

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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

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

The Federal Election Commission (“Commission”) hereby submits the following response to the Plaintiffs’ Proposed Findings of Fact in Rebuttal to the FEC’s Proposed Findings of Fact filed by plaintiffs SpeechNow.org (“SpeechNow”), David Keating, Edward Crane, Fred Young, Brad Russo and Scott Burkhardt (collectively “plaintiffs”).

**I. Facts in Rebuttal to the Defendant’s Expert Report**

166. There are no scientific studies of the treatment effect of independent expenditures on either political corruption or the appearance of corruption. Decl. of Jeffrey Milyo, Ph.D., in Supp. of Pls.’ Resp. to Def.’s Proposed Findings of Fact ¶ 3(c) [hereinafter Milyo Rebuttal Decl.].

FEC RESPONSE: This proposed rebuttal fact is misleading and the Court should decline to adopt it. Professor Wilcox has explained (Wilcox Dep. at 168-70, FEC Exh. 18) that because unlimited contributions have been illegal for over thirty years, political scientists have largely been unable to study their effects systematically:

Q: “The danger of large contributions is well-established in political science.”  
Well-established. Does that mean that there are lots of — there’s lots of  
empirical research or something else?

A: Something else.

Q: And what is that something else?

A: It means that it becomes an understanding that most political scientists have acknowledged in some form or another in their writing. *We don't actually write about this much because large direct contributions to candidates have been banned since 1974. . . .* But at some point or another in most of the research, plus most of the writings many, many political scientists have . . . talked about the fact that unlimited contributions can lead to corruption.

Proving corruption from unlimited direct contributions is indeed difficult when those very contributions are illegal. For example, Professor Wilcox noted (Report at 21-22) in his report that a systematic study of the impact of contributions on roll-call votes involved PAC contributions. While the study showed that the PAC contributions had limited impact on roll-call voting by members of Congress, such research involved PAC contributions limited by law, as opposed to unlimited contributions. As Professor Wilcox explains (*id.* at 22), “the weak relationship between PAC contributions and policymaking is precisely what contribution limits in FECA were intended to create.”

In addition, Professor Milyo admits that this fact does not mean that there is no relationship between independent expenditures and political corruption, just that he does not think it has been explored. Professor Milyo stated at his deposition that he is 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, FEC Exh. 12.)

167. There are no scientific studies of the treatment effect of campaign contribution limits of any sort on either political corruption or the appearance of corruption, except for Primo and Milyo (2006), who examine the treatment effect of campaign finance laws on public opinion regarding political efficacy and find little support for the notion that contribution limits increase public trust in government. Milyo Rebuttal Decl. ¶¶ 3(d), 33.

FEC RESPONSE: The Court should not adopt this proposed finding of fact as it is contradicted by the article Milyo cites, as discussed at his deposition. The paper, which Milyo

wrote with David Primo, actually found 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).) Additionally, the study only involved an “analysis at the state level looking at state political institutions” (See Milyo Dep. at 285:1-2, FEC Exh. 12), and not all states have limits comparable to those at issue in this case.

168. There exist a handful of studies that superficially examine the association between limits on contributions to candidates and political corruption with mixed results (e.g. Stratmann 2003; Alt and Lassen 2003; Maxwell and Winters 2005); however, these studies do not convincingly identify the treatment effect of contribution limits because they do not examine changes in limits on changes in corruption within state/country. Milyo Rebuttal Decl. ¶ 3(d) n.1.

FEC RESPONSE: This proposed rebuttal fact should be disregarded because it is misleading. It is probably true that many studies purport to examine the relationship between contribution limits and corruption with mixed results. But as Professor Wilcox explained, this is so for reasons not acknowledged in SpeechNow’s proposed rebuttal fact. First, Professor Wilcox explains that corruption is inherently difficult to measure. (See Wilcox Dep. at 38-40, FEC Exh. 18) (“[W]e really don’t really have a very good measure of the dependent variable [i.e., corruption].”) (“[W]e don’t have any quantitative studies of [corruption] because everyone understands that we can’t measure the dependent variable very well.”.)

Second, Professor Wilcox explains (Wilcox Dep. at 168-70, FEC Exh. 18) that because unlimited contributions to federal candidates have been illegal for over thirty years, political scientists have largely been unable to study their effects systematically. Proving corruption from unlimited direct contributions is indeed difficult when those very contributions are illegal. For example, Professor Wilcox noted (Report at 21-22) in his report that a systematic study of the impact of contributions on roll-call votes involved PAC contributions. While the study showed

that the PAC contributions had limited impact on roll-call voting by members of Congress, such research involved PAC contributions limited by law, as opposed to unlimited contributions. As Professor Wilcox explains (*id.* at 22), “the weak relationship between PAC contributions and policymaking is precisely what contribution limits in FECA were intended to create.”

169. There are other political activities beside contributions to independent expenditure groups that have value to candidates. For example, consider a group of community organizers that work to get out the vote in neighborhoods that are home to citizens that disproportionately support the incumbent. Such activity would be valuable to the incumbent. As another example, consider a group of campaign volunteers that go above and beyond what is expected in providing services to an incumbent’s campaign (working late nights and weekends, engaging in enthusiastic voter outreach activities, etc.); such activities would also be valuable. Finally, an incumbent politician may enjoy disproportionate popularity among environmentalists, or women, or union members, or residents of a certain geographical area, etc.; the votes of such interest groups are also valuable to the incumbent. Milyo Rebuttal Decl. ¶ 7.

FEC RESPONSE: This proposed rebuttal fact is irrelevant and the Court should decline to adopt it. While candidates may be grateful for many activities other than contributions to organizations that make independent expenditures, the constitutionality of those activities are not at issue in this case. Congress has not chosen to regulate these activities. Nor has Congress otherwise recognized that these activities pose a danger of corruption or its appearance. Conversely, Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant 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. Unlike those activities, the activity referred to in this proposed rebuttal fact is irrelevant to the determination of the constitutionality of the statutory provision challenged by plaintiffs.

170. The notion that non-monetary activities may have substantial value to a candidate is not just hypothetical. Celebrities often endorse candidates and sometimes appear or even perform at fundraisers. Further, recent scholarly studies quantify the effects of Oprah Winfrey’s endorsement of Barack Obama and the value of a candidate’s appearance on the “Colbert Report.” For example, the Oprah endorsement is estimated to have been worth about 1,000,000 votes for Obama in the Democratic primary. Even ignoring this estimate, for a political candidate, time spent with Oprah is undoubtedly valuable. For example, in 2004 a 30 second national advertising spot on Oprah Winfrey’s syndicated morning television program was priced at \$70,000; so even a few minutes on Oprah’s show can be conservatively valued at several hundred thousand dollars. Milyo Rebuttal Decl. ¶ 8.

FEC RESPONSE: *See* Response to Proposed Rebuttal Fact ¶ 169.

171. Studies of the electoral effects of newspaper endorsements indicate that such endorsements are typically worth between one and five percentage points to a candidate. Milyo Rebuttal Decl. ¶ 9.

