doubt in my mind John Kerry can raise between \$80 million and \$100 million. In my career I have never seen people join together this fast and furious."

Kerry's fundraising operation reflects two political trends:

First, Democrats are more united than they have been in decades, and the base of Democratic donors, especially new and smaller ones, appears deeper than most party officials originally projected.

"George Bush promised that he would be a uniter and not a divider," said Alan D. Solomont of Massachusetts, one of Kerry's top money men. "The one group he has united are Democrats."

Second, Democrats are copying Bush's successful model of creating scorecards for their top fundraisers, and have added special Internet tracking systems so that the people who raise large amounts get credit from the campaign and their peers.

Democratic strategists had been warning for more than two years that a nominee without substantial cash resources at this stage could expect to be defined harshly in television commercials by the Bush

campaign just when voters are beginning to develop an impression of the Democratic candidate.

The Democrats' success indicates that their party and presidential candidate will not be swamped by a tidal wave of Republican cash, as many Democrats feared after passage of the McCain-Feingold campaign finance law.

"We are going to set a record in the first quarter of this year," said Louis Susman, Kerry's national finance chairman.

The \$26 million Kerry has raised since the Iowa caucuses includes the take from one record-setting day: March 4, two days after his Super Tuesday victories, when he raised \$2.6 million over the Internet, tripling the one-day record of \$800,000 set by former Vermont governor Howard Dean.

In the entire last quarter of 2003, Kerry raised \$2.4 million.

With a 20-city fundraising tour beginning at the end of next week designed to raise large contributions -- \$1,000 to \$2,000 -- the figures suggest that Kerry's goal of raising \$80 million through the summer is well within reach.

Democratic National Committee Chairman Terence R. McAuliffe said the party will have an unprecedented \$25 million in the bank at the end of this month, with no debt. In addition, McAuliffe said the party's annual gala next Thursday has already raised \$10.3 million, more than doubling the record set in 2000 of \$4.6 million.

Bill Clinton is planning a springtime announcement to help raise money for Kerry and several outside groups, according to a source close to the former president. Meantime, Clinton is one of several prominent Democrats who signed an e-mail appeal to raise \$10 million in the 10 days leading up to next week's dinner, which he will attend.

Peter Maroney, who moved from national finance director for the Kerry campaign to national finance co-chair for the DNC, said he will run the Kerry Victory 2004 Committee. The first \$2,000 of any contribution will go to Kerry, and the rest -- as much as \$25,000 -- will go to the DNC.

Lierman has set up a meeting for next week between Kerry and members of the "Dean's List," a group of 100 men and women who each raised \$50,000 or more for the former Democratic candidate.

Last week, Kerry met with about 100 of Sen. John Edwards's fundraisers, many of them trial lawyers who had collected thousands of \$2,000 donations. "Everybody in that room is very committed to taking George Bush out of office," said Frederick M. Baron, Edwards's finance chairman.

Some trial lawyers in the Edwards camp are holding back support for Kerry to pressure him to pick Edwards (N.C.) as a running mate. Baron played down the effort, saying it is limited to a few lawyers, who, he said, will soon fully support Kerry.

One Democratic concern has been the threat of defections among Jewish donors. Bush, who has been a supporter of Israel, has sought to win over many Jewish Democrats.

Steve Grossman, Dean's former campaign chairman who now backs Kerry, said 16 top fundraisers, most of them Jewish, held a conference call this week to finalize plans to raise several million dollars for Kerry. Many of those fundraisers, who call themselves the "Dinner Group," are Pennsylvanians and are

lobbying Kerry to tap Gov. Edward G. Rendell, who is Jewish, for vice president.

Josh Ross, director of Kerry Internet strategy, said the campaign has a list of 500,000 people to solicit for money, all of whom signaled their interest in Kerry through the Internet. Ross noted that Internet fundraising is more cost-effective than direct mail or major-donor dinner and cocktail events, costing only about 3 cents on the dollar.

The Kerry campaign and the DNC allow fundraisers to have their own donor pages on the Internet contribution systems. That way a fundraiser who persuades someone to give money over the Internet will get credit for that contribution.

Also, a system of titles for major donors has been set up, similar to Bush's Pioneers and Rangers, who have raised \$100,000 and \$200,000, respectively.

The Kerry campaign selected neutral titles to avoid too direct comparisons to Bush. Those who raise \$25,000 are members of the national finance committee, those who raise \$50,000 are co-chairs and those who come up with \$100,000 are vice chairs.

The DNC has more colorful titles.

Under a banner of "Bring Down King George," the program ranges from those who raise \$1,000 to become members of the "Minuteman Corps" and get "a limited edition ePatriot lapel pin," to those who raise \$10,000 to join "Paul Revere's Midnight Riders" and "earn a phone briefing with DNC Chairman Terry McAuliffe" -- all the way to \$100,000 fundraisers who become DNC Patriots and qualify for a host of benefits at the Democratic National Convention in Boston.

Kerry and DNC fundraisers are conducting a joint effort to persuade contributors to all the losing presidential candidates to back Kerry. Overall, the Democratic field, excluding Kerry, raised \$118 million through Jan. 31. All those donors can legally give to Kerry.

In addition, Kerry and the DNC are pressing wealthy donors to the campaigns, who are allowed to give a maximum of \$2,000 to Kerry, to also give the maximum of \$25,000 to the DNC.

Kerry's success on the money front was reflected earlier this week. Lanny Davis, Clinton's former counsel, invited New York Attorney General Eliot L. Spitzer, a prospective gubernatorial candidate, to be the speaker for a \$500-a-head fundraiser at the St. Regis Hotel.

Davis said nearly 200 Washington lobbyists and lawyers showed up, four times as many as expected.

"In all of my years in Democratic politics, I have never seen an easier fundraising process," Davis said.

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**UNITED STATES DISTRICT COURT
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SPEECHNOW.ORG, ET AL.,)	
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Plaintiffs,)	
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v.)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 160

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.)	
_____)	

**DEFENDANT FEDERAL ELECTION COMMISSION'S
RESPONSE TO PLAINTIFFS' FIRST SET OF DISCOVERY REQUESTS**

Pursuant to Rules 33, 34, and 36 of the Federal Rules of Civil Procedure, defendant Federal Election Commission (“FEC” or “Commission”) hereby provides the following Objections and Responses to the Interrogatories, Request for Production of Documents, and Requests for Admissions by Plaintiffs served on July 22, 2008. Pursuant to agreement of the parties, this response is due on August 25, 2008.

GENERAL OBJECTIONS

1. The Commission objects to plaintiffs’ Interrogatories, Document Requests, and Requests for Admissions to the extent that they are unreasonably broad, unduly burdensome, oppressive, unreasonably cumulative, not limited in scope, or otherwise beyond the permissible scope of discovery.

2. The Commission objects to plaintiffs’ Interrogatories, Document Requests, and Requests for Admissions to the extent that they call for the disclosure of information that contains privileged attorney-client communications, constitutes attorney work product, discloses the mental impressions, conclusions, opinions 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.

3. The Commission objects to plaintiffs' Interrogatories, Document Requests, and Requests for Admissions to the extent that they request production of information protected from disclosure by the deliberative process executive privilege, see In re Sealed Case, 121 F.3d 729, 736-38 (D.C. Cir. 1997); the law enforcement investigative privilege, see Black v. Sheraton Corp. of America, 564 F.2d 531, 541 (D.C. Cir. 1977); or governmental information that is otherwise confidential under law.

4. The Commission objects to plaintiffs' Interrogatories, Document Requests, and Requests for Admissions to the extent that they request production of information from open enforcement matters protected from disclosure under the Federal Election Campaign Act ("FECA"). 2 U.S.C. 437g(a)(12). The Commission also objects to plaintiffs' Interrogatories, Document Requests, and Requests for Admissions to the extent that they request production of information from closed enforcement matters regarding First Amendment protected activities. See AFL-CIO v. FEC, 333 F.3d 168 (D.C. Cir. 2003).

5. Any response to an Interrogatory or Document Request that inadvertently discloses privileged or otherwise protected information is not intended to and shall not be deemed or construed to be a waiver of any privilege or right of the Commission. Insofar as a response to an Interrogatory or the production of any information by the Commission may be deemed to be a waiver of any privilege or right, such waiver shall be deemed to be a waiver limited to that particular response only.

6. The Commission objects to the plaintiffs' Interrogatories, Document Requests, or Requests for Admissions to the extent they seek information that is not relevant to the subject

matter of this action, not relevant to the parties' claims or defenses, or not reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(B)(1).

7. The Commission reserves any and all objections as to competency, relevance, materiality, privilege, admissibility, or any other grounds on which an objection may be made. The Commission reserves the right to object to further discovery into the subject matter of these Interrogatories, Document Requests, or Requests for Admissions.

8. All of the Commission's responses to these Interrogatories, Document Requests, and Requests for Admissions are based upon information currently and reasonably available. Some are based on records maintained by the Commission in the ordinary course of its operations that represent the best information reasonably available to the Commission at this time. The Commission reserves the right to supplement and amend its responses and objections pursuant to Fed. R. Civ. P. 26(e).

9. The Commission also objects to plaintiffs' Interrogatories, Document Requests, and Requests for Admission to the extent they are not limited by date or time period. The Commission notes that it has been in existence for more than thirty years. Where a time period is not specified, the Commission interprets plaintiffs' discovery requests to seek documents or information as of the date of the Commission's response.

