UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR PROPOSED FINDINGS OF FACT FOR CERTIFICATION

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Plaintiffs by and through their attorneys hereby reply in support of their proposed findings of fact for certification. Included with this memorandum are the following documents: the Declaration of Rodney Smith, the Declaration of Paul M. Sherman, and the Declaration of Robert Gall. This memorandum replies to both the FEC's Response to Plaintiffs' Proposed Findings of Fact (FEC's Response) and its memorandum in support (FEC's Memorandum).

INTRODUCTION

If there is a theme running through the FEC's filings in connection with the proposed findings of fact it is cloud, confuse, and clutter. Divert attention from the issues. Focus on anything and everything as long as it has nothing to do with the Plaintiffs or the laws and precedents on which they rely in this as-applied constitutional challenge. Thus, where the Plaintiffs say they want to join together as a group, the FEC responds that they can speak individually. Where they say they want to run television advertisements, the FEC says they can speak in other ways. When the Plaintiffs say SpeechNow.org will follow the laws and rules governing independent expenditures, the FEC asks the Court to ignore those laws and rules because they do not work, and then purports to demonstrate the motives and actions of everyone but the Plaintiffs. If the Plaintiffs point out that raising money under contribution limits is more difficult than raising it outside of those limits, the FEC responds that national political parties have raised money under those limits. When Plaintiffs claim that the limits inhibit the ability of individuals to associate and speak effectively, the FEC says that Plaintiffs' lawyers have done a good job publicizing this case and that some of the individual Plaintiffs are either wealthy or are friends with journalists. If Plaintiffs argue that the reporting requirements for PACs are burdensome, the FEC argues that its own employees do not agree and that it tries to help people comply with those requirements.

In short, the vast majority of what the FEC has said, both in its proposed findings of fact and in its response to Plaintiffs' proposed findings, is irrelevant either to the case in general or at this stage of the proceedings. Most of the FEC's proposed findings go well beyond the application of the challenged laws to the Plaintiffs and thus are irrelevant to the issues in this as-applied constitutional challenge. Most of the FEC's points in response to Plaintiffs' proposed findings of fact are simply legal arguments about the merits, and are thus irrelevant at this stage of the case.

Indeed, the FEC goes beyond relying on irrelevant facts and argument and actively criticizes the Plaintiffs and their attorneys for bringing what the FEC terms is a "test case." But the FEC has it exactly backwards. Plaintiffs have done precisely what individuals who believe their rights are being violated are *supposed* to do in this country. Indeed, in *Buckley*, the Supreme Court made clear that one of the reasons it upheld limits on contributions to candidates was because the effect of such limits would be "to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on *direct political expression*." *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (emphasis added). Direct political expression is precisely the sort of speech in which the Plaintiffs wish to engage. As a result, in reliance on existing statutes, rules, and precedents, Mr. Keating created an association that Plaintiffs believe eliminates concerns about corruption while still allowing individuals to band together and engage in the direct political expression to which the Court in *Buckley* alluded. To clarify the application of the laws, SpeechNow.org sought an advisory opinion from the FEC. After that process was completed, Plaintiffs brought a narrow as-applied constitutional challenge to those laws.

The FEC's response is to try to change not only the subject but the very rules of the game. The Supreme Court has made clear that "as-applied challenges are the basic building blocks of constitutional adjudication." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1639 (2007) (citation omitted). Yet the FEC, by relying on hundreds of proposed "findings of fact" that involve practically every group and individual *except* the Plaintiffs, is asking this Court to ignore the very distinction between as-applied and facial constitutional challenges. The FEC goes even farther, arguing repeatedly that the Plaintiffs' proposed findings of fact are irrelevant because they can speak individually or in other ways, or do other things, or that other groups have been able to raise funds under contribution limits or comply with the requirements for PACs. Yet these are simply versions of the FEC's implicit position that as-applied challenges do not exist; indeed, the FEC seems to believe that if it can imagine ways in which Plaintiffs can speak under the laws they challenge, those laws are necessarily constitutional. But this is not the law.