FEC RESPONSE: The activity referred to in this proposed rebuttal fact is irrelevant to the determination of the constitutionality of the statutory provision challenged by plaintiffs and the Court should decline to enter it. *See* Response to Proposed Rebuttal Fact ¶ 169. In any event, Professor Wilcox explains (Wilcox Dep. at 187-88, FEC Exh. 18) that whatever value a candidate may ascribe to a newspaper endorsement, independent expenditures are probably more valuable: “What we think we know about the magnitude of impact of the newspaper endorsement is that they are relatively small . . . I think that unlimited independent expenditures are certainly more valuable than . . . limited endorsements by newspapers.” According to Wilcox, the value of a newspaper endorsement is limited because, unlike the viewing audience

that might see an independent expenditures, the “[r]eadership of newspapers is self-selective.” Wilcox explains, “[N]o matter how many editorials . . . the same newspaper writes, it’s headed to the same set of readers . . . Newspapers don’t have a way to reach people who are outside the readership very easily.” (Wilcox Dep. at 190, FEC Exh. 18.)

172. Political scientists and legal scholars have long recognized that the concepts of “corruption” and “undue influence” are ambiguous and problematic. Milyo Rebuttal Decl. ¶ 11.

FEC RESPONSE: The Court should decline to enter this proposed finding of fact because Milyo is unqualified to make the statement upon which it relies. Plaintiffs rely on Milyo’s Rebuttal Declaration to offer a fact regarding legal terms and what “legal scholars” believe. However, counsel for plaintiffs stated at Milyo’s deposition that “It’s been established that he is not an attorney, not a legal expert.” (Milyo Dep. at 101:13-13, FEC Exh. 12.) As Milyo also stated, “I haven’t represented myself as a lawyer with expertise in constitutional interpretation.” (*See id.* at 103:1-3.) This proposed rebuttal fact is also irrelevant. As explained by the Commission (*see* FEC’s Reply re 2<sup>nd</sup> Mot.), this claim does not conflict with the well-established principal that unlimited direct contribution are “problematic.” Professor Wilcox explains that because unlimited contributions have been illegal for over thirty years, political scientists have been unable to systematically study their effects. Nonetheless, the dangers of large direct contributions is assuredly well-established: political scientists have been writing about the dangers of unlimited contributions since at least the early thirties and most would agree that “at some point really large contributions create the possibility for corruption.” (*See* Wilcox Dep. at 168-70, FEC Exh. 18.)

173. The FEC’s own expert, Clyde Wilcox, has acknowledged in his scholarly writing that: “Debate persists in the United States about the meaning of ‘corruption,’ . . . (and) . . . the question of whether contributions lead to an ‘undue influence’ of donors on policymakers” (quotation marks in the original). Further, Wilcox (2005) notes: “. . . it is exceedingly difficult to

*prove* that corruption has occurred, and many observers doubt that corruption is common.” (emphasis in the original). Milyo Rebuttal Decl. ¶ 12.

FEC RESPONSE: The Court should decline to adopt this proposed finding of fact because it takes statements attributed to Wilcox out of context, and it suggests a discrepancy between Professor Wilcox’s scholarship and his expert report that does not exist. (*See also* Milyo Rebuttal Decl. ¶¶ 12, 22.) As the Commission detailed (Reply re 2<sup>nd</sup> Mot.), Professor Wilcox explains why political scientists have generally concluded that large contributions pose a risk of corruption, even though they have been unable to prove it to a certainty. Wilcox explained (Wilcox Dep. at 168-70, FEC Exh. 18) that the dangers of large direct contributions are well-established because political scientists have been writing about these dangers since at least the early thirties and most would agree that “at some point really large contributions create the possibility for corruption.” Nonetheless, he points out that because unlimited contributions have been illegal for over thirty years, political scientists have been unable to systematically study their effects. *Id.*

174. “Access and influence” is a broader concept than political corruption; “access and influence” also describes the effect of political activities that are both legal and socially desirable. Milyo Rebuttal Decl. ¶ 15.

FEC RESPONSE: The Court should decline to adopt this proposed finding of fact because plaintiffs refer to the legal definition of “access and influence,” but rely on the testimony of Milyo, who is not qualified to give an expert opinion on these terms as discussed in response to Paragraph 172. No matter what the terms “access” and “influence” may otherwise mean in Milyo’s view, the Supreme Court has explained that corruption, properly understood, includes undue influence on an officeholder’s judgment, and the appearance of such influence that might arise from contributors gaining preferential access to and influence over government officials. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 388 (2000) (“In speaking of

‘improper influence’ and ‘opportunities for abuse’ in addition to ‘*quid pro quo* arrangements,’ we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”). In *McConnell v. FEC*, 540 U.S. 93, 146-154 (2003), the Court further explained that the appearance of such undue influence had arisen from large “soft money” contributors gaining preferential access and influence over government officials. The issue in this case involves whether unlimited contributions to groups that make independent expenditures might result in this type of access and influence. Accordingly, additional connotations of the terms are irrelevant to the determination of the constitutionality of the statutory provision challenged by plaintiffs.

175. Social scientists mean something very specific by statements like “significant risk.” “Significant risk of corruption” implies some quantification of the probability of corruption. Milyo Rebuttal Decl. ¶ 16.

FEC RESPONSE: The proposed rebuttal fact regarding the quantification of the threat of corruption is irrelevant, has no context, and the Court should decline to adopt it. This proposed rebuttal fact, like many of the others forwarded by the plaintiffs, does not contain any information concerning the issues presented by this case. (*See also* ¶¶ 176-189.) These facts obliquely critique Wilcox’s expert opinions, but do not provide any helpful facts for consideration of the constitutional issues. At his deposition, Professor Wilcox explained that although the threat of corruption is difficult to quantify, most political scientists would agree that the danger is real. (*See* Wilcox Dep. at 168-70, FEC Exh. 18.) Professor Wilcox explained that because unlimited contributions to federal candidates have been illegal for over thirty years, political scientists have largely been unable to systematically study their effects. Nonetheless, he explained (*id.*) that the dangers of large direct contributions are well-established; political

scientists have been writing about these dangers since at least the early 1930s and most would agree that “at some point really large contributions create the possibility for corruption.”

176. There is no reason to assume that making a political contribution for “business reasons,” *see* Wilcox Report at 6, has anything to do with political corruption. There is nothing unseemly about supporting a candidate or party out of self-interest; indeed, many candidates make direct appeals to voters’ pocketbooks (e.g., “Are you better off now than you were four years ago?”). Milyo Rebuttal Decl. ¶ 20.

FEC RESPONSE: The Court should not adopt this proposed rebuttal fact as it is legally inaccurate, irrelevant, and represents only Milyo’s personal opinion of what is “unseemly.” When upholding FECA contribution limits, the Supreme Court has referred to this type of access. *See McConnell*, 540 U.S. at 119 n.5 (upholding ban on soft money fundraising by national party committees) (noting that D.C. Circuit in *Buckley*, 519 F.2d 821, 832 (D.C. Cir. 1975), had observed that “Congress found and the District Court confirmed that such contributions were often made for the purpose of furthering business or private interests by facilitating access to government officials of influencing government decisions.”).)

In any event, the Supreme Court has explained that corruption, properly understood, includes undue influence on an officeholder’s judgment, and the appearance of such influence that might arise from contributors gaining preferential access to and influence over government officials. (*See* FEC Reply ¶ 174.) The Supreme Court has never suggested that any particular type of access that comes from spending money is benign, whether sought for business purposes or for any other reason. Accordingly, this proposed rebuttal fact is irrelevant and the Court should decline to adopt it.

177. But since a minority of contributors indicates that business is a primary motive, it must be the case that other motives, like ideology, dominate the decision to give to candidates. Milyo Rebuttal Decl. ¶ 21.