10. To the extent the Interrogatories, Document Requests, and Requests for Admission request MUR-related information, the Commission objects that the requests are not only overly burdensome, but that the information requested, including but not limited to the names of MUR respondents and final dispositions, is readily obtainable from publicly available documents and sources, including both the Commission's web site and public records room. Such publicly available documents include, but are not limited to, documents in the

Commission's public records office, such as Commission publications, regulatory history, closed investigatory files, and closed litigation files. Accordingly, the burden of deriving or ascertaining the answers the plaintiffs seek from publicly available documents and sources is substantially the same for the plaintiffs as it is for the Commission. See Fed. R. Civ. P. 33(d). Notwithstanding these objections, the Commission responds as follows in order to provide sufficient detail so that the plaintiffs can locate, identify, examine, or audit the documents and records from which they may derive the answers they seek:

Many of the non-privileged documents from closed MURs are available on Commission's publicly available Enforcement Query System (EQS), which allows individuals to search all documents in the Commission's public records from MURs closed in 1999 or later by keyword, case number, case name, respondent, respondent's counsel, election year, final Commission disposition, statutory citation, regulatory citation, complainant, civil penalty amount, document type, and the date a case was opened or closed. EQS is available both in the Commission's Public Records Room and on the internet at <http://eqs.sdrdc.com/eqs/searcheqs>.

Documents from these and prior MURs also are available on microfilm in the Commission's Public Records Office on the Commission's first floor at 999 E Street, NW, Washington DC 20463. Indices to these closed MUR files are arranged by MUR in the Public Records Office and indicate therein the dates a MUR was opened and closed, the microfilm location of the MUR related documents, the complainants, the respondents, and a list of citations to the United States Code and federal regulations that correspond to the Commission's findings in each MUR.

Other information regarding the Commission's application of campaign finance law to committees making independent expenditure – apart from enforcement related documents – is

also available to the plaintiffs and the general public both on the Commission's web site and in the Commission's public records room. This includes the Commission's regulations, including 11 C.F.R. § 104.4, as well as the instructions for FEC Form 3X, Schedule E, utilized by political committees other than authorized committees to report independent expenditures, and the Campaign Guide for Nonconnected Committees (May 2008 and August 2008 Supplement), and the Commission's brochure on Coordinated Communications and Independent Expenditures (updated October 2007) are all available at the Commission and on-line. *See, e.g.*

<http://www.fec.gov/info/publications.shtml>; http://www.fec.gov/pages/brochures/ie_brochure.pdf;
<http://www.fec.gov/pdf/forms/fecfrm3xi.pdf>.

Similarly, the statements issued by FEC Commissioner Ellen Weintraub and then-Commissioner David Mason in response to SpeechNow.org's advisory opinion request, which were previously provided to SpeechNow.org, are available at the Commission and on the web site. Furthermore, prior FEC advisory opinions and policy statements are also publicly available.

Subject to and without waiving any of the foregoing General Objections, which are hereby incorporated into each response given below, the Commission responds to plaintiffs' Interrogatories, Document Requests, and Requests for Admissions as follows:

REQUESTS FOR PRODUCTION

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.

Response: The Commission OBJECTS on the grounds that this request is overbroad and seeks documents that are not relevant to the subject matter of this litigation. The request is also vague to the extent that SpeechNow.org's members, organizers and potential contributors are not

fully disclosed or identified, or otherwise currently known to the Commission. The Commission further OBJECTS on the grounds that searching for responsive documents throughout the entire agency, locating and producing such documents would be unduly burdensome, noting that the burden far outweighs the probative value of such documents. Indeed, this request would include any document in the files accumulated by the Commission over the past three decades mentioning the named individuals or members of the categories listed, including routine campaign finance disclosure reports filed with the Commission, no matter how tangential the reference. Moreover, any documents maintained in the Commission's files of open enforcement matters where such persons are referenced also would be privileged or confidential by statute. 2 U.S.C. § 437g(a)(12). Some documents in the Commission's files from closed enforcement matters also remain privileged or confidential. Plaintiffs and defendant have equal access to many of the non-privileged documents from closed enforcement matters, which are available on the Commission's web site. Documents created by or for counsel for the Commission in connection with this litigation are protected by the attorney work-product privilege.

Subject to and without waiving these or the Commission's general objections, the Commission identifies the following publicly-available documents, which the Commission may rely on in this litigation.

Susan Crabtree, *New 527 Group Takes Aim at Campaign Contribution Limits*, The Hill, Dec. 3, 2007. <http://thehill.com/leading-the-news/new-527-group-takes-aim-at-campaign-contribution-limits-2007-12-03.html>

Jeanne Cummings, *Conservatives Plot on Campaign Finance*, Politico, Aug. 11, 2008, <http://dyn.politico.com/printstory.cfm?uuid=B3BE1B03-18FE-70B2-A8A6309C143867E9>

The Commission also identified the following additional publicly-available web pages:

<http://www.cato.org/people/edward-crane/>; <http://www.hjta.org/aboutus>;

<http://www.bizjournals.com/milwaukee/stories/1999/01/04/focus2.html>;

<http://www.cato.org/people/directors.html>; <http://www.wisdc.org/pr032306.php>,
<http://www.wisdc.org/pr082504.php>;
http://www.ij.org/first_amendment/speech_now/background.html;
<http://online.wsj.com/article/SB120494323497621511.html>;
<http://washingtontimes.com/apps/pbcs.dll/article?AID=/20080309/NATION/398660662/1002>;
<http://www.newsweek.com/id/117839/page/1>;
<http://online.wsj.com/article/SB120372754692987363-search.html?KEYWORDS=speak+easier&COLLECTION=wsjie/6month>;
<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021502963.html>;
<http://www.latimes.com/news/printedition/opinion/la-ed-speechnow15feb15,1,6451632.story?ctrack=1&cset=true>;
<http://www2.nysun.com/editorials/free-speechnow/>; <http://www2.nysun.com/national/new-group-seeks-changes-for-political-fund-raising>.

In addition, the Commission identifies the audio and video of the Policy Forum held on March 5, 2008, available at <http://www.cato.org/event.php?eventid=4498>.

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.

Response: The Commission OBJECTS on burdensomeness and privilege grounds. As noted *supra*, documents and information regarding policy interpretations and decisions in advisory opinions, closed administrative enforcement matters and administrative fine cases are available in the Commission's public records room and on the Commission's web site. These records include closed enforcement matters which involved administrative complaints filed with the Commission about committees making independent expenditures. As already discussed, the

Commission's closed enforcement files are indexed, and bibliographical information regarding those files may be searched by plaintiffs. Any contemplated or pending enforcement actions remain privileged and confidential by statute.

Subject to and without waiving any of these or the Commission's general objections, the Commission notes that the Commission's General Counsel prepared a draft advisory opinion in response to SpeechNow.org's request, and non-privileged documents regarding the advisory opinion request are publicly available.

3. Any and all documents concerning whether independent expenditures cause or pose a risk of corruption.

Response: The Commission OBJECTS to this request on burdensomeness grounds to the extent that it seeks documents regarding independent expenditures by political committees which receive no contributions in excess of the Act's individual and aggregate contribution limits, and fully disclose their financial activity to the Commission as required by the Act. The Commission also OBJECTS to this request to the extent it seeks privileged documents in the Commission's possession.

Subject to and without waiving these or the Commission general objections, the Commission identifies the following publicly-available documents which the Commission may rely on in this litigation:

John O'Brien, *West Virginia Supreme Court Lets Massey off \$50 Million Hook, Starcher Furious*, Legal News Online, November 21, 2007.
<http://www.legalnewsline.com/news/contentview.asp?c=204393>.

Doborah Goldberg, et al., *The New Politics of Judicial Elections 2004*, Justice at Stake Campaign. <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.

Peter Lattman, *West Virginia Supremes to Rehear Massey Case*, The Wall Street Journal, January 24, 2008, <http://blogs.wsj.com/law/2008/01/24/west-virginia-supremes-to-rehear-massey-case>.

Paul J. Nyden, *Starcher Recuses Himself from Massey Case*, The Charleston Gazette, February 16, 2008, <http://www.wvgazette.com/News/200802150839>.

Lawrence Messina, *West Virginia Court Overturns \$76 Million Award Against Massey*, International Business Times, April 3, 2008, <http://www.ibtimes.com/articles/20080403/3-2-ruling-favors-massey-energy.htm>.

Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, New York Times, October 24, 2004, <http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html>.

Jane Mayer, "The Money Man: Can George Soros's Millions Insure the Defeat of President Bush," The New Yorker, October 22, 2004.

John Fund, "Energy Independent: Maverick Oilman Boone Pickens talks about fuel pries and his love for philanthropy," The Wall Street Journal, 6/2/2007, available at <http://www.opinionjournal.com/editorial/feature.html?id=110010157>.

The Commission also identifies the following additional publicly-available web pages:

<http://www.washingtonpost.com/wp-dyn/content/article/2007/04/04/AR2007040402405.html>;

<http://www.whitehouse.gov/news/releases/2006/12/20061204-9.html>;

http://blog.washingtonpost.com/sleuth/2007/04/biden_slams_sam_fox_recess_app.html;

<http://www.foxnews.com/story/0,2933,264090,00.html>;

<http://www.senate.gov/~foreign/hearings/2007/hrg070227p.html>;

http://www.usatoday.com/news/washington/2007-04-04-bush-sam-fox_N.htm;

<http://wcco.com/politics/President.Bush.nomination.2.282380.html>;

http://blog.washingtonpost.com/sleuth/2007/02/staring_adversity_in_the_face.html;

<http://gao.gov/decisions/appro/309301.htm>.

The Commission also relies on the record in *McConnell v. FEC*, 540 U.S. 93 (2003).

In addition, the Commission identifies the following additional documents, previously provided to plaintiffs:

Clyde Wilcox, Report of Expert Witness (Aug. 15, 2008).