Plaintiffs address these points in detail below, and they reply to the FEC's arguments in its memorandum and in its responses to Plaintiffs' proposed findings of fact. However, wherever possible, the Plaintiffs have replied to categories of claims the FEC made in response to the Plaintiffs' proposed findings of fact, rather than replying to each of the FEC's responses on a point-by-point basis. Plaintiffs do this both in the interest of efficiency, and because they view the fact finding process fundamentally differently than the FEC does. In Plaintiffs' view, it is pointless for the parties to argue about proposed findings except to point out (1) that the evidence offered does not support the proposed finding, or (2) that the evidence is inadmissible or irrelevant, as the Plaintiffs often did in their response to the FEC's proposed findings of fact and in their motions in limine.[1] The FEC devotes much space in its responses arguing that the Court

[1] The Court ruled on December 9, 2008 that it does not understand Plaintiffs' motions in limine to be motions in limine at all, and it has allowed the FEC to reply to those motions in its reply brief. It is not clear whether the

should not enter Plaintiffs' proposed findings of fact because the FEC disagrees with the Plaintiffs' legal theories or because the FEC knows of other facts that prove things other than what the Plaintiffs' sought to prove in their proposed findings. This goes well beyond arguments about relevance. The FEC is, in essence, attempting to litigate the entire case now, during the fact-finding stage.

Accordingly, in Part I, below, Plaintiffs demonstrate that the FEC's reliance on hundreds of proposed findings of fact that have nothing to do with the Plaintiffs is improper in an as-applied challenge. Plaintiffs then address the FEC's responses to the Plaintiffs' proposed findings of fact in order both to summarize the relevant facts on which the parties agree and to demonstrate that the FEC's arguments are entirely irrelevant or baseless. Despite the FEC's

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Court's conclusion was based on the styling of the motions as "motions in limine" or on the fact that Plaintiffs made separate motions rather than including their arguments in their response to the FEC's proposed findings of fact. Plaintiffs note that the parties in other campaign finance cases, notably *WRTL II* and *McConnell*, have filed motions to exclude both evidence and witnesses. *See, e.g.*, *WRTL II*, No. 04-01260, Motion to Strike Plaintiff's Evidence Concerning Its 2006 Advertisement by Federal Election Commission (D.D.C. Sept. 13, 2006) (Docket #112; *McConnell*, No. 02-00874, Motion Filed by Plaintiff in 1:02-cv-00874 to Strike Certain Witnesses or for Certification of Counsel (D.D.C. Sept. 24, 2002) (Docket #170). Plaintiffs styled their motions as motions in limine given the nature of the relief they sought—i.e., excluding, from consideration by the fact-finder, specific documents and the testimony of certain witnesses because of their inadmissibility. This Court's consideration of the proposed findings after the parties complete their submissions in this certification procedure is analogous either to summary judgment or trial because it will result in ultimate findings of fact. The parties are now at the threshold of that fact-finding. And motions in limine have been considered by judges of this Court within the context of both summary judgment and trial. *See, e.g.*, *Lewis v. Booz-Allen & Hamilton, Inc.*, 150 F.Supp.2d 81, 84 (D.D.C. 2001) ("Since a motion for summary judgment requires an examination of the entire record, including all pleadings and all admissible evidence, the court will first address the evidentiary motions."); *Morphosys AG v. Cambridge Antibody Technology Limited*, No. 99-1012, 2001 WL 36165572 (D.D.C. 2001) (granting and denying various motions in limine, before trial, on subjects such as the possible exclusion of expert testimony and reports). Although Plaintiffs could have labeled their motions as motions to strike or just called them objections, motions to exclude expert testimony (which is the largest category of testimony Plaintiffs seek to exclude) are "[t]ypically . . . presented as in limine motions." 32-23 MOORE'S FEDERAL PRACTICE § 23.353 n.1073. Further, a party may seek to invoke the exclusion sanction of Rule 37(c) of the Federal Rules of Civil Procedure in a variety of ways, including "a motion in limine prior to the beginning of the trial." 6-26 MOORE'S FEDERAL PRACTICE § 26.27[2][a]. Moreover, under Fed. R. Civ. P. 12(f), motions to strike are typically directed at "pleadings," which under Rule 7(a) include the complaint, answer, and related documents. Finally, Plaintiffs' understanding is that the rules of civil procedure are construed liberally, and that a motion's substance determines how it is treated, not the form of its title. *See, e.g.*, *Sacks v. Reynolds Sec., Inc.*, 593 F.2d 1234, 1239 (D.C. Cir. 1978) ("The liberality of the . . . Federal Rules is such that erroneous nomenclature does not prevent the court from recognizing the true nature of a motion.") (citation omitted); *see also Perez-Perez v. Popular Leasing, Inc.*, 993 F.2d 281, 283 (1st Cir. 1993) ("Our inquiry into the character of the motion is a functional one: nomenclature should not be exalted over substance.") (Internal quotation marks and citation omitted); *Snyder v. Smith*, 736 F.2d 409, 419 (7th Cir. 1984) ("The Federal Rules are to be construed liberally so that erroneous nomenclature in a motion does not bind a party at his peril."), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998).