FEC RESPONSE: This proposed rebuttal fact should not be adopted as it mischaracterizes the results of Professor Wilcox's research and, on its face, is nothing more than a syllogism. Professor Wilcox explained (Rept. at 6) that obviously people often give to candidates for multiple purposes, noting that contributors donate "for a variety and mixture of motives" and that "many are 'investors' who give in part or primarily to protect or promote their business interests." (Rept. at 6.) Because the motives of contributors are mixed, it is not necessarily the case that other motives "dominate" the decision to contribute.

178. Professor Wilcox's claim, Wilcox Report at 21, that it is "well-established in political science" that "large direct contributions to candidates" create the danger of "special access and particularistic policy favors to donors . . . explicit and implicit quid-pro-quo relationships" gives the misleading impression that there is a consensus among scholars that there is strong evidence that contributions cause corruption. Milyo Rebuttal Decl. ¶ 22. This is not the case, and Wilcox does not acknowledge that his own scholarship, e.g., Wilcox (2005), is inconsistent with this claim. *Id.*

FEC RESPONSE: While the Commission does not contest the technical accuracy of the words quoted in this proposed finding of fact, which actually appear on page 5 of Wilcox's report, they are taken out of context and misconstrue Wilcox's actual expert testimony. Additionally, this paragraph suggests a discrepancy between Wilcox's expert report and his previous scholarship that does not exist. (*See supra* Response to Proposed Finding of Fact in Rebuttal ¶ 173.) Finally, Milyo's rebuttal opinion should be given little weight as he cites no contrary authority to dispute Wilcox's description of current well-established views in the field of political science. (*See* Milyo Rebuttal Decl. ¶ 22.)

179. Professor Wilcox admits that there is little relationship between PAC contributions and roll-call votes. Milyo Rebuttal Decl. ¶ 23 (citing Wilcox Report at 21).

FEC RESPONSE: This proposed rebuttal should not be adopted because it misconstrues Wilcox's expert opinion and ignores portions of Professor Wilcox's report and testimony which actually explain his views on the nature of the relationship between PAC contributions and roll-

call votes. Professor Wilcox explains that contributions are “likely to matter more at other stages of the legislative process.” (*See* Wilcox Rept. at 21-22, FEC Exh. 1.) Additionally, he explains that study of contributions capped by law sheds little light on the likely impact of unlimited contributions: “[T]he weak relationship between PAC contributions and policy making is precisely what contribution limits in FECA were intended to create. It is in fact reassuring that these smaller, regulated contributions have only a modest impact on access and policymaking.” (*Id.* at 22; *see also* Wilcox Dep. at 168 (“We don’t actually write about [the danger of large contributions] much because large direct contributions to candidates have been banned since 1974 . . .”))

180. It is not necessarily true, as Professor Wilcox claims, Wilcox Report at 21-22, that because studies of PAC contributions and roll-call votes do not include independent expenditures, such studies understate the effects of contributions. If groups that make PAC contributions also make independent expenditures, then studies of the effects of PAC contributions on roll-call votes would overstate the effects of PAC contributions. Milyo Rebuttal Decl. ¶ 24.

FEC RESPONSE: This proposed rebuttal fact mischaracterizes Professor Wilcox’s report and the Court should decline to adopt it. Milyo inaccurately claims that Wilcox writes that “because studies of PAC contributions and roll-call votes do not include independent expenditures, such studies understate the effects of contributions.” Milyo claims that this proposition is not necessarily true. In the report, however, Professor Wilcox does not merely refer to the effects of contributions; Wilcox actually states that “almost none of this research includes contributions from group members or any form of indirect contribution, and thus it understates the impact of *money on policymaking*.” (Wilcox Rept. at 21, FEC Exh. 1.) In its actual form, Professor Wilcox’s conclusion is accurate and Milyo’s comments give no reason to question it. In any event, Professor Wilcox further explained (*id.* at 21-22) that studies of PAC contributions on roll-call votes explain little about the effect of money on policymaking because

“money is likely to matter more at other stages of the legislative process.” *Cf* *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (“The evidence connects soft money to manipulations of the legislative calendar, leading to Congress’ failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislations . . . To claim that such actions do not change legislative outcomes surely misunderstands the legislative process.”) (internal citations omitted).

181. To the extent that access to legislators affects roll-call votes, this should also be manifest in the relationship between PAC contributions and roll-call votes (but it isn’t). Milyo Rebuttal Decl. ¶25.

FEC RESPONSE: This proposed fact is explicitly hypothetical, and accordingly, the Court should decline to adopt it. In any event, the connection between contributions and roll-call votes does not necessarily capture all corrupt activity. As Professor Wilcox explained, studies of PAC contributions on roll-call votes are scarcely indicative of the effect of money on policymaking because “money is likely to matter more at other stages of the legislative process.” (Wilcox Rept. at 21-22)

182. The study by Hall and Wayman—cited by Wilcox in support of his claim that PAC contributions buy access to legislators, Wilcox Report at 22—is methodologically flawed and hence “almost surely biased” (Snyder 2002). Contrary evidence in Wawro (2000) is more comprehensive and systematic than the three cases examined by Hall and Wayman. Milyo Rebuttal Decl. ¶ 26.

FEC RESPONSE: Milyo’s claim that the Hall and Wayman study is flawed is supported solely by the Rebuttal Report of Professor James Snyder, Jr. hired by opponents of BCRA in *McConnell v. FEC*, No 02-0582 (D.D.C. 2003). SpeechNow ignores, however, that the Supreme Court itself found the Hall and Wayman study credible. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 (2000), the Court concluded that “there is little reason to doubt that sometimes large contributions will work actual corruption on our political system, and no reason to question the existence of a corresponding suspicion among voters.” In arriving at

this conclusion, the Court referred to Hall and Wayman and several studies invoked by the litigants that bore on this question. Furthermore Milyo's casual reference to "contrary evidence" is so general that it should carry little weight.

183. Professor Wilcox ignores scholars who argue that campaign contributions have a limited impact on policy outcomes (e.g., Ansolabehere et al. 2003, Milyo et al. 2000, Snyder 2002); this despite the fact that he assigns such studies (e.g., Ansolabehere et al. 2003) as required reading in his course on "Money in American Politics" at Georgetown. Milyo Rebuttal Decl. ¶ 27 (citing course syllabus available at <https://www9.georgetown.edu/faculty/wilcox/Government%20374.doc>).

FEC RESPONSE: This proposed rebuttal fact is inaccurate and the Court should decline to adopt it. Professor Wilcox does address studies which purport to show that campaign contributions have a limited impact on policy outcomes. He explains (Wilcox Rept. at 21-22, FEC Exh. 1) that these studies shed little light on the corruption that might result from unlimited contributions because they examine the effects of capped contributions, not unlimited contributions. For example, Professor Wilcox noted (*id.*) in his report a study of the impact of PAC contributions on roll-call votes. While the study showed that the PAC contributions had limited impact on roll-call voting by members of Congress, such research involved PAC contributions limited by law, as opposed to unlimited contributions. Because unlimited contributions have been illegal for decades it is difficult to systematically examine their effects. (*See also* Wilcox Dep. at 168-70, FEC Exh. 12.) Nevertheless, as Professor Wilcox explains (Report at 22), "the weak relationship between PAC contributions and policymaking is precisely what contribution limits in FECA were intended to create." Finally, without any context, the fact that a paper appears on a Professor's syllabus says very little.