Steven Walters and Patrick Marley, *Chvala Reaches Plea Deal: Ex-Lawmaker Could Admit Guilt in at Least 2 Felonies*, MILWAUKEE JOURNAL SENTINEL, Oct. 24, 2005, <http://www.jsonline.com/story/index.aspx?id=365362>.

Beth Barrett, *Billboard Bonanza Lobbyist Stands to Make Millions if L.A. Lifts Freeway Ban*, DAILY NEWS OF LOS ANGELES, Jan. 11, 2002.

State's Sentencing Memorandum, *Wisconsin v. Chvala*, No. 02CF2451, Cir. Ct. for the State of Wis., Dane County (Dec. 2005).

Motion of Respondent Corporations for Disqualification of Justice Benjamin, *Caperton v. Massey Coal Company, Inc.*, No. 98-C-192, Supreme Court of Appeals of West Virginia (Oct. 19, 2005).

Brian Ross and Maddy Sauer, *Another Legal Victory for Tough Coal Boss*, ABC NEWS, April 7, 2008.

Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal*, KANSAS CITY STAR, Oct. 6, 1998 at B1.

Tim Carpenter, *Kansas Lawmaker Alleges Bribery Try on Gaming Issues*, LAWRENCE KANSAS JOURNAL-WORLD, Oct. 8, 1998.

Chris Dickerson, *Company Asks Benjamin to Recuse Himself Again, this Time with Poll Numbers*, LEGALNEWSLINE.COM, Mar. 28, 2008 <http://www.legalnewsline.com/news/209989-company-asks-benjamin-to-recuse-himself-again-this-time-with-poll-numbers>).

Second Renewed Motion for Disqualification of Justice Benjamin, *Massey Coal Company, Inc. v. Caperton*, Appeal No. 33350, Supreme Court of Appeals of West Virginia (Mar. 28, 2008).

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.

Response: The Commission OBJECTS to this request to the extent that it seeks privileged documents. See General Objections. Subject to and without waiving these or any of the Commission's general objections, the Commission identifies state and local laws regarding unincorporated associations, to which plaintiffs and defendant have the same access.

In addition, the Commission identifies the following publicly-available documents which the Commission may rely on in this litigation.

Uniform Unincorporated Nonprofit Association Act (1996), *Comments*, available at <http://www.law.upenn.edu/bll/archives/ulc/unincorx/unincorx.pdf>.

Mohr v. Kelley, 8 P.3d 543 (Colo. Ct. App. 2000).

Izen v. Sjostrom 2007 WL 968841, 5 (Tex.App.-Hous. (14 Dist.) 2007).

Elizabeth Kingsley and John Pomeranz, "A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations," 31 *Wm. Mitchell L. Rev.* 55 (2004).

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.

Response: The Commission OBJECTS to this request on the grounds that this request, which is not limited to the facts of this case, is vague and extremely burdensome. Indeed, nearly any document relating to federal campaign finance matters, including, for example, the Commission's entire library of campaign finance related materials, could be responsive to this request. Information from the Commission's library, public records room and the Commission's web site is equally available to plaintiffs and defendant. The Commission also OBJECTS to this request to the extent that it seeks privileged documents. See General Objections.

Subject to and without waiving these objections, the Commission notes that many court decisions, including *Buckley v. Valeo*, 424 U.S. 1 (1976), and other decisions cited in the parties' filings in this litigation, address this issue. Plaintiffs and defendant have equal access to these decisions.

In addition, the Commission notes that it previously produced documents discussing amounts raised and spent in recent federal election cycles. See Summary of PAC Activity 1990-2006 (Sadio Decl. Exh. B); 2005-2006 Summary of PAC Independent Expenditures (Sadio Decl.

Exh. C); National Party Financial Activity Through the End of the Election Cycle (Sadio Decl. Exh. D); and National Party Federal Financial Activity Through The End of the Election Cycle (Sadio Decl. Exh. E).

6. Any and all documents containing any legislative facts.

Response: The Commission also OBJECTS to this request on the grounds that the request is unduly burdensome because nearly any document relating to federal campaign finance matters, including, for example, the Commission's entire library of campaign finance related materials, could be responsive to this request. The Commission also OBJECTS to this request to the extent that it seeks privileged documents. See General Objections.

Subject to and without waiving these objections, the Commission identifies the following publicly-available documents which the Commission may rely on in this litigation.

Stephen Weissman and Ruth Hassan, "BCRA and the 527 Groups" *The Election after Reform: Money, Politics and the Bipartisan Campaign Reform Act*, Ed. Michael J. Malbin (New York: Rowman and Littlefield Publishers, Inc. 2006).

Stephen Weissman and Kara D. Ryan, "Soft Money in the 2006 Election and the Outlook for 2008: The Changing Nonprofits Landscape," A CFI Report, 2007, available at http://www.cfinst.org/books_reports/pdf/NP_SoftMoney_0608.pdf.

In addition, the Commission identifies the Expert Report of Clyde Wilcox (Aug. 15, 2008) previously provided to plaintiffs, and documents relied upon therein. In addition, the Commission also identifies the following additional documents, previously provided to plaintiffs:

Steven Walters and Patrick Marley, *Chvala Reaches Plea Deal: Ex-Lawmaker Could Admit Guilt in at Least 2 Felonies*, MILWAUKEE JOURNAL SENTINEL, Oct. 24, 2005, <http://www.jsonline.com/story/index.aspx?id=365362>.

Steve Weismann, *Fast Start for Soft Money Groups in 2008 Election: 527s Adapt to New Rules, 501(c)(4)s On the Upswing*, Press Release, CAMPAIGN FINANCE INSTITUTE, April 3, 2008, <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=188>.

Glen Justice and Eric Lichtblau, *Bush's Backers Donate Heavily to Veteran Ads*, THE NEW YORK TIMES, September 11, 2004.

Kate Zernike and Jim Rutenberg, *The 2004 Campaign: Advertising; Friendly Fire: The Birth of an Attack on Kerry*, THE NEW YORK TIMES, Aug. 20, 2004.

Beth Barrett, *Billboard Bonanza Lobbyist Stands to Make Millions if L.A. Lifts Freeway Ban*, DAILY NEWS OF LOS ANGELES, Jan. 11, 2002.

Jim Rutenberg, *Democrats' Ads in Tandem Provoke G.O.P.*, THE NEW YORK TIMES, Mar. 27, 2004.

Deborah Goldberg, *Commentary, Nebraska Should Stand Up for Integrity*, LINCOLN STAR JOURNAL, July 3, 2001.

In the Matter of Drew Miller, No. 00-34, (Neb. Accountability and Disclosure Comm'n Sept. 28, 2001) (Order of Comm'n).

In the Matter of Drew Miller, No. 00-34 (Neb. Accountability and Disclosure Comm'n Sept. 28, 2001) (Settlement Agreement).

Richard Engstrom and Christopher Kenny, *The Effects of Independent Expenditures in Senate Election*, POL. RESEARCH Q., Vol. 55, No. 44 (Dec. 2002) at 885-905.

State's Sentencing Memorandum, *Wisconsin v. Chvala*, No. 02CF2451, Cir. Ct. for the State of Wis., Dane County (Dec. 2005).

Motion of Respondent Corporations for Disqualification of Justice Benjamin, *Caperton v. Massey Coal Company, Inc.*, No. 98-C-192, Supreme Court of Appeals of West Virginia (Oct. 19, 2005).

Brian Ross and Maddy Sauer, *Another Legal Victory for Tough Coal Boss*, ABC NEWS, April 7, 2008.

Christopher Borick, *Up the River: An Empirical Analysis of the Effectiveness of the Swift Boat Commercials*, Presentation at the Annual Meeting of the American Political Science Association, (Sept. 1, 2005) (*available at* http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/1/6/2/p41627_index.html).

Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal*, KANSAS CITY STAR, Oct. 6, 1998 at B1.

Tim Carpenter, *Kansas Lawmaker Alleges Bribery Try on Gaming Issues*, LAWRENCE KANSAS JOURNAL-WORLD, Oct. 8, 1998.

California Fair Political Practices Commission, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, June, 2008, <http://www.fppc.ca.gov/ie/IEReport2.pdf>.

Jules Witcover, *The Buying of the President 2008: Interviews: Paul Manafort*, THE CENTER FOR PUBLIC INTEGRITY, Mar. 20, 2007, http://www.buyingofthepresident.org/index.php/interviews/paul_manafort.

Chris Dickerson, *Company Asks Benjamin to Recuse Himself Again, this Time with Poll Numbers*, LEGALNEWSLINE.COM, Mar. 28, 2008 <http://www.legalnewsline.com/news/209989-company-asks-benjamin-to-recuse-himself-again-this-time-with-poll-numbers>).

Second Renewed Motion for Disqualification of Justice Benjamin, *Massey Coal Company, Inc. v. Caperton*, Appeal No. 33350, Supreme Court of Appeals of West Virginia (Mar. 28, 2008).

The Commission also relies on the record in *McConnell v. FEC*, 540 U.S. 93 (2003).

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).

Response: The Commission OBJECTS to this request as unduly burdensome to the extent that it seeks privileged documents or documents from the administrative enforcement actions listed which are publicly available on the Commission's web site and in the Commission's public records room for copying and inspection by plaintiffs. See General Objections. Many of the non-privileged documents from these MURs are accessible on the Commission's web site, and are accessible to plaintiffs for inspection and copying.

The Commission also notes that the non-public portions of the Commission's files on the MURs listed by plaintiffs are large, and contain First Amendment protected documents, as well as personal identification information that has the potential to harm the interests of the respondents recognized in *AFL-CIO*. Substantial time and effort to review the documents and redact

privileged or sensitive information would be required before documents could be produced.