many arguments to the contrary, it actually does not dispute most of the essential facts on which Plaintiffs relied in their proposed findings of fact. In Part II, Plaintiffs address the FEC's arguments in its memorandum in support of its responses to Plaintiffs' proposed findings of fact to the extent those arguments are not already covered in the first part.

ARGUMENT

I. The Court Should Decline the FEC's Invitation to Treat This Case As a Facial Challenge.

This is a narrow, as-applied constitutional challenge. Plaintiffs challenge the contribution limits and certain regulations of PACs only as they apply to the Plaintiffs in this case. Plaintiffs have done everything they can both to seek clarification from the FEC about the laws as they apply to them and to narrow the focus of their constitutional challenge. Mr. Keating relied on existing rules, statutes, and precedents in creating SpeechNow.org, and the association sought an advisory opinion—a process the FEC itself has invoked in responding to constitutional challenges[2]— to determine how those laws would apply to it. Although the laws Plaintiffs challenge have been on the books for years, the constitutionality of their application to an association that makes only independent expenditures is an open question, as both courts and commentators have recognized. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 17-18.

In response to the Plaintiffs narrow and focused challenge, the FEC's strategy is to be broad and unfocused. Thus, the FEC ignores the application of the challenged laws to the Plaintiffs and focuses, instead, on their application to virtually every other group and individual conceivable. Where the FEC cannot ignore the Plaintiffs, it seeks to ignore the laws on which they rely, either by arguing, in the case of the laws and rules governing independence and

[2] *See Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 87 n.3 (D.D.C. 2006) ("The Commission argues that, in order to establish its standing, the League must seek an advisory opinion. . . .").

coordination, that they are irrelevant or ineffective; or by attempting to convince the Court to enter legal conclusions as factual findings, and thereby to avoid the necessity of arguing the merits entirely. In short, the FEC is trying mightily to transform this case into a facial challenge, sometimes even to laws and legal principles—for example, a version of coordination that relies on "access and gratitude" or the notion that speakers have no right to speak in the manner they choose—that do not exist. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 31.

As a result, most of what the FEC has said in its briefs in support of its proposed findings of fact is either irrelevant to the case in general or irrelevant to this phase of the proceedings. As demonstrated below, the touchstone of an as-applied challenge is the court's focus on the *application* of laws in a particular circumstance, not the application of the laws to every conceivable situation. Accordingly, the FEC's effort to demonstrate the actions of every individual and group other than the Plaintiffs is a waste of time, as is the FEC's effort to "prove" that the Plaintiffs do not need to associate with one another, can be heard in ways other than television advertisements, or that the contribution limits and PAC requirements are not burdensome. These are all legal questions to be addressed on the merits; arguing them now is simply a waste of time. In any event, as Plaintiffs further demonstrate below, the FEC does not really dispute the basic facts on which Plaintiffs relied.

A. This As-Applied Challenge Should Be Limited Primarily to the Facts and Circumstances of the Plaintiffs' Case.

The Supreme Court has long indicated a preference for narrow as-applied constitutional challenges that focus on the facts of a particular case. *See, e.g., Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190-91 (2008) (stating preference for as-applied challenges and citing cases that establish that preference). According to the Court, as-applied challenges avoid the need for speculation because they are based on specific facts concerning the

application of laws to particular plaintiffs, and, as a result, they are less likely than facial challenges to result in rulings that are broader than necessary or "premature interpretations of statutes in areas where their constitutional application might be cloudy." *See id*. Thus, the focus of an as-applied challenge is necessarily much narrower than a facial challenge. In a facial First Amendment challenge, the plaintiff must demonstrate that "a 'substantial number' of [a laws'] applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 1190 n.6. In an as-applied challenge, by contrast, the focus is on the facts of the plaintiffs' particular case. *See, e.g., Field Day LLC v. County of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006) (contrasting facial with as-applied challenges and stating that an as-applied challenge "requires an analysis of *the facts of a particular case* to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right") (emphasis added); *Zelotes v. Martini*, 352 B.R. 17, 21 n.3 (D. Conn. 2006) (stating that as-applied challenges require "a case-by-case analysis of whether the application of a statute, even if facially constitutional, deprived the individual to whom it was applied of a protected right").