184. Professor Wilcox ignores or is unaware of a recent study by Ansolabehere and Snyder (2004) that is particularly relevant to his discussion of soft money and his assertion that donors benefit from making contributions. The authors of this study demonstrate that the share prices of firms that gave large amounts of soft money pre-BCRA were not adversely affected by

BCRA. This strongly suggests that those firms were not receiving any important policy favors as a result of their soft money contributions. Milyo Rebuttal Decl. ¶ 28.

FEC RESPONSE: This proposed rebuttal fact is inaccurate and the Court should decline to adopt it. SpeechNow alleges that Professor Wilcox either ignores or is unaware of a 2004 study by Ansolabehere and Snyder. But Professor Wilcox's deposition indicates that he was quite probably aware of the study, but that he nonetheless found it irrelevant, and therefore did not rely on it. In his deposition, Professor Wilcox explains that he is generally aware of the work of Ansolabehere and of Snyder (*See* Wilcox Dep. at 138-40, FEC Exh. 18.), but that he only cited those sources which he found the most relevant, (*id.* at 76 ("I didn't list everything I read, but the parts that I ended up finding relevant for this report I do cite . . .")). Counsel for SpeechNow never asked Professor Wilcox about this particular study, and thus have no basis to claim that he was unaware of the study or simply ignored it.

SpeechNow also alleges that the study by Ansolabehere and Snyder is "particularly relevant." But the study is hardly germane to Professor Wilcox's various conclusions about large soft money donors and the access and influence they apparently sought. The study purports to explore whether soft money donations in the pre-BCRA era actually led to private gain. But it attempts to do so by examining the stock prices of corporate soft money donors and non-donors on one date (December 10, 2003 — the day the Supreme Court issued its McConnell opinion), and fails to account for other economic and political events that might have affected stock valuations that day.

In any event, Wilcox's expert report, including his discussion of soft money, is well supported and methodologically sound (*see* Reply re 2<sup>nd</sup> Mot.), and accordingly, the Court should give this critique little weight.

185. Professor Wilcox cites an opinion-laden piece by Malbin (2008) in support of the broad claim that campaign contributions are a corrupting influence. Wilcox Report at 5. However, Defendant's expert fails to note anywhere in his report that Malbin also argues that independent expenditures have less potential for corruption than direct contributions to candidates (Defendant's expert later takes a contrary position in his report, *See* Wilcox Report at 22). Milyo Rebuttal Decl. ¶ 29.

FEC RESPONSE: In this proposed rebuttal fact, SpeechNow nowhere identifies exactly where Malbin asserts that independent expenditures have less potential for corruption than direct contributions. In any event, this proposed rebuttal fact appears to overstate the extent to which Malbin might disagree with Professor Wilcox's conclusion that large contributions, whether made directly to candidates or given to groups to fund independent expenditures, are more problematic than small, limited contributions. Accordingly, the Court should decline to adopt it.

Malbin does indeed contrast independent spending and contributions (2<sup>nd</sup> Mot. at 10), but at that point in his article he is discussing whether *independent spending* should be limited, not whether the size of contributions to groups devoted to independent advocacy should be limited. Gall Decl., Exh. F at 3 (discussing a debate between proponents of "the abolition of contribution limits" and those who "say the Constitution should be amended to let Congress limit spending"). Limiting spending is, of course, foreclosed by Supreme Court precedent and not at issue in this case. In that context, Malbin points out only that preventing officeholders from seeking funds deals with "quasi-extortion," but he does not say that it solves the problem of "quasi-bribery," noting that "[c]onstraining the ability to ask does not solve all of the world's problems." *Id.* at 3-4. Thus, SpeechNow overstates whatever difference might exist between the conclusions of these two scholars.

186. Several scholars consider corruption from campaign contributions to be a "small societal problem" (e.g., Ansolabehere 2007; also see Ansolabehere et al. 2001 and 2003). Further, opinion surveys consistently reveal that respondents do *not* consider campaign finance reform to be an important issue (e.g., Mayer 2001). Milyo Rebuttal Decl. ¶ 30.

FEC RESPONSE: This proposed rebuttal fact is irrelevant and the Court should decline to adopt it. Whatever opinion surveys suggest about the importance of campaign finance reform relative to other public matters has no bearing on whether the statutory provisions that have been in place for more than thirty years, and require no reform, aid in the prevention corruption or its appearance.

187. Professor Wilcox also argues that large contributions “lead to increased public perceptions of corruption” (Wilcox Report at 5). The only empirical study cited in support of this claim is Shapiro (2003); however, Shapiro merely demonstrates that survey respondents have cynical attitudes about elected officials and the role of money in politics. Shapiro does not estimate the treatment effect of either contributions or limits on contributions on public opinion. It is therefore inaccurate to cite Shapiro in support of the claim that large contributions *increase* public perceptions of corruption. Milyo Rebuttal Decl. ¶ 31.

FEC RESPONSE: This proposed rebuttal fact ignores the other empirical evidence relied on by Professor Wilcox in his report to support his conclusion that “large contributions can also lead to increased public perceptions of corruption” including the results of two public opinion polls. (Wilcox Rep. at 5, 22, FEC Exh. 1.) Additionally, Milyo’s description of Shapiro’s study is incorrect. (See Robert Shapiro, “Public Attitudes Toward Campaign Finance Practice and Reform,” in *Inside the Campaign Finance Battle: Court Testimony on the New Reforms*. Anthony Corrado, Thomas Mann, and Trevor Potter, eds. (The Brookings Institution Press: Washington DC 2003), at 256-265, FEC Exh. 165. Regarding contribution limits and the corruption, Shapiro states, *inter alia* that “large majorities saw large political contributions and fund-raising in campaigns as a major source of corruption,” “the public has been concerned with contributions from special interests groups and has placed a high priority on reform that limits the influence they have through campaign contributions,” and “the public has connected this influence to political contributions: the public has seen a major problem in elected officials seeking and receiving such contributions while making decisions about issues of concern to

those given money.” (*Id.* at 261, 262.) Ultimately, Professor Wilcox’s report is based on his extensive expertise, is well-supported and is methodologically sound (*see* Reply re 2<sup>nd</sup> Mot.), and the Court should give Milyo’s critique little weight.

188. Professor Wilcox fails to cite a number of other recent and relevant studies on campaign finance and the appearance of corruption, all of which would contradict his argument that large contributions increase public perceptions of corruption. Milyo Rebuttal Decl. ¶ 32. In the same edited volume as the Shapiro study, Primo (2003) presents evidence that changes in trust in government over time do not support the notion that either campaign spending or contribution limits have an important impact on citizen trust. Milyo Rebuttal Decl. ¶ 33.

FEC RESPONSE: This proposed rebuttal fact is refuted by empirical evidence relied on by Professor Wilcox in his report (*see* Rept. at 22-23) and facts set forth in the Commission’s proposed facts (*see* FEC Facts ¶¶ 315-41) that support Professor Wilcox’s conclusion that “large contributions can also lead to increased public perceptions of corruption.” Wilcox’s expert report, including his discussion of soft-money, is well supported and methodologically sound. (*See* Reply re 2<sup>nd</sup> Mot.) As a result, the Court should give this critique little weight. Wilcox references several sources to support his assertions regarding public perceptions of corruption and neither this proposed fact in rebuttal nor Milyo’s rebuttal declaration gives any legitimate reason to question those sources. Moreover, the Supreme Court itself has concluded that “there is little reason to doubt that sometimes large contributions will work actual corruption on our political system, and no reason to question the existence of a corresponding suspicion among voters.” *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 395 (2000).