While more targeted discovery requests might identify documents relevant to the issues in this litigation, the steps which would be necessary to review and redact the non-public portions of the Commission's files on the listed MURs would be extremely burdensome.

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.

Response: The Commission OBJECTS to this request on burdensomeness grounds to the extent that it seeks documents already available in the Commission's public records room or on the Commission's web site for copying and inspection by plaintiffs. See General Objections. The Commission also OBJECTS on the grounds that this request seeks documents that are privileged or confidential by statute.

Subject to and without waiving these or any of the Commission's general objections, the Commission notes that many court decisions address this issue. Plaintiffs and defendant have equal access to these decisions.

The Commission also notes that publicly available documents include the record in the Commission's 2004 Political Committee Status rulemaking, and the public filings in *McConnell v. FEC*, 540 U.S. 93 (2003).

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.

Response: The Commission OBJECTS on the grounds that this request is overly broad and unduly burdensome because all responses to Requests for Additional Information, including new or amended reports or statements, are available in the Commission's public records room and on the Commission's web site, where they are available to plaintiffs for copying and

inspection. The Commission OBJECTS to the extent that this request seeks additional or other documents referring to Requests for Additional Information that are maintained as part of the files of Commission enforcement actions, and not on the public record at the Commission. Not only would locating such documents be unduly burdensome, but such documents are also privileged or protected by statute, 2 U.S.C. § 437g(a)(12). See General Objections. In addition, the Commission also objects to the extent that this request seeks documents recording or referring to oral communications between the Commission and persons who were recipients of RFAIs, or persons communicating with the Commission on their behalf because locating and producing such documents would be unduly burdensome.

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.

Response: The Commission OBJECTS to this request on burdensomeness grounds to the extent that it seeks documents already available in the Commission's public records room or on the Commission's web site for inspection and copying by plaintiffs. See General Objections. The Commission also OBJECTS on the grounds that this request seeks documents that are privileged or confidential by statute.

Subject to and without waiving these or any of the Commission's general objections, the Commission notes that many court decisions address this issue. Plaintiffs and defendant have equal access to these decisions.

The Commission also notes that the publicly available documents responsive to this request include the record in the Commission's 2004 Political Committee Status rulemaking, and the public filings in *McConnell v. FEC*, 540 U.S. 93 (2003).

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.

Response: The Commission OBJECTS to this request on relevance and burdensomeness grounds. See General Objections. Statistics regarding the number of telephone calls received are available on the Commission's web site, and are available for inspection and copying by plaintiffs. See FEC Annual Reports, available at <http://www.fec.gov/pages/anreport.shtml>.

12. All Requests for Additional Information sent by the FEC Reports Analysis Division to political committees from January 1, 1998 to the present.

Response: The Commission objects to this Request on burdensomeness grounds. Subject to and without waiving these or any of the Commission's general objections, the Commission responds that Requests for Additional Information sent by the Commission to political committees are made public by the Commission, and are available in the Commission's public records room and on the Commission's web site for inspection and copying by plaintiffs.

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.

Response: The Commission OBJECTS to this Request on burdensomeness grounds. Documents regarding administrative fines previously levied by the Commission are publicly available at the Commission and on the Commission's web site for inspection and copying by plaintiffs. The Commission also OBJECTS on the grounds that reviewing the non-public portions of the Commission's files on closed administrative fine matters would be unduly burdensome, and that the files in pending administrative fine matters are privileged and confidential by statute.

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.

Response: The Commission OBJECTS to this Request as unduly burdensome. Subject to and without waiving this or any of the Commission's general objections, the Commission

responds that all disclosure documents filed with the Commission are publicly available at the Commission and on the Commission's web site for inspection and copying by plaintiffs.

Subject to and without waiving these or any of the Commission's general objections, the Commission provides the attached lists of persons and entities (other than political party committees) that reported to the Commission making independent expenditures during the 1997-1998 and subsequent election cycles, but did not report to the Commission making any contributions or coordinated expenditures during the same election cycle. FEC Attachment I03. Data for the 2007-2008 election cycle data contains all independent expenditures reported to and processed by the Commission as of August 22, 2008.

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.

Response: The Commission OBJECTS to this request on relevance grounds. The Commission OBJECTS to this request to the extent it seeks documents used to train employees in the Commission's Reports Analysis Division which are protected by the law enforcement privilege. See General Objections. Subject to and without waiving this or any of the Commission's general objections, the Commission produces the following public documents used to train employees in the Commission's Reports Analysis Division.

Fed. Election Comm'n., Federal Election Campaign Laws (2008), <http://www.fec.gov/law/feca/feca.pdf>.

Code of Federal Regulations, Title 11, Federal Elections, 11 C.F.R. §§ 1-9039 (2008), http://www.access.gpo.gov/nara/cfr/waisidx_08/11cfrv1_08.html.

Fed. Election Comm'n., Campaign Guide for Congressional Candidates and Committees (Apr. 2008), <http://www.fec.gov/pdf/candgui.pdf>, and Supplement (Aug. 2008), http://www.fec.gov/pdf/cand_guide_supp.pdf.

Fed. Election Comm'n., Campaign Guide for Nonconnected Committees (Oct. 2005) (copy attached as FEC Attachment DR15a), and Supplement (Aug. 2008), http://www.fec.gov/pdf/nongui_supp.pdf.

Fed. Election Comm'n., Campaign Guide for Political Party Committees (Aug. 2007), <http://www.fec.gov/pdf/partygui.pdf>, and Supplement (Aug. 2008), http://www.fec.gov/pdf/party_guide_supp.pdf.

Fed. Election Comm'n., Campaign Guide for Corporations and Labor Organizations (Jan. 2007), <http://www.fec.gov/pdf/colagui.pdf>, and Supplement (Aug. 2008), http://www.fec.gov/pdf/corp_supp.pdf.

Reports and Analysis Division, Fed. Election Comm'n., *Getting Started with FECfile User Manual*, http://www.fec.gov/support/GettingStartedManual_U.doc.

FEC Form 1 (Dec. 2007), <http://www.fec.gov/pdf/forms/fecfrm1.pdf>, and Instructions, <http://www.fec.gov/pdf/forms/fecfrm1i.pdf>.

FEC Form 3X (Dec. 2004), http://www.fec.gov/pdf/forms/fecfrm3x_06.pdf, and Instructions (Feb. 2006) (copy attached).

FEC Form 1M (Jan. 2001), <http://www.fec.gov/pdf/forms/fecfrm1m.pdf>, and Instructions (Jan. 2004), <http://www.fec.gov/pdf/forms/fecfrm1mi.pdf>.

List of Federal Records Offices,
<http://www.fec.gov/pubrec/StateRecordsOffices.pdf>.

Fed. Election Comm'n., Thirty Year Report (2005),
<http://www.fec.gov/info/publications/30year.pdf>.

The Commission also produces the accompanying documents used to train the Commission's

Help Line staff:

Fundraising for Candidates, Part 1 – Individual Volunteer Activity, Scenario (July 9, 2008).

Use Of Campaign Funds, Scenario #2 (July 9, 2008).

Corporate SSF Fundraising – PAC Solicitation Meeting, Scenario #1 (July 9, 2008).

E-Mail Newsletter Articles, Scenario #3 (July 21, 2008).

Fundraising for Candidates, Part 1 – Fundraising for House and Senate Campaigns, Part 1 (July 9, 2008).

Fundraising for Candidates, Part 2 – Fundraising for House and Senate Campaigns, Part 2 (July 9, 2008).

Candidate Reporting – House and Senate Campaign Reporting (July 9, 2008).

Candidate Reporting – House and Senate Campaign Reporting, Scenario Answer Key (July 21, 2008).

Communications Scenario (July 21, 2008).

Election-Related Communications (July 21, 2008).

Fundraising For Corporate PACS (July 9, 2008).

Corporate SSF Fundraising – PAC Solicitation Meeting, Scenario #1 (July 9, 2008).

SSF Fundraising, Part 1 – Fundraising for Separate Segregated Funds, Part 1 (2008).

SSF Fundraising, Part 2 – Fundraising for Separate Segregated Funds, Part 2 (2008).

Communications, Tab 7, All – Examples of Communications under the WRTL Exemption in 11 CFR 114.15 (2008).

Introduction to FECA – Introduction To Federal Campaign Finance Law (July 9, 2008).

FEC Rules for Leadership PACs, Objectives and Outline, Tab 3 – FEC Rules for Leadership PACs (July 21, 2008).

Fundraising for the PACs of Membership Associations, Trade Associations and Labor Unions (July 21, 2008).

E-Mail Newsletter Articles, Scenario #1 (July 21, 2008).

FEC Rules for Nonconnected Committees (July 21, 2008).

Introduction to Office Procedures – Information Division Office Procedures And The Duties Of Communications Specialists (July 9, 2008).

Party Fundraising Scenarios – Scenario – Candidate Support (July 21, 2008).

Party Reporting (July 9, 2008).

Party Reporting, Scenarios/Answer Key (July 21, 2008).

Presidential Training List and Table of Contents – For Internal Use Only.

Questions Frequently Handled By Information Division – For Internal Use Only.

Presidential Training (2008).

Party Fundraising, Part 1 – Political Party Committees Fundraising, Part 1 (July 9, 2008).

Party Fundraising, Pt. 2 – Political Party Committees Fundraising, Part 2 (July 9, 2008).

Using Corp/Union/Assn. Resources: Activity Chart [Slide] (July 21, 2008).

Using Membership/Labor/Association Resources and Facilities on Behalf of Candidates and Parties (July 21, 2008).

Copies of these documents are provided as FEC Attachments DR15b.