The Supreme Court recently made clear the narrow focus of as-applied challenges in the campaign finance context in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (hereinafter *WRTL II*). *WRTL II* involved a challenge to the very same electioneering communications provisions of BCRA that the Court had upheld on their face a mere three years before in *McConnell v. FEC*. *Id*. at 2658-59. Even so, in *WRTL II* the Court held that the burden was still on the government to demonstrate that the electioneering communications ban could constitutionally be applied to the ads that WRTL wanted to broadcast. *Id*. at 2663-64. As the Court made clear, while *McConnell* involved a facial challenge to the electioneering

communications ban, *WRTL II* "present[ed] the separate question whether [the ban] may constitutionally be applied to *these specific ads*." *Id*. (emphasis added). Thus, according to the Court, to prevail the government must show that "applying BCRA to WRTL's ads" satisfies strict scrutiny. *Id*. at 2664. Although the Court looked to *McConnell* for the general question that needed to be answered—whether WRTL's ads were the functional equivalent of express advocacy—its inquiry focused entirely on WRTL's ads, not the actions and speech of other groups not before the Court. *Id*. at 2664. Indeed, in *WRTL II*, the Court declined even to conduct a broader inquiry into the intentions of WRTL or the effect of its ads on the election. That was not only beyond the proper scope of the case, but, according to the Court, such an inquiry would itself constitute an undue burden on and thus an additional threat to free speech because it would lead to lengthy litigation and expert-driven inquiries into the intentions and effects of WRTL's ads. *See id*. at 2665-66 (stating that to safeguard speech, "the proper standard for an as-applied challenge to BCRA § 203 must be objective" and "must entail minimal if any discovery, to allow the parties to resolves disputes quickly without chilling speech through the threat of burdensome litigation").

Thus, in this case it is appropriate for the Court and the FEC to look to other decisions to determine the proper question to be answered—here, for instance, whether the Plaintiffs' activities fall within what the Supreme Court has already defined as corruption or its appearance—but it is wholly beyond the scope of this as-applied challenge to examine the actions of hundreds of other groups and individuals to determine whether they have engaged in activities or financed speech that can be said to create concerns about corruption. Under the Court's ruling in *WRTL II*, it is clear that even where the Court concludes—as it did in *McConnell*—that some groups and individuals have engaged in activities that raise concerns

about corruption, *other* groups and individuals may nonetheless be entitled to speak free of restrictions previously upheld if their speech and activities fall within the protections of the First Amendment. To demonstrate that they do, such individuals may bring as-applied challenges even to laws that have been upheld on their face, as WRTL did and as Plaintiffs do here. If the FEC's approach to this case were correct—if it were appropriate to rely on evidence about the actions and motives of hundreds of groups and individuals other than the Plaintiffs—then the Supreme Court's decision in *WRTL II* could not have turned out the way it did. The government would only have had to refer to the evidence that the Court had already examined in *McConnell* to foreclose the challenge that WRTL subsequently brought. Indeed, the government did just that in *WRTL I* but the Supreme Court rejected its argument, holding that *McConnell* had not foreclosed future as-applied challenges. *Wisc. Right to Life, Inc. v. FEC*, 546 U.S. 410, 412 (2006) (hereinafter *WRTL I*). As a result, the subsequent challenge to the same provision in *WRTL II* did not simply rehash the evidence already reviewed in *McConnell*; it focused on WRTL's ads and only WRTL's ads.