189. Notably, Malbin (2008), who is cited approvingly by Wilcox in his report, discusses the findings in Primo and Milyo and argues in reference to BCRA: “. . . it is true that some of the bill’s sponsors, reformers and newspaper editorial boards talked about contribution limits as if they would reverse the public’s cynicism about government. But it was *never plausible* to expect changes in campaign finance law by themselves measurably to improve citizens’ views about government” (emphasis added). Milyo Rebuttal Decl. ¶ 35.

FEC RESPONSE: This proposed rebuttal fact is irrelevant and the Court should decline to adopt it. The Milyo and Primo study cited by Milyo (Rebuttal Decl. at ¶ 35) and Malbin purported to measure whether the imposition of BCRA's prohibitions on soft money fundraising by political parties "would reverse the public's cynicism about government" (Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, 6 *The Forum*, Issue 1, Article 3 (2008) (Gall Decl. Exh. F at 5)). It did not purport to measure the effect that *lifting* the contribution limits would have on corruption or its appearance. Furthermore, the study also 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).)

190. Persily and Lammie (2004) also examine perceptions of corruption; they argue that citizens' general views of government, social capital and demographic attributes appear to drive perceptions of corruption. They do not find evidence consistent with the notion that campaign finance is an important determinant of perceptions of corruption. Milyo Rebuttal Decl. ¶ 36.

FEC RESPONSE: This proposed rebuttal fact is irrelevant, misconstrues the findings of Persily and Lammie, and, accordingly, the Court should decline to adopt it. It is important to note that the most salient issue regarding public opinion is the public's views on corruption and the influence of large contributions, not their familiarity with the details of campaign finance regulations or the number of other factors that may determine the public's general feelings about government. On this point, and in the article cited by Milyo, Persily and Lammie actually state that, "Although we are critical of the way public opinion polls have been deployed in [*McConnell v. FEC*], among others, *we admit the obvious: the American public believes that contributors exert undue influence over the decisions of members of Congress.* We should even

concede up front that we too believe that representatives have been influenced by campaign contributions: *money buys access and in some cases, may buy votes.*” (Nathaniel Persily and Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119 at 121 (2004) (emphasis added).) Milyo’s rebuttal testimony relied on here gives no reason to question Professor Wilcox’s findings.

191. Persily and Lammie also question the extent to which public opinion about corruption is related to actual political corruption. They note that the public is notoriously ill-informed about even very basic campaign finance facts. It is therefore no surprise that perceptions of corruption are not strongly related to campaign contribution limits. Milyo Rebuttal Decl. ¶ 37.

FEC RESPONSE: This proposed finding of fact should not be adopted for the reasons stated in regards to Paragraph 190, above.

192. One explanation for the public’s lack of knowledge about campaign finance is that the issue is considered unimportant by most citizens (e.g., Mayer 2001). Further, newspaper reporting of campaign finance stories is notoriously sensationalized (Ansolabehere et al. 2005). Milyo Rebuttal Decl. ¶ 38.

FEC RESPONSE: This proposed finding of fact should not be adopted for the reasons stated in regards to Paragraphs 186 and 190, above.

193. Despite the widespread and misinformed cynicism that exists about the role of money in politics, large numbers of survey respondents frequently support eliminating all contribution limits. For example, Grant and Rudolph (2004) demonstrate that a majority of survey respondents support removing all contribution limits. Milyo Rebuttal Decl. ¶ 39. Coleman and Manna (2000) also argue that there is little or no relationship between campaign spending and trust in government. Milyo Rebuttal Decl. ¶ 40.

FEC RESPONSE: This proposed rebuttal fact entitled to little weight. The great weight of public survey information elaborately detailed by Shapiro (*see supra* ¶ 187) indicates broad support for limiting large contributions.

194. The assertion that an independent expenditure committee like SpeechNow is functionally no different from a PAC that makes direct contributions is erroneous in multiple

respects. First, connected PACs may have their overhead costs paid for by the connected organization; an unconnected independent expenditure committee like SpeechNow must pay all its overhead costs out of limited hard-money contributions (which presumably have a higher opportunity cost). Milyo Rebuttal Decl. ¶ 48. Second, compliance with campaign finance regulations is costly and burdensome, like any other regulation, although compliance costs are rarely studied in the campaign finance literature. *Id.* ¶ 49. A connected PAC may have a sponsoring organization that provides sufficient funds to employ a full-time professional staff; while independent groups like SpeechNow may not have the same resources. *Id.*

FEC RESPONSE: This proposed rebuttal fact is irrelevant and unsupported and the Court should decline to adopt it. The assertion that compliance with campaign finance regulations is costly and burdensome is unsupported and belied by the Commission's facts, which demonstrate that the number of non-connected committees and their total receipts have risen since 1990 and increased dramatically in this decade (*see* FEC Facts ¶¶ 376-84), and that reporting is not difficult for committees like SpeechNow (*see* FEC Facts ¶¶ 410-11, 444, 449-51).

195. The Wilcox report is riddled with logical errors and factual omissions. However, this sloppiness does not appear to be random; in every instance, these errors and omissions serve to support Defendant's expert's argument. Milyo Rebuttal Decl. ¶ 50.

FEC RESPONSE: The Court should disregard this proposed rebuttal fact, which wrongly impugns Professor Wilcox's report and the care he took in preparing it. As explained by the Commission (*see generally*, Reply re 2<sup>nd</sup> Mot. in Limine), SpeechNow and its expert repeatedly mischaracterize or selectively ignore portions and aspects of Professor Wilcox's methods, his previous scholarly writings, his testimony, and his report itself.

## **II. Facts in Rebuttal to the FEC's Claims Regarding the Difficulty of Raising Funds and Financing Independent Expenditures While Subject to Contribution Limits.**

196. The FEC admits that, if there were no contribution limits applicable to groups like SpeechNow.org, individuals could give more money to such groups, and the groups would therefore be able to spend more money. FEC's Proposed Findings of Fact ¶ 223 ("With no limits on contributions to . . . groups [making independent expenditures], individuals could give them

far more than \$100,000, allowing groups to spend very large sums.” (alterations in original)); Pls.’ Br. in Resp. to FEC’s Proposed Findings of Fact ¶ 223.

FEC RESPONSE: The Commission agrees that in many cases groups would be able to raise more money without contribution limits, but groups can also raise more money by seeking new contributors or larger contributions from previous supporters who have not yet donated up to the contribution limit.

197. The Howard Jarvis Taxpayers Association has never used its PACs to make independent expenditures on behalf of candidates. Decl. of John Coupal in Supp. of Pls.’ Resp. to Def.’s Proposed Findings of Fact ¶ 5. One reason is that it would be too costly to make those independent expenditures in support of state (or federal) candidates. *Id.* To reach a significant number of people in California in state races, the HJTA would have to engage in extensive media advertising costing far more than they have available for any one individual race. Of HJTA’s three PACs, two state PACs collect most of the funds (between \$100,000 and \$200,000 per year). Funding an independent expenditure is very expensive and would leave little funds to contribute to other candidates through their regular campaign committees. A relatively small grassroots organization like HJTA is simply not in the position to fund a meaningful independent expenditure campaign. *Id.*

FEC RESPONSE: The Court should not adopt this fact which is based on conclusory and self-serving testimony. The alleged fundraising difficulties of one state-focused organization in California has nothing to do with SpeechNow’s ability to operate within the contribution limits mandated by law or any of its constitutional claims. Furthermore, to the extent that plaintiffs propose this fact as evidence of the fundraising activities of federal PACs generally, it is controverted by the Commission’s proposed findings of fact ¶¶ 376-384 (showing the success of non-connected PACs since 1990).