Fundraising for House and Senate Campaigns Part 1 – PowerPoint (Feb. 12, 2008)

Fundraising for House and Senate Campaigns Part 2 – PowerPoint (Feb. 12, 2008)

House and Senate Campaign Reporting – PowerPoint (2008).

Election-related Communications -- PowerPoint

Using Corporate Resources for Candidates or Parties – PowerPoint (2008)

Copies of these latter documents are provided as FEC Attachments DR15c through DR15g.

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.

Response: The Commission OBJECTS to this Request on relevance and burdensomeness grounds. Subject to and without waiving these or any of the Commission's general objections, the Commission responds that disclosure documents filed with the Commission, including statements of organization filed by political action committees, are publicly available at the Commission and on the Commission's web site, where they are available to plaintiffs for inspection and copying.

17. Any and all Statements of Organization filed by non-connected PACs between January 1, 1998 and the present.

Response: The Commission OBJECTS to this Request on relevance and

burdensomeness grounds. Subject to and without waiving these or any of the Commission's general objections, the Commission responds that disclosure documents filed with the Commission, including statements of organization filed by political action committees, are publicly available at the Commission and on the Commission's web site for inspection and copying.

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.

Response: The Commission OBJECTS to this request to the extent that it seeks privileged documents or documents already available in the Commission's public records room or on the Commission's web site for inspection and copying. See General Objections. Subject to and without waiving these or any of the Commission's general objections, the Commission identifies the Expert Report of Clyde Wilcox (Aug. 15, 2008) previously provided to plaintiffs, and documents relied upon therein. In addition, the Commission identifies the following documents:

John O'Brien, *West Virginia Supreme Court Lets Massey off \$50 Million Hook, Starcher Furious*, Legal News Online, November 21, 2007, <http://www.legalnewsline.com/news/contentview.asp?c=204393>.

Doborah Goldberg, et al., *The New Politics of Judicial Elections 2004*, Justice at Stake Campaign, <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.

Peter Lattman, *West Virginia Supremes to Rehear Massey Case*, The Wall Street Journal, January 24, 2008, <http://blogs.wsj.com/law/2008/01/24/west-virginia-supremes-to-rehear-massey-case>.

Paul J. Nyden, *Starcher Recuses Himself from Massey Case*, The Charleston Gazette, February 16, 2008, <http://www.wvgazette.com/News/200802150839>.

Lawrence Messina, *West Virginia Court Overturns \$76 Million Award Against Massey*, International Business Times, April 3, 2008, <http://www.ibtimes.com/articles/20080403/3-2-ruling-favors-massey-energy.htm>.

Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*, New York Times, October 24, 2004, <http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html>.

In addition, the Commission notes that the publicly available documents responsive to this request include the record in the Commission's 2004 Political Committee rulemaking, and the public filings in *McConnell v. FEC*, 540 U.S. 93 (2003).

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.

Response: The Commission OBJECTS to this request to the extent that it seeks privileged documents or documents already available in the Commission's public records room or on the Commission's web site for inspection and copying. See General Objections. The publicly available documents include the record in the Commission's 2004 Political Committee rulemaking, and the public filings in *McConnell v. FEC*, 540 U.S. 93 (2003).

Subject to and without waiving these objections, the Commission identifies the Expert Report of Clyde Wilcox (Aug. 15, 2008) previously provided to plaintiffs, and documents relied upon therein. In addition, the Commission identifies the following documents:

John O'Brien, *West Virginia Supreme Court Lets Massey off \$50 Million Hook, Starcher Furious*, Legal News Online, November 21, 2007, <http://www.legalnewsline.com/news/contentview.asp?c=204393>.

Doborah Goldberg, et al., *The New Politics of Judicial Elections 2004*, Justice at Stake Campaign, <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf>.

Peter Lattman, *West Virginia Supremes to Rehear Massey Case*, The Wall Street Journal, January 24, 2008, <http://blogs.wsj.com/law/2008/01/24/west-virginia-supremes-to-rehear-massey-case>.

Paul J. Nyden, *Starcher Recuses Himself from Massey Case*, The Charleston Gazette, February 16, 2008, <http://www.wvgazette.com/News/200802150839>.

Lawrence Messina, *West Virginia Court Overturns \$76 Million Award Against Massey*, International Business Times, April 3, 2008, <http://www.ibtimes.com/articles/20080403/3-2-ruling-favors-massey-energy.htm>.

Adam Liptak, *Judicial Races in Several States Become Partisan Battlegrounds*,
New York Times, October 24, 2004,
<http://www.nytimes.com/2004/10/24/politics/campaign/24judicial.html>.

In addition, the Commission produces audio files from a February 14, 2008 hearing conducted by the California Fair Political Practices Commission. FEC Attachments DR19-01.MP3 through DR19-20MP3.

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.

Response: The Commission OBJECTS to this request on relevance grounds to the extent it seeks information regarding communications “concerning this lawsuit or any of the plaintiffs in this lawsuit” unrelated to the factual or legal issues in this case. The Commission also OBJECTS on the grounds that the request is unduly burdensome. The Commission’s search for responsive documents was limited to personnel most likely to have responsive documents. Subject to and without waiving this or any of the Commission’s general objections, the Commission produces the accompanying documents.

Legislative Contact Report (Feb. 25, 2008).

Communication Result Report (Feb. 28, 2008).

Email chain (Feb. 25-28, 2008).

Copies of these documents are provided as FEC Attachment DR20.

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.

Response: The Commission OBJECTS to this Request insofar as the terms “political candidate” and “officeholders” are not defined and vague. In this respect, those terms could refer to candidates for elective office at the state or local level, or the incumbents in state

or local elective offices. The Commission also OBJECTS to this request on relevance grounds to the extent it seeks information regarding communications unrelated to the factual or legal issues of this case.

Subject to and without waiving this or any of the Commission's general objections, and construing this request as referring to federal candidates and officeholders, the Commission incorporates herein by reference its response to Document Request 20, above.

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.

Response: The Commission OBJECTS to this request on burdensomeness grounds. Indeed, this request could be interpreted to require a search of most of the agency's files, which would be excessively burdensome. The Commission also OBJECTS to this request to the extent that it seeks privileged documents. See General Objections. The Commission also OBJECTS to this request to the extent that it seeks documents already available in the Commission's public records room or on the Commission's web site for inspection and copying by plaintiffs. See General Objections. Subject to and without waiving these or any of the Commission's general objections, the Commission notes that the publicly available documents responsive to this request include the record in the Commission's 2004 Political Committee rulemaking, and the public filings in *McConnell v. FEC*, 540 U.S. 93 (2003).

23. Any and all filings by individuals or organizations other than party committees disclosing their independent expenditures since January 1, 1998.

Response: The Commission OBJECTS to this Request on relevance and burdensomeness grounds. Subject to and without waiving these objections, the Commission responds that disclosure documents filed with the Commission, including independent expenditure reports, are publicly available at the Commission and on the Commission's web site

for inspection and copying by plaintiffs.

24. For any Request for Admission that the FEC denies, provide any documents supporting the FEC's denial.

Response: See FEC responses to plaintiffs' requests for admission.

REQUESTS FOR ADMISSION

1. Admit that if SpeechNow.org engaged in the proposed activities it would meet the statutory definition of "political committee."

Response: ADMIT.

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.

Response: ADMIT.

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).

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT that plaintiff David Keating would be liable, in his official capacity as treasurer of SpeechNow.org, for the violations of the Act by SpeechNow.org if it accepts contributions in excess of the Act's contribution limits. The Commission notes, however, that a committee "treasurer will typically be subject to Commission action only in his or her official capacity." *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 1 (Jan. 3, 2005). In this regard, a "probable cause finding against a treasurer in his or her official capacity makes clear to the district court in enforcement litigation that the Commission is seeking relief against the committee, and would only entitle the Commission to obtain a civil penalty from the committee." *Id.* at 4-5.

However, "when information indicates that a treasurer has knowingly and willfully violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or has intentionally deprived himself or herself of the operative facts giving rise to the violation, the Commission will consider the treasurer to have acted in a

personal capacity and make findings (and pursue conciliation) accordingly.” *Id.* at 1, 5, 6.

In addition, “[i]f a past or present treasurer violates a prohibition that applies generally to individuals, the treasurer may be named as a respondent in his or her personal capacity, and findings may be made against the treasurer in that capacity. In this way, a treasurer would be treated no differently than any other individual who violates a provision of the Act.”

Id. at 5 n.7, 6. “Should the Commission file suit in district court following a finding of probable cause against a treasurer in his or her personal capacity, judicial relief, including an injunction and payment of a civil penalty, could be obtained against the treasurer personally.” *Id.* at 5 (citation omitted).

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.

Response: The Commission incorporates herein by reference its response to Interrogatory 10.

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.

Response: ADMIT.

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.

Response: ADMIT.

14. Admit that some candidates do not approve of independent expenditures in support of their election to office or in opposition to their opponent.

Response: The Commission ADMITS that candidates do not approve of 100% of independent expenditures in support of their election to office or in opposition to their opponent,

but note the available evidence suggests that candidates generally do approve of such independent expenditures. In support of its denial, the Commission relies on the record in *McConnell v. FEC*, 540 U.S. 93 (2003).

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.

Response: The Commission ADMITS that not all candidates are aware of the identities of those who contribute funds to organizations to finance independent expenditures that support the candidate or oppose the candidate's opponents, but note that the available evidence suggests that candidates generally are aware of the identities of such donors.

The Commission also notes that candidates likely are more aware of the identity of donors who give donations in excess of the Act's contribution limits than the identity of donors who give less than the contribution limits. Knowledge of the identity of the donor generally increases as the size of the donation increases.

16. Admit that the Supreme Court of the United States has never recognized mere gratitude by candidates in response to independent expenditures as corruption.