In essence, the FEC wants to defend this case by attempting to show that the contribution limits and PAC reporting requirements are not overbroad on their face—that is, that a "substantial number" of the applications of those laws are not unconstitutional because many other groups and individuals allegedly use independent spending to gain access to and gratitude from candidates. But the Plaintiffs are not challenging these laws on their face, so the FEC's defense of their facial validity is beside the point. *Cf. WRTL II*, 127 S. Ct. at 2670 n.8 (stating that "Courts do not resolve unspecified as-applied challenges in the course of resolving a facial attack. . . . By the same token, in deciding this as-applied challenge, we have no occasion to revisit *McConnell*'s conclusion that the statute is not facially overbroad"). The Plaintiffs would

not be permitted to rely on evidence demonstrating that contribution limits and PAC requirements have violated the rights of other groups and individuals in asserting their as-applied challenge. *See, e.g.*, *Legal Aid Servs. of Or. v. Legal Servs. Corp.*, 561 F. Supp. 2d 1187, 1207 (D. Or. 2008) (holding evidence of constitutional injury to other parties irrelevant in as-applied challenge). The FEC should likewise not be permitted to rely on evidence allegedly showing that others' rights are *not* being violated in defending this case. *Cf. WRTL II*, 127 S. Ct. at 2673 n.10 (declining to reach argument made by *amici* because case was as-applied challenge and facts pertaining to WRTL were different than those raised by *amici*).

In *WRTL II*, the FEC ignored the distinction between facial and as-applied challenges and attempted in large part to re-litigate *McConnell*. The Supreme Court rebuffed its efforts despite the identity of issues in the two cases. The FEC is attempting to do the same thing here, going as far as to try to introduce much of the actual evidence on which it relied in *McConnell*, despite the fact that the issues here are entirely different than the issues in *McConnell*. Its effort should fail here as well.

In sum, the FEC should not be permitted to rely on evidence concerning the actions and financing of political party committees and the soft money donations they received prior to the passage of BCRA, the motives of those who operated or funded 527s during the 2004 election cycle or issue advocacy groups over the past decade,[3] the actions of individuals or groups that have made direct contributions to candidates or coordinated expenditures with them, or the actions of those who have violated the law or committed crimes.[4] All of this evidence is beyond

[3] As explained in further detail below, the Supreme Court has held that "'[u]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection.'" *WRTL II*, 127 S. Ct. at 2666 (citation omitted). As a result, the motives of *other* speakers are irrelevant as well.

[4] As the Court stated in *WRTL II*, "'[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.'" 127 S. Ct. at 2670 (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002)).

the scope of this as-applied challenge and not properly admissible to demonstrate that the Plaintiffs, here, pose a threat of corruption. In short, to demonstrate that the Plaintiffs pose a threat of corruption, the FEC must focus on the Plaintiffs' actions, not those of everyone else.

B. Most of the FEC's Points in Its Response and Memorandum Are Legal Arguments That Ignore the Proper Standards in As-Applied Constitutional Cases.

The FEC's response to the Plaintiffs' proposed findings of fact can be summed up as follows: This is a test case; the Plaintiffs can speak in other ways besides television advertisements or they can speak as individuals, rather than as a group; many PACs and the major political parties have raised significant sums of money under contribution limits; unlimited contributions to independent groups pose a danger of corruption; the FEC does not think its PAC regulations are burdensome; and David Keating once said that he has a general understanding of those regulations and can "handle" them. *See* FEC's Memorandum at 1, 4, 6, 23, 26, and 27. Even if one assumed that all of these points, and the facts offered in support of them, were true, they still would not have any bearing on the truth of the Plaintiffs' proposed findings of fact. They are essentially legal arguments that may or may not be relevant at the merits stage, but they have nothing to do with whether the Court should enter Plaintiffs' proposed findings of fact.

For example, the fact that the Plaintiffs would like to see the law changed and would like others to follow in their footsteps if SpeechNow.org is permitted to function free of contribution limits and other regulations does not in any way change the fact that the Plaintiffs want to form the group in order to speak. Indeed, given SpeechNow.org's purpose—convincing Americans to vote against those who support unconstitutional campaign finance laws—it would be quite strange if Mr. Keating *did not* want others to follow in his footsteps. Similarly, while it is obviously true that the Plaintiffs—like anyone who has ever complained about a restriction on speech—are able to speak in other ways, that does not alter the fact that the contribution limits

and PAC regulations do what they do—that is, they prevent the Plaintiffs from pooling the funds they now have available and speaking in the manner they wish to speak. *See WRTL II*, 127 S.Ct. at 2671 n.9 (rejecting the argument that because WRTL was free to form a PAC or to publish newspaper ads instead of television ads or to say something other than what it wanted to say that limits on its speech was acceptable). Likewise, the fact that other groups have raised money under contribution limits and that the FEC does not believe its own PAC regulations are burdensome does not alter the burden that the laws in fact impose.