198. If SpeechNow.org were deemed to be a political committee, it would be classified as a “non-connected” committee. Declaration of Steven M. Simpson in Supp. of Pls.’ Proposed Findings of Fact, Ex. 25, Deposition Transcript of Gregory Scott, at 17:14-18:2.

FEC RESPONSE: No response.

199. Data drawn from Exhibit 99 of the FEC’s Proposed Findings of Fact indicates that between 1989 and 2006 non-connected PACs typically averaged higher levels of debt than connected PACs. Sherman Decl. in Supp. of Pls.’ Resp. to Def.’s Proposed Findings of Fact ¶ 7

[hereinafter Sherman Resp. Decl.]. For example, between 1989 and 2006, corporate PACs never averaged more than \$432 in debt in any election cycle, while non-connected PACs never averaged *less* than \$2,916 in debt. *Id.* During the same time period, non-connected PACs averaged thousands of dollars more debt than union PACs in all but two election cycles (2003-04 and 2005-06). *Id.* These data are summarized in the chart below, taken from Sherman Resp. Decl. ¶ 6:

Election Cycle	Average debt per committee					
	Corporate	Union	Trade/ Membership / Health	Cooperative	Corporation w/out stock	Non- Connected
2005-2006	\$96	\$13,634	\$1,432	\$0	\$3,986	\$2,916
2003-2004	\$136	\$9,763	\$1,134	\$0	\$3,383	\$5,454
2001-2002	\$346	\$402	\$1,414	\$0	\$3,156	\$5,580
1999-2000	\$160	\$396	\$1,120	\$0	\$3,512	\$9,845
1997-98	\$315	\$1,121	\$1,663	\$0	\$2,522	\$7,395
1995-96	\$432	\$3,126	\$1,428	\$0	\$2,985	\$7,562
1993-94	\$125	\$284	\$905	\$0	\$2,258	\$7,601
1991-92	\$76	\$674	\$667	\$788	\$1,434	\$7,802
1989-90	\$63	\$209	\$517	\$598	\$1,058	\$7,555

FEC RESPONSE: No response.

200. Across all types of PACs during the entire period covered by FEC Exhibit 99, there are only three instances where a category of connected PAC averaged more debt in an election cycle than did non-connected PACs for that same cycle. Those are: PACs affiliated with unions in the 2003-04 and 2005-06 election cycles, and PACs affiliated with non-stock corporations in the 2005-06 election cycle. Sherman Resp. Decl. ¶ 8.

FEC RESPONSE: Denied. *See* FEC Response to SN Facts ¶ 199.

201. One difference between connected PACs and non-connected PACs is that connected PACs are permitted by FEC regulations to use “general treasury monies, including monies obtained in commercial transactions and dues monies or membership fees, for the establishment, administration, and solicitation of contributions to [their connected PACs].” 11 C.F.R. § 114.5(b); *see also* Sherman Resp. Decl. ¶ 9; Milyo Rebuttal Decl. ¶ 49.

FEC RESPONSE: Objection to the extent contains legal conclusions.

202. The number of non-connected committees that spent funds on independent expenditures has remained small — relative to the total number of non-connected committees — in each election cycle from 1995-1996 to 2005-2006 (the six election cycles for which the FEC appears to have made such summary data available). *Compare* Simpson Decl., Ex. 37, FEC Summaries of PAC Independent Expenditures for 1995-1996 (available at <http://www.fec.gov/finance/pacieye.htm>), 1997-1998 (available at

<http://www.fec.gov/press/pacie98.htm>), 1999- 2000 (available at <http://www.fec.gov/press/press2001/053101pacfund/pacie00.htm>), 2001-2002 (available at [www.fec.gov/press/press2003/20030327pac/indepexp.xls](http://www.fec.gov/press/press2003/20030327pac/indepexp.xls)), 2003-2004 (available at <http://www.fec.gov/press/press2005/20050412pac/indepexp.pdf>) & 2005-2006 (available at [www.fec.gov/press/press2007/20071009pac/indepexp2006.xls](http://www.fec.gov/press/press2007/20071009pac/indepexp2006.xls)), with FEC Summary of PAC Activity, 1990-2006, FEC Ex. 99.

FEC RESPONSE: Objection to the extent contains legal conclusions.

203. In the 1995-1996 cycle, of the 1,259 non-connected committees reported by the FEC, *See* FEC Ex. 99, only 95 (or fewer) — or 7.5 percent — reported making independent expenditures. Simpson Decl., Ex. 37, FEC Summary of PAC Independent Expenditures, 1995-1996.

FEC RESPONSE: No response.

204. In the 1997-1998 cycle, of the 1,326 non-connected committees reported by the FEC, *See* FEC Ex. 99, only 42 (or fewer) — or 3.2 percent — reported making independent expenditures. Simpson Decl., Ex. 37, FEC Summary of PAC Independent Expenditures, 1997-1998.

FEC RESPONSE: No response.

205. In the 1999-2000 cycle, of the 1,362 non-connected committees reported by the FEC, *See* FEC Ex. 99, only 81 (or fewer)—or 5.9 percent—reported making independent expenditures. Simpson Decl., Ex. 37, FEC Summary of PAC Independent Expenditures, 1999-2000.

FEC RESPONSE: Ninety-one nonconnected political committees reported making independent expenditures, not eighty-one as recited in plaintiffs' paragraph. Otherwise, no response.

206. In the 2001-2002 cycle, of the 1,401 non-connected committees reported by the FEC, *See* FEC Ex. 99, only 44 (or fewer) — or 3.1 percent — reported making independent expenditures. Simpson Decl., Ex. 37, FEC Summary of PAC Independent Expenditures, 2001-2002.

FEC RESPONSE: No response.

207. In the 2003-2004 cycle, of the 1,650 non-connected committees reported by the FEC, *See* FEC Ex. 99, only 110 (or fewer)—or 6.7 percent—reported making independent expenditures. Simpson Decl., Ex. 37, FEC Summary of PAC Independent Expenditures, 2003-2004.

FEC RESPONSE: No response.

208. In the 2005-2006 cycle, of the 1,797 non-connected committees reported by the FEC, *See* FEC Ex. 99, only 93 (or fewer)—or 5.2 percent—reported making independent expenditures. Simpson Decl., Ex. 37, FEC Summary of PAC Independent Expenditures, 2005-2006.

FEC RESPONSE: No response.

209. Likewise, the number of “[p]ersons and entities (other than political party committees) that reported making independent expenditures, and reported making no contributions or coordinated expenditures,” has remained very small — relative to the total number of non-connected political committees —in each election cycle from 1997-1998 to 2005-2006. *Compare* Simpson Decl., Ex. 33, FEC’s Response to Pls.’ Interrog. No. 3, *with* FEC Ex. 99, FEC Summary of PAC Activity, 1990-2006.

FEC RESPONSE: No response.

210. In the 1997-1998 cycle, the FEC reported that 1,326 non-connected political committees reported some sort of activity, *see* FEC Ex. 99, while only 65 “[p]ersons and entities (other than political party committees) . . . reported making independent expenditures . . . [but] reported making no contributions or coordinated expenditures.” *See* Simpson Decl., Ex. 33, FEC’s Response to Pls.’ Interrog. No. 3 (1997-1998 Election Cycle).

FEC RESPONSE: No response.