Response: DENY that gratitude is irrelevant to the issue of corruption. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court recognized, in the context of soft money donations to political party committees, that "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." 540 U.S. at 145. The Supreme Court stated that "[t]he evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." 540 U.S. at 146 (citations omitted). Furthermore, "[e]ven when not participating directly in the fundraising, federal officeholders were well aware

of the identities of the donors; National party committees would distribute lists of potential or actual donors, or donors themselves would report their generosity to officeholders.” 540 U.S. at 147.

17. Admit that political candidates often feel gratitude toward celebrities or other prominent individuals who endorse their candidacies.

Response: ADMIT.

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.

Response: ADMIT.

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.

Response: ADMIT.

20. Admit that political candidates ask citizens for their votes and show gratitude for the support of those citizens.

Response: ADMIT.

21. Admit that contribution limits reduce the overall amount of money that organizations to which they apply have to spend on election-related communications.

Response: DENY. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court explained that the “overall effect of the Act’s contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would [have] otherwise contribute[d] amounts greater than the statutory limits to expend such funds on direct political expression.” 424 U.S. at 21-22.

INTERROGATORIES

1. Identify all persons with knowledge of legislative facts pertaining to the issues in this case and the legislative facts known to each.

Response: The Commission OBJECTS to this Interrogatory on the grounds that it is

unduly burdensome, and seeks information protected by the attorney work product privilege.

The Commission also OBJECTS that this interrogatory would require the identification of a vast array of people involved with independent candidate spending, as well as fundraising for such spending, and the legislative process. Subject to and without waiving these or any of the Commission's general objections, the Commission responds by identifying Professor Clyde Wilcox.

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.

Response: FEC Chief Communications Officer Arthur Forster, and managers and staff in the Commission's Office of Communications, Information Division:

Gregory Scott, Assistant Staff Director
Amy Kort, Deputy Assistant Staff Director – Publications
Kevin R. Salley, Deputy Assistant Staff Director – Outreach
Marie Dixon, Special Assistant to the Assistant Staff Director
Latonya L. Prescott, Management Assistant
LeJuan M. Dean, Administrative Clerk
Elizabeth S. Kurland, Senior Communications Specialist
Dorothy H. Yeager, Senior Communications Specialist
Isaac Baker, Communications Specialist
Katherine Carothers, Communications Specialist
Myles G. Martin, Communications Specialist
Amy E. Pike, Communications Specialist
Michelle Ryan, Communications Specialist

In addition, staff in the E-Filing Division also respond to communications and staff in the Reports Analysis Division not only review reports for compliance, but also assist political committees with reporting questions.

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.

Response: The Commission OBJECTS to this request as unduly burdensome.

Disclosure reports filed with the Commission are publicly available in the Commission's public

records room and on the Commission's web site. The web site also allows users to create lists of independent expenditures reported to the Commission since June 1, 2001 during user-specified time frames. http://www.fec.gov/finance/disclosure/ie_reports.shtml.

Subject to and without waiving these or the Commission's general objections, the Commission responds by providing the attached lists of persons and entities (other than political party committees) that reported to the Commission making independent expenditures during the 1997-1998 and subsequent election cycles, but did not report to the Commission making any contributions or coordinated expenditures during the same election cycle. FEC Attachment I03. Data for the 2007-2008 election cycle data contains all independent expenditures reported to and processed by the Commission as of August 22, 2008.

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.

Response: The Commission does not have knowledge of the qualified nonprofit corporate status of the entities identified in the Commission's response to Interrogatory 3, except to the extent that this information is provided on the reports and statements they file with the Commission. Those reports and statements are equally accessible to plaintiffs and defendant.

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.

Response: The Commission OBJECTS on the grounds that this request is unduly burdensome. Subject to and without waiving these or the Commission's general objections, the Commission responds that information regarding amounts contributed by individuals to political committees, including the identity of individuals who have donated amounts equaling or in excess of their applicable aggregate limit for the relevant time period, is available in the reports available on the Commission's web site and in the Commission's public records room, and that

information is equally available to plaintiffs and the Commission. Similarly, enforcement and administrative fine matters involving excessive contributions may be identified from information available on the Commission's web site, including the Enforcement Query System, which also is equally available to plaintiffs and the Commission.

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.

Response: The Commission OBJECTS on relevance and burdensomeness grounds. Subject to and without waiving these objections, the Commission notes that information is available on the Commission's web site, including the following documents:

Fed. Election Comm'n., Budget Request for FY2001, *available at* <http://www.fec.gov/pages/fc2001just.html>.

Fed. Election Comm'n., Congressional Justification Budget Request for FY2002 (Mar. 27, 2001), *available at* <http://www.fec.gov/pages/fy2002budget/budgetrequest2002.pdf>.

Fed. Election Comm'n., Budget Request Justification for FY 2004 (Mar. 20, 2003), *available at* <http://www.fec.gov/pages/budget/fy2004/brj2004/brj2004.pdf>.

Fed. Election Comm'n., Budget Request Justification for FY 2005 (Nov. 24, 2003), *available at* <http://www.fec.gov/pages/budget/fy2005/brj2005/brj.pdf>.

Fed. Election Comm'n., Enforcement Profile (Sept. 30, 2004), *available at* http://www.fec.gov/pages/budget/fy2006/cbr2006/cbr_app_d.pdf.

Fed. Election Comm'n., Congressional Justification Budget Request for FY 2006 (Apr. 11, 2005), *available at* http://www.fec.gov/pages/budget/fy2006/cbr2006/cbr_justification.pdf.

Fed. Election Comm'n., Enforcement Profile (Sept. 30, 2005), *available at* http://www.fec.gov/pages/budget/fy2007/fy2005_enf_prof.pdf.

Fed. Election Comm'n., Budget Request Congressional Justification for FY 2007 (Mar. 17, 2006), *available at* http://www.fec.gov/pages/budget/fy2007/fy2007_final_budg_just_0315.pdf.

Fed. Election Comm'n., Performance and Accountability Report Fiscal Year 2006 (Nov. 15, 2006), *available at* http://www.fec.gov/pages/budget/fy2006/par_2006.pdf.

Fed. Election Comm'n., Fiscal Year 2008 Performance Budget for the Fed. Election Comm'n. (FEC) (Feb. 5, 2007), *available at* http://www.fec.gov/pages/budget/fy2008/fy2008cbj_final.pdf.

Fed. Election Comm'n., Fiscal Year 2009 Congressional Budget Justification (Feb. 4, 2008), *available at* http://www.fec.gov/pages/budget/fy2009/CJ_final_1_31_08.pdf.

The Commission further responds that the Commission's staff assigns a Matter Under Review ("MUR") number to each administrative complaint received by the Commission which appears to meet the requirements of the Act and Commission regulations. The Commission notes that MUR numbers are assigned to administrative complaints received by the Commission prior to review or action by the Commission. In some complaint-generated matters, the Commission subsequently finds that no violations occurred or closes the matter without making any findings. In addition, the Commission's staff also assigns MUR numbers to internally-generated enforcement actions when the Commission finds "reason to believe" a violation has occurred and decides to open a Matter Under Review. As of August 22, 2008, the highest MUR number assigned by the Commission in these matters is MUR 6057.

Detailed statistical information is not readily available for FEC enforcement actions prior to October 1999. However, since October 1, 1999, the Commission found reason-to-believe that one or more violations of the Act or other statutes within the Commission's jurisdiction occurred in 427 Matters Under Review. In 118 of these MURs, the Commission conducted an investigation. (In other instances, the Commission closed the MUR without conducting an investigation. This includes cases where the Commission conciliated the violation(s) or moved to the "probable-cause-to-believe" stage without conducting an investigation.)

Of the 427 MURs, six MURs involved findings of knowing and willful violations by the

Commission at the probable-cause-to-believe stage.

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.

Response: The Commission OBJECTS on relevance and burdensomeness grounds.

Subject to and without waiving these objections, the Commission responds that enforcement and administrative fine matters may be identified from information on the public record at the Commission and available on the Commission's web site, which is equally available to plaintiffs and the Commission.

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.

Response: The Commission incorporates its objections and response to Interrogatory 6.

Subject to and without waiving those objections, the Commission states that of the 118 Matters in which the Commission found "reason to believe" a violation occurred and conducted an investigation, the matter was pending an average of 544 days from the date the MUR was opened until it was closed with respect to the last respondent.

9. Identify all attendees of FEC conferences since January 1, 1998.

Response: The Commission OBJECTS to this interrogatory on relevance grounds.

Without waiving this or any of the Commission's general objections, the Commission provides lists of attendees at FEC Conferences from 1999 to the present as FEC Attachment I09. Should the Commission locate the list of attendees at the 1998 FEC Conferences, the Commission will produce it.

10. For any Request for Admission that the FEC denies, identify the facts supporting the FEC's denial.

Response: *See* the Commission's responses to plaintiffs' requests for admission, incorporated herein by reference.

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

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

Steve N. Hajjar
Graham Wilson
Attorneys

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

Dated: August 25, 2008

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 161

Form **8872**
 (November 2002)
 Department of the Treasury
 Internal Revenue Service

**Political Organization
 Report of Contributions and Expenditures**

OMB No. 1545-1696

▶ See Separate instructions.