Here, again, the FEC is simply trying to change the subject from the Plaintiffs' constitutional challenge to the fact that the FEC can imagine many ways in which the Plaintiffs could operate under the laws. In essence, the FEC's defense to the Plaintiffs' case is that the Plaintiffs should not have brought it. But this Court has already held that the Plaintiffs' claims are substantial and not frivolous and has identified the issues to be certified. No purpose is served by the FEC attempting to convince the Court to enter as "factual findings" arguments such as that the Plaintiffs do not need to speak through SpeechNow.org or can do something other than pay for television ads, or contribution limits do not inhibit the ability of individuals to associate, or are not burdensome, or prevent corruption. These are all legal conclusions.

Indeed, as with the FEC's effort to introduce facts concerning everyone but the Plaintiffs, its endless legal arguments in response to the Plaintiffs proposed findings of fact amount to another effort to ignore the fact that as-applied First Amendment challenges exist. To present their *prima facie* case, Plaintiffs need only show that they are exercising First Amendment rights and that the laws they challenge burden those rights. *See, e.g.*, *WRTL II*, 127 S. Ct. 2652, 2660-61 (2007); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 292-93 (1981); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 277-78 (4th Cir. 2008). *See also, e.g.*, *Rhodes v.*

Robinson, 408 F.3d 559, 569 (9th Cir. 2005) ("[Plaintiff's] allegations that his First Amendment rights were chilled, though not necessarily silenced, is enough to perfect his claim."); *Laird v. Tatum*, 408 U.S. 1, 11 (1972) ("[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."); *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1103 (10th Cir. 2006) ("The chilling effect from a total ban [on referenda concerning a specific issue] may be greater than the chilling effect from a supermajority requirement, but they raise the same First Amendment issue.").

Plaintiffs have easily met this burden by demonstrating how SpeechNow.org will function and the fact that it will make only independent expenditures and by showing that the contribution limits and PAC requirements impose a burden on their ability to function and to speak. The Supreme Court has made clear that the express advocacy in which Plaintiffs wish to engage and the independent expenditures that fund that speech are core political speech, *see, e.g.*, *Buckley*, 424 U.S. at 39; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (hereinafter *NCPAC*); that it upheld limits on direct contributions to candidates in large part because their effect would be to divert funding to the sort of "direct political expression" in which Plaintiffs wish to engage, *see Buckley*, 424 U.S. at 22-23; that contribution limits imposed on such direct political expression severely burden rights to both speech and association and can amount to limits on expenditures as well, *see Citizens Against Rent Control*, 454 U.S. at 299-300; and that the requirements for PACs impose significant burdens on the speech of small, voluntary associations like SpeechNow.org, *see FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254-55 (1986) (hereinafter *MCFL*). Moreover, as stated above, the Supreme Court has repeatedly held that the government bears the burden of demonstrating that campaign finance

laws do not infringe rights to speech and association even where those laws have been upheld on their face. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2663-64 (2007); *MCFL*, 479 U.S. at 251-52. In short, it is crystal clear that Plaintiffs' proposed findings of fact are relevant and material to the issues in this case.

In arguing to the contrary, the FEC implicitly takes the position that it is Plaintiffs' burden to prove beyond a shadow of a doubt that they are unable to raise any money at all; that they could not speak individually or in other ways or say other things or use new technology or pamphlets, yard signs, or soap boxes to spread their message; that no one, including the largest organizations in the country, can raise money under contribution limits; that independent expenditures cannot possibly raise the specter of corruption; and that regulations for PACs are impossible to comply with. *See* FEC's Memorandum at 3-4, 4-5, 6-10, 23, and 27-28. In short, according to the FEC, if Plaintiffs cannot disprove everything the FEC can imagine in response to their claims, the Court should not even enter Plaintiffs' proposed findings of fact. The case should simply end here, because Plaintiffs have not demonstrated