211. In the 1999-2000 cycle, the FEC reported that 1,362 non-connected political committees reported some sort of activity, *see* FEC Ex. 99, while only 126 “[p]ersons and entities (other than political party committees) . . . reported making independent expenditures . . . [but] reported making no contributions or coordinated expenditures.” *See* Simpson Decl., Ex. 33, FEC’s Response to Pls.’ Interrog. No. 3 (1999-2000 Election Cycle).

FEC RESPONSE: No response.

212. In the 2001-2002 cycle, the FEC reported that 1,401 non-connected political committees reported some sort of activity, *see* FEC Ex. 99, while only 93 “[p]ersons and entities (other than political party committees) . . . reported making independent expenditures . . . [but] reported making no contributions or coordinated expenditures.” *See* Simpson Decl., Ex. 33, FEC’s Response to Pls.’ Interrog. No. 3 (2001-2002 Election Cycle).

FEC RESPONSE: No response.

213. In the 2003-2004 cycle, the FEC reported that 1,650 non-connected political committees reported some sort of activity, *see* FEC Ex. 99, while only 169 “[p]ersons and entities (other than political party committees) . . . reported making independent expenditures . . .

.[but] reported making no contributions or coordinated expenditures.” *See* Simpson Decl., Ex.33, FEC’s Response to Pls.’ Interrog. No. 3 (2003-2004 Election Cycle).

FEC RESPONSE: No response.

214. In the 2005-2006 cycle, the FEC reported that 1,797 non-connected political committees reported some sort of activity, *see* FEC Ex. 99, while only 127 “[p]ersons and entities (other than political party committees) . . . reported making independent expenditures . . . [but] reported making no contributions or coordinated expenditures.” *See* Simpson Decl., Ex. 33, FEC’s Response to Pls.’ Interrog. No. 3 (2005-2006 Election Cycle).

FEC RESPONSE: No response.

215. In the most recently reported 2005-2006 cycle, the five committees, of any type, that spent the largest amount on independent expenditures were national political party committees, *i.e.*, the National Republican Congressional Committee, the Democratic Congressional Campaign Committee, the Democratic Senatorial Campaign Committee, the National Republican Senatorial Committee, and the Republican National Committee. Simpson Decl., Ex. 36, FEC Total Independent Expenditures by Committee, Reports Received as of Nov. 8, 2006, also available at <http://www.fec.gov/press/press2006/2006indexp/iesummarycom1109.pdf>.

FEC RESPONSE: No response.

216. The amount spent on independent expenditures in the 2005-2006 cycle by any one of those five national party political committees — the National Republican Congressional Committee (\$83,585,308.49), the Democratic Congressional Campaign Committee (\$64,146,745.86), the Democratic Senatorial Campaign Committee (\$41,904,370.62), the National Republican Senatorial Committee (\$19,528,341.14), and the Republican National Committee (\$13,937,138.19) — greatly exceeded the total amount spent on independent expenditures by all non-connected committees combined (\$8,083,013). *Compare* Pls. Ex. 36, FEC Total Independent Expenditures by Committee, Reports Received as of Nov. 8, 2006 (Total Independent Expenditures of the National Republican Congressional Committee, the Democratic Congressional Campaign Committee, the Democratic Senatorial Campaign Committee, the National Republican Senatorial Committee, and the Republican National Committee), *with* Pls. Ex. 37, FEC Summary of PAC Independent Expenditures, 2005-2006 (Total Independent Expenditures by Committee Type, Non-connected Organization).

FEC RESPONSE: No response.

217. The contribution limit for national political party committees in the 2005-2006 cycle was \$26,700, an amount more than five times greater than the contribution limit for nonconnected committees, which was \$5,000. *Compare* 2 U.S.C. § 441a(a)(1)(B) (showing political party committee contribution limit of \$25,000 unadjusted for inflation) & 70 Fed. Reg. 11658, 11660 (Mar. 9, 2005) (showing political party committee contribution limit of \$26,700 for the 2005-2006 cycle when indexed for inflation), *with* 2 U.S.C. § 441a(a)(1)(C) (showing

contribution limit of \$5,000 for “any other political committee,” which is static and not adjusted for inflation).

FEC RESPONSE: No response.

219. The FEC’s expert, Clyde Wilcox, admitted that if the FEC passed a rule like California’s—requiring groups running independent expenditures to identify their largest donors in their advertising disclaimers—his concerns about the transparency of SpeechNow.org’s disclaimers would be “solved.” FEC Ex. 18, Wilcox Dep. 26:3-267:4.

FEC RESPONSE: This proposed rebuttal fact poses a hypothetical that is irrelevant and the Court should decline to adopt it. Passing a rule that would require groups running independent expenditures to identify only their largest donors in advertising disclaimers is beyond the Commission’s authority. Such a rule mandating limited disclosure would conflict with the Act, which requires political committees like SpeechNow to report all receipts and expenditures. Thus, the rule that SpeechNow appears to be proposing would not require the disclosure of all receipts and expenditure. But such disclosure ensures that vital information about who is supporting candidates is made publicly available. (*See* FEC Facts ¶¶ 361-75.)

**IV. Facts in Rebuttal to the FEC’s Claims Regarding the Motives of Donors to Political Committees and 527 Groups.**

220. Political scientists who have studied contributions to Congressional candidates have categorized donors as possessing one or more motives: purposive (a desire to enact general public policies that apply to large classes of society), solidary (seeking the psychological benefits that stem from the social side of political participation), and material (seeking tangible personal gain as a result of contributions). Simpson Decl., Ex. 22 at 43, Wilcox et al., *THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES AND INTIMATES* 42 (2003).

FEC RESPONSE: The Supreme Court has never suggested that any particular type of access that comes from spending money is benign, whether sought for business purposes or for any other reason. In any event, the Supreme Court has explained that corruption, properly understood, includes undue influence on an officeholder’s judgment, and the appearance of such influence that might arise from contributors gaining preferential access to and influence over

government officials. Accordingly, this proposed rebuttal fact is irrelevant and the Court should decline to adopt it.

221. The single largest motivation that underlies contributions to political candidates is purposive or ideological; that is, trying to effect changes in public policy that will benefit all of, or a large portion of, society. In a survey that asked individuals why they gave to Congressional candidates, the most commonly expressed reason was the candidate's ideological position, with 69% of respondents saying that ideology was always important and another 24% saying it was sometimes important. *Id.* at 46, Table 3.1.

FEC RESPONSE: Plaintiffs mischaracterize the cited source, conflating a chart that allowed donors to name multiple motives with classifications into different types of donors. "Ideologues" made up one-third of the donors and "investors" made up one-fourth. "Investors," donors who contribute seeking this type of tangible personal gain, thus account for a significant percentage of those who make contributions. When upholding contribution limits, the Supreme Court has referred to this type of access. In *McConnell*, the Court referenced several statements from corporate executive regarding the influence business leaders sought for their contributions. *See* 540 U.S. 93 at 147-48; *see also id.* at 119 (upholding ban on soft money fundraising by national party committees) (noting that D.C. Circuit in *Buckley*, 519 F.2d 821, 832 (D.C. Cir. 1975), had observed that "Congress found and the District Court confirmed that such contributions were often made for the purpose of furthering business of private interested by facilitating access to government officials of influencing government decisions.")

In any event, the Supreme Court has never suggested that ideological access that is achieved by spending money is benign, even if not sought for personal profit. Accordingly, this proposed rebuttal fact is irrelevant and the Court should decline to adopt it.