A For the period beginning _____, 20 _____ and ending _____, 20 _____

B Check applicable boxes: Initial report Change of address Amended report Final report

1 Name of organization _____ **Employer identification number** _____

2 Mailing address (P.O. Box or number, street, and room or suite number) _____
 City or town, state, and ZIP code _____

3 E-mail address of organization _____ **4** Date organization was formed _____

5a Name of custodian of records _____ **5b** Custodian's address _____

6a Name of contact person _____ **6b** Contact person's address _____

7 Business address of organization (if different from mailing address shown above). Number, street, and room or suite number _____
 City or town, state, and ZIP code _____

8 Type of report (check only one box)

a First quarterly report (due by April 15)

b Second quarterly report (due by July 15)

c Third quarterly report (due by October 15)

d Year-end report (due by January 31)

e Mid-year report (Non-election year only-due by July 31)

f Monthly report for the month of: _____
 (due by the 20th day following the month shown above, except the December report, which is due by January 31)

g Pre-election report (due by the 12th or 15th day before the election)
 (1) Type of election: _____
 (2) Date of election: _____
 (3) For the state of: _____

h Post-general election report (due by the 30th day after general election)
 (1) Date of election: _____
 (2) For the state of: _____

9 Total amount of reported contributions (total from all attached Schedules A).	9
10 Total amount of reported expenditures (total from all attached Schedules B).	10

Sign Here

Under penalties of perjury, I declare that I have examined this report, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete.

▶ _____ ▶ _____
 Signature of authorized official Date

Form 8872 (11-2002)

Schedule A Itemized Contributions		Schedule A page _____ of _____
Name of organization		Employer identification number
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Contributor's name, mailing address and ZIP code	Name of contributor's employer	Amount of contribution
	Contributor's occupation	\$
	Aggregate contributions year-to-date . . . ▶ \$	Date of contribution
Subtotal of contributions reported on this page only. Enter here and also include this amount in the total on line 9 of Form 8872 ▶		\$

Form 8872 (11-2002)

Schedule B Itemized Expenditures		Schedule B page _____ of _____
Name of organization		Employer identification number
Recipient's name, mailing address and ZIP code	Name of recipient's employer	Amount of expenditure
		\$
	Recipient's occupation	Date of expenditure
Purpose of expenditure		
Recipient's name, mailing address and ZIP code	Name of recipient's employer	Amount of expenditure
		\$
	Recipient's occupation	Date of expenditure
Purpose of expenditure		
Recipient's name, mailing address and ZIP code	Name of recipient's employer	Amount of expenditure
		\$
	Recipient's occupation	Date of expenditure
Purpose of expenditure		
Recipient's name, mailing address and ZIP code	Name of recipient's employer	Amount of expenditure
		\$
	Recipient's occupation	Date of expenditure
Purpose of expenditure		
Recipient's name, mailing address and ZIP code	Name of recipient's employer	Amount of expenditure
		\$
	Recipient's occupation	Date of expenditure
Purpose of expenditure		
Recipient's name, mailing address and ZIP code	Name of recipient's employer	Amount of expenditure
		\$
	Recipient's occupation	Date of expenditure
Purpose of expenditure		
Subtotal of expenditures reported on this page only. Enter here and also include this amount in the total on line 10 of Form 8872		\$



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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 162

Instructions for Form 8872

(Rev. January 2007)



Department of the Treasury
Internal Revenue Service

Use with Form 8872 (Rev. November 2002)

Political Organization Report of Contributions and Expenditures

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

What's New

- You are now required to report aggregate contributions less than \$200 on Schedule A. See *Schedule A—Itemized Contributions* for more information.
- If expenditures below the \$500 reporting threshold were made to a person, you must now report the aggregate of those expenditures on Schedule B. See *Schedule B—Itemized Expenditures* for more information.

Purpose of Form

Unless an exception applies (see *Who Must File* below), a tax-exempt section 527 political organization must file Form 8872 to report certain contributions received and expenditures made. Generally, an organization that is required to file Form 8872 also must file Form 8871, Political Organization Notice of Section 527 Status, within 24 hours of the organization's formation or within 30 days of any material change to the information reported on Form 8871.

Note. The organization is not required to report contributions accepted or expenditures made after July 1, 2000, if they were received or made under a contract entered into before July 2, 2000.

Who Must File

Every section 527 political organization that accepts a contribution or makes an expenditure for an exempt function during the calendar year must file Form 8872, except:

- A political organization that is not required to file Form 8871,
- A political organization that is subject to tax on its income because it did not file or amend a Form 8871, or
- A qualified state or local political organization.

A qualified state or local political organization is a political organization that meets the following requirements:

- The organization's exempt functions are solely for the purpose of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local political office or office in a state or local political organization.
- The organization is subject to state law that requires it to report information that is similar to that required on Form 8872.

- The organization files the required reports with the state.
- The state makes such reports public and the organization makes them open to public inspection in the same manner that organizations must make Form 8872 available for public inspection.

For additional information, including the prohibition of involvement in the organization of a federal candidate or office holder, see section 527(e)(5).

When To File

Due dates for Form 8872 vary depending on whether the form is due for a reporting period that occurs during an even-numbered or odd-numbered year.

Note. If any due date falls on a Saturday, Sunday, or legal holiday, the organization may file on the next business day.

Even-Numbered Years

The organization may opt to file its reports on either a quarterly or monthly basis, but it must file on the same basis for the entire calendar year.

Quarterly reports. File the first report for the first quarter of the calendar year in which the organization accepts a contribution or makes an expenditure. Quarterly reports are due by the 15th day after the last day of each calendar quarter, except the year-end report which is due by January 31 of the following year. In addition, the organization may have to file a pre-election report, a post-general election report, or both, as explained below.

Monthly reports. File the first report for the first month of the calendar year in which the organization accepts a contribution or makes an expenditure. Reports are due by the 20th day after the end of the month. This report must reflect all reportable contributions accepted and expenditures made during the month for which the report is being filed. No monthly reports are due for October and November. Instead, the organization must file a pre-general election report and a post-general election report (see *Pre-election report* and *Post-general election report*). In addition, a year-end report must also be filed by January 31 of the following year instead of a monthly report for December.

Pre-election report. This report must be filed before any election for which the organization made a contribution or expenditure. This report must be filed by the:

- 12th day before the election, or
- 15th day before the election, if the organization is posting the report by certified or registered mail.

This report must reflect all reportable contributions accepted and expenditures made through the 20th day before the election.

Post-general election report. File by the 30th day after the general election. This report must reflect all reportable contributions accepted and expenditures made through the 20th day after the general election.

Election means:

- A general, special, primary, or runoff election for a federal office,
- A convention or caucus of a political party which has authority to nominate a candidate for federal office,
- A primary election held for the selection of delegates to a national nominating convention of a political party, or
- A primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

General election means:

- An election for a federal office held in even numbered years on the Tuesday following the first Monday in November, or
- An election held to fill a vacancy in a federal office (that is, a special election) that is intended to result in the final selection of a single individual to the office at stake in a general election.

Odd-Numbered Years

The organization may opt to file its reports on either a semiannual or monthly basis, but it must file on the same basis for the entire calendar year.

Semiannual reports. File the mid-year report by July 31 for the period beginning January 1 through June 30. File the year-end report by January 31 of the following year for the period beginning July 1 and ending December 31.

Monthly reports. File the first report for the first month of the calendar year in which the organization accepts a contribution or makes an expenditure. Reports are due by the 20th day after the end of the month, except for the December report, which is due on January 31 of the following year. This report must reflect all reportable contributions accepted and expenditures made during the month for which the report is being filed.

Where and How To File

Form 8872 may be filed either electronically or by mail. Organizations that have, or expect to have, contributions or expenditures exceeding \$50,000 are required to file electronically.

To file by mail, send Form 8872 to the:

Internal Revenue Service Center
Ogden, UT 84201

File electronically using the IRS Internet website at www.irs.gov/polorgs. A username and a password are required for electronically filing Form 8872. Organizations that have completed the electronic filing of Form 8871 and submitted a completed, signed Form 8453-X, Political Organization Declaration for Electronic Filing of Notice of Section 527 Status, will receive a username and a password in the mail. Organizations that have completed the electronic filing of Form 8871, but have not received their username and password may request them by writing to the following address:

Internal Revenue Service
Attn: Request for 8872
Password Mail Stop 6273
Ogden, UT 84201

If you have forgotten or misplaced the username and password issued to your organization after you filed your initial Form 8871 and Form 8453-X, please send a letter requesting a new username and password to the above address. You may also fax your request to 801-620-3249. It may take 3-6 weeks for your new username and password to arrive, as they will be mailed to the organization. Submit your request now in order to have your username and password available for your next filing.

Who Must Sign

Form 8872 must be signed by an official authorized by the organization to sign this report.

Penalty

A penalty will be imposed if the organization is required to file Form 8872 and it:

- Fails to file the form by the due date, or
- Files the form but fails to report all of the information required or it reports incorrect information.

The penalty is 35% of the total amount of contributions and expenditures to which a failure relates.

Other Required Reports and Returns

An organization that files Form 8872 may also be required to file the following forms.

- Form 990, Return of Organization Exempt From Income Tax, or Form 990-EZ, Short Form Return of Organization Exempt From Income Tax (or other designated annual return).
- Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations (annual return).

Public Inspection of Form 8872

The IRS will make Form 8872 (including Schedules A and B) open to public inspection on the IRS website at www.irs.gov/polorgs. In addition, the organization must make available for public inspection a copy of this report during regular business hours at the organization's principal office and at each of its regional or district offices having at least 3 paid employees. A penalty of \$20 per day will be imposed on any person under a duty to comply with the public inspection requirement for each day a failure to comply continues. The maximum penalty imposed on all persons for failures relating to one report is \$10,000.

Telephone Assistance

If you have questions or need help completing Form 8872, please call 1-877-829-5500. This toll-free telephone service is available Monday through Friday.

Exempt Organizations Update

The IRS has established a new, subscription-based email service for tax professionals and representatives of tax-exempt organizations. Subscribers will receive periodic updates from the IRS regarding exempt organizations tax law and regulations, available services, and other information. To subscribe, visit www.irs.gov/eo.

Specific Instructions

Line A

Enter the beginning and ending date for the period to which this report relates. If the organization filed a prior report for the calendar year, the beginning date must be the first day following the ending date shown on the prior report.

Line B

- Check the "Initial report" box if this is the first Form 8872 filed by the organization for this period.
- Check the "Change of address" box if the organization changed its address since it last filed Form 8871, Form 8872, Form 990 (or 990-EZ), or Form 1120-POL.
- Check the "Amended report" box if the organization is filing an amended report.
- Check the "Final report" box if the organization will not be required to file Form 8872 in the future.

Employer Identification Number (EIN)

Enter the correct EIN in the space provided as shown on the Form 8871 the organization filed.

Lines 5a and 5b

Enter the name and address of the person in possession of the organization's books and records.

Lines 6a and 6b

Enter the name and address of the person whom the public may contact for more information about the organization.

Lines 8a through 8h

Check only one box. See *When To File* beginning on page 1 for details on the types of reports and the periods covered.

Line 8f. If the organization is filing on a monthly basis, enter the month for which this report is being filed. During even-numbered years, do not check this box to report October, November, or December activity. Instead, file a pre-general election report, post-general election report, a year-end report, and check the appropriate box on line 8d, 8g, or 8h.

Line 8g. If the organization is filing a pre-election report also indicate the type of election (primary, general, convention, special, or run-off) on line 8g(1), the date of the election on line 8g(2), and the state in which the election is held on line 8g(3).

Line 8h. If the organization is filing a post-general election report, indicate the date of the election on line 8h(1) and the state in which the election was held on line 8h(2).

Line 9

If the organization is required to file Schedule(s) A, enter the total of all subtotals shown on those schedules. If the organization is not required to file Schedule A, enter zero.

Line 10

If the organization is required to file Schedule(s) B, enter the total of all subtotals shown on those schedules. If the organization is not required to file Schedule B, enter zero.

Schedule A—Itemized Contributions

Note. Multiple Schedules A can be filed with any report. Number each schedule in the box in the top right corner of the schedule. Be sure to include both the number of the specific page and the total number of Schedules A (for example, "Schedule A, page 2 of 5").

The organization must list on Schedule A each contributor from whom it accepted contributions during the calendar year if:

- The aggregate amount of the contributions accepted from that person during the calendar year as of the end of this reporting period was at least \$200 and
- Any of those contributions were accepted during this reporting period.

Treat contributions as accepted if the contributor has contracted or is otherwise obligated to make the contribution.

In-kind contributions must be included. These contributions may be identified by including "(In-kind)" in the contributor's name field.

As an entry on the last page of Schedule A, enter the total amount of all contributions received from contributors whose aggregate contributions were less than \$200 and are not reported elsewhere. Enter "Aggregate below Threshold" instead of the contributor's name. *If filing electronically*, also enter your organization's address and the last day of the reporting period (for example, Jan. 31); and enter "NA" for employer, occupation, and date.

Name of Contributor's Employer

If the contributor is an individual, enter the name of the organization or person by whom the contributor is employed (and not the name of his or her supervisor). If the individual is self-employed, enter "Self-employed." If the individual is not employed, enter "Not employed." If filing electronically and the contributor is not an individual, enter "NA."

Contributor's Occupation

If the contributor is an individual, enter the principal job title or position of that contributor. If the individual is self-employed, enter the principal job title or position of that contributor. If the individual is not employed, enter a descriptive title to explain the individual's status such as "Retired," "Student," "Homemaker," or "Unemployed." If filing electronically and the contributor is not an individual, enter "NA."

Aggregate Year-to-Date Contributions

Enter the total amount of contributions accepted from the contributor during this calendar year as of the end of this reporting period.

Amount of Contribution

If a contributor made more than one contribution in a reporting period, report each contribution separately. If the contribution is an in-kind contribution, report the fair market value of the contribution.

Non-Disclosed Amounts

As the last entry on Schedule A, list the aggregate amount of contributions that are required to be reported on this schedule for which the organization does not disclose all of the information required under section 527(j). Enter "Withheld" as the contributor's name. If filing electronically, enter the organization's address, the date of the report, and "NA" for occupation and employer. This amount is subject to the penalty for the failure to provide all the information required. See *Penalty* on page 2 for details.

Schedule B—Itemized Expenditures

Note. Multiple Schedules B can be filed with any report. Number each schedule in the box in the top right corner of the schedule. Be sure to include both the number of the specific page and the total number of Schedules B (for example, "Schedule B, page 2 of 10").

The organization must list on Schedule B each recipient to whom it made expenditures during the calendar year if:

- The aggregate amount of expenditures made to that person during the calendar year as of the end of this reporting period was at least \$500 and
- Any of those expenditures were made during this reporting period.

Treat expenditures as made if the organization has contracted or is otherwise obligated to make the expenditure.

In-kind expenditures must be included. These expenditures may be identified by including "(In-kind)" in the purpose field.

As an entry on the last page of Schedule B, enter the total amount of all expenditures paid to recipients whose aggregate receipts were less than \$500 and are not reported elsewhere. Enter "Aggregate below Threshold" instead of the recipient's name. *If filing electronically*, also enter the organization's address and the last day of the reporting period (for example, Jan. 31); and enter "NA" for employer, occupation, and date.



Do not include any independent expenditures. An independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made with the cooperation or prior consent of, in consultation with, or at the request or suggestion of a candidate or agent or authorized committee of a candidate.

Name of Recipient's Employer

If the recipient is an individual, enter the name of the organization or person by whom the recipient is employed (and not the name of his or her supervisor). If the individual is self-employed, enter "Self-employed." If the individual is not employed, enter "Not employed." If filing electronically and the recipient is not an individual, enter "NA."

Recipient's Occupation

If the recipient is an individual, enter the principal job title or position of that recipient. If the individual is

self-employed, enter the principal job title or position of that recipient. If the individual is not employed, enter a descriptive title to explain the individual's status such as "Volunteer." If filing electronically and the recipient is not an individual, enter "NA."

Amount of Each Expenditure Reported for This Period

Report each separate expenditure made to any person during the calendar year that was not reported in a prior reporting period. If the expenditure is an in-kind expenditure, report the fair market value of the expenditure.

Purpose

Describe the purpose of each separate expenditure.

Non-Disclosed Amounts

As the last entry on Schedule B, list the aggregate amount of expenditures that are required to be reported on this schedule for which the organization does not disclose all of the information required under section 527(j). Enter "Withheld" as the recipient's name and as the purpose. If filing electronically, enter the organization's address, the date of the report, and "NA" for occupation and employer. This amount is subject to the penalty for the failure to provide all the information required. See *Penalty* on page 2 for details.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. If the organization is required to report contributions accepted and expenditures made as required by section 527(j), you are required to give us the information. We need it to ensure that you are complying with these laws.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. The rules governing the confidentiality of Form 8872 are covered in section 6104.

The time needed to complete and file the form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping	9 hr., 48 min.
Learning about the law or the form	24 min.
Preparing and sending the form to the IRS	34 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:T:SP, 1111 Constitution Ave. NW, IR-6406, Washington, DC 20224.

Do not send Form 8872 to this address. Instead, see *Where and How To File* on page 2.

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

_____)	
SPEECHNOW.ORG, ET AL.,)	
)	
Plaintiffs,)	
)	
v.	)	Civ. No. 08-248 (JR)
)	
FEDERAL ELECTION COMMISSION	)	FEC Exhibits
999 E St. NW)	
Washington, DC 20463,)	
)	
Defendant.)	
_____)	

FEC EXHIBIT 163

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,	)	Declaration of Steve N. Hajjar
)	
Defendant.)	
_____)	

**DECLARATION OF STEVE N. HAJJAR IN SUPPORT OF DEFENDANT
FEDERAL ELECTION COMMISSION’S MEMORANDUM IN SUPPORT OF
RESPONSE TO PLAINTIFFS’ PROPOSED FINDINGS OF FACT**

Steve N. Hajjar hereby declares as follows:

1. My name is Steve Nicholas Hajjar. I am a resident of the Commonwealth of Virginia and am over 18 years of age. I am an attorney in the Office of General Counsel, Litigation Division at the Federal Election Commission (“FEC” or “Commission”). Unless otherwise indicated, I make this declaration based on my personal knowledge.

2. The Commission served a subpoena in this matter on plaintiffs’ expert Rodney A. Smith, commanding him to produce on September 16, 2008, *inter alia*, all documents relating to his testimony in this case.

3. On September 18, 2008, I conducted Mr. Smith’s deposition. The deposition began at 9:34 AM. At 10:03 AM, while I was taking Mr. Smith’s deposition,

counsel for the Commission received an email from Paul Sherman, counsel for the plaintiffs.

4. Attached to the email from Mr. Sherman was an attachment that contained an email from Rodney Smith to Steve Hoersting, another counsel for the plaintiffs, dated August 4, 2008, and a draft of Mr. Smith's expert report. The email from Mr. Smith to Mr. Hoersting indicated that Mr. Smith had sent his draft report to Mr. Hoersting on August 4, 2008. True and accurate copies of the email from Paul Sherman to counsel for the Commission and its attachment are attached as Exhibit 155 to the Commission's Memorandum in Support of Response to Plaintiffs' Proposed Findings of Fact.

5. Because I received the draft of Mr. Smith's report while I was taking his deposition, I had insufficient time to examine the draft report's substance and prepare questions about it.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and this declaration was executed in Washington, D.C. on the 21st day of November, 2008.

A handwritten signature in blue ink, appearing to read 'Steve N. Hajjar', is written over a horizontal line.

Steve N. Hajjar
Attorney