222. Among donors who make contributions of \$200 or more, 73% say that it is very important to support a candidate or cause, and 61% say it is very important to influence policies of government. By contrast, only eight percent of significant donors say that business or employment reasons were a very important reason they contributed to a Congressional candidate. *Id.*

FEC RESPONSE: *See supra* Response to Proposed Rebuttal Fact ¶ 177. This proposed rebuttal fact mischaracterizes Professor Wilcox’s research and the Court should decline to adopt it as such.

223. Even those donors who are “investors” often give for purposive reasons. For instance, 60% of “investors” say they contribute to a Congressional candidate “to support a candidate or cause” and 62% contribute based on a “candidate’s liberalism-conservatism.” *Id.* at 49.

FEC RESPONSE: *See supra* Response to Proposed Rebuttal Fact ¶ 177.

224. Large contributors to 527s tend to support only a single political party. In the 2004 election cycle, 113 individuals contributed more than \$250,000 to 527s. Of those, only five made soft-money contributions to *both* the Democratic and Republican parties in either of the previous two election cycles. The remaining 108 individuals restricted their soft-money contributions to only a single political party. FEC Ex. 55, Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM* 79, 94-96, Table 5.2 (Michael J. Malbin ed., 2006).

FEC RESPONSE: This proposed rebuttal fact distorts the data to suggest a conclusion regarding a motive for giving that is not supported. Weissman and Hassan central claim based on this data is that “[c]learly what was happening was not only a shift in their soft money giving — from party to 527 — but also a vast escalation in their total donations.” (Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM* 79, 94-96, Table 5.2 (Michael J. Malbin ed., 2006) FEC Ex. 55) (emphasis in original). The Commission disputes plaintiffs’ characterization of the data to the extent it suggests the donors’ motives, which the authors of the book chapter do not claim these data address. In any event, the Supreme Court has never suggested that access purchased with money from only one political party is benign.

225. These same people tended to restrict their hard-money contributions to candidates of the same party to which they had directed their soft-money contributions. Plaintiffs analyzed the hard-money candidate contributions that the 108 single-party soft-money givers had made through September 19, 2008. Of those people, all but nine gave at least 90% of their hard-money

contributions to candidates from the same party to which they had directed their soft-money contributions. Declaration of Robert Frommer in Supp. of Pls.' Resp. to Def.'s Proposed Findings of Fact ¶ 7.

FEC RESPONSE: This proposed rebuttal fact distorts the data to suggest a conclusion regarding the motive that is not supported the declaration. The FEC disputes plaintiffs' characterization of the data to the extent it suggests the donors' motives for giving, which are not apparent based on the data or the declaration. To the extent that this fact characterizes data from disclosure reports filed with the FEC, that data speaks for itself. In any event, the Supreme Court has never suggested that access purchased with money from only one political party is benign.

**V. Facts in Rebuttal to the FEC's Claim That Unlimited Contributions to Groups Like SpeechNow.org Will Create Actual Political Corruption or the Appearance of Such Corruption.**

226. Political candidates and officeholders often feel gratitude toward many individuals and groups that provide benefits to them. For example, candidates feel gratitude towards nonprofit organizations that support causes or legislation of importance to the candidate or incumbent,. Simpson Decl., Ex. 14, FEC's Resp. to Pls.' First Set of Disc. Reqs., at 30; *see also* Simpson Decl., Ex. 23, FEC's Resp. to Pls.' Second Set of Disc. Reqs., at 8.

FEC RESPONSE: *See supra* Response to Proposed Rebuttal Fact ¶ 169.

227. Candidates also ask citizens for votes, and show gratitude for the support of those citizens when support is received, as the FEC has admitted. Simpson Decl., Ex. 14, FEC's Resp. to Pls.' First Set of Disc. Reqs., at 30.

FEC RESPONSE: *See supra* Response to Proposed Rebuttal Fact ¶ 169.

228. Candidates often feel gratitude toward celebrities or other prominent individuals who endorse their candidacies. Simpson Decl., Ex. 14, FEC's Resp. to Pls.' First Set of Disc. Reqs., at 30; *see also* Milyo Rebuttal Decl. ¶ 8.

FEC RESPONSE: *See supra* Response to Proposed Rebuttal Fact ¶ 169.

229. Political candidates and officeholders often feel gratitude toward newspapers that endorse their candidacies or support legislation sponsored by the candidate or officeholder. Simpson Decl., Ex. 14, FEC's Resp. to Pls.' First Set of Disc. Reqs., at 30.

FEC RESPONSE: *See supra* Response to Proposed Rebuttal Fact ¶ 169.

230. Political candidates and officeholders often feel gratitude toward individuals who make independent expenditures that support the candidacies of those candidates and officeholders or oppose the candidacies of their opponents. Simpson Decl., Ex. 23, FEC's Resp. to Pls.' Second Set of Disc. Reqs., at 8-9; *see also* FEC Ex. 18, Wilcox Dep. 178:7-179:2; FEC Ex. 16, Starcher Dep. 142:4-143:2.

FEC RESPONSE: No response.

231. California Fair Political Practices Commission Chairman Ross Johnson was not corrupted by a \$75,000 independent expenditure campaign promoting his election to the California Senate in 1995. The independent expenditures did not cause him to introduce any legislation he would not have otherwise introduced or to meet with anyone that he would not have otherwise met. The independent expenditures did not cause him to do anything different than he would have done had the independent expenditures not been made. In sum, Senator Johnson states that he was not corrupted by the independent expenditures made on his behalf. FEC Ex. 10, Johnson Dep. 92:5-95:2

FEC RESPONSE: While the Commission does not dispute the fact that Chairman Johnson was not corrupted by the independent expenditure made in support of his candidacy, as Chairman Johnson stated during his deposition, "It was perfectly fair for you or anybody else to wonder about that, and that's the point." (*See* Johnson Dep. at 89:10-12, FEC Exh. 10.)

232. No contribution to the election campaign of West Virginia Supreme Court Justice Larry V. Starcher, regardless of its size, could influence his vote in a case. FEC Ex. 16, Starcher Dep. 159:20-161:15.

FEC RESPONSE: This proposed fact is irrelevant and the Court should decline to adopt it. The Commission's proposed facts demonstrate generally that unlimited contributions to that a coal company executive's contributions for independent expenditures in a 2005 West Virginia Supreme Court race illustrate the appearance of corruption. (*See* FEC Facts ¶¶ 317-32.) Whether any specific individual is incorruptible is not relevant to the determination of the constitutionality of the statutory provision challenged by plaintiffs.

233. Evidence suggests that the public does not perceive gratitude and access to be the pervasive threats the FEC alleges. A telephone survey conducted by Rasmussen Reports in 2008 "found that 55% believe media bias is more of a problem than big campaign contributions" while 36% disagree. *See* Simpson Decl., Ex. 38, Rasmussen Reports, *55% Say Media Bias Bigger Problem than Campaign Cash*, dated Aug. 11, 2008. The survey also found that "[j]ust 22%

believe it would be a good idea to ban all campaign commercials so that voters could receive information on the [2008 Presidential] campaign only from the news media and the internet. Sixty-six percent (66%) disagree and think that ... it's better to put up with an election-year barrage of advertising rather than rely on the news media." *Id.*

FEC RESPONSE: This proposed rebuttal fact is irrelevant and the Court should decline to adopt it. Whatever opinion surveys purport to suggest about the importance of campaign finance reform relative to other public matters has no bearing on whether the statutory provisions challenged by plaintiffs prevent corruption or its appearance.

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  
Attorneys

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

Dated: December 12, 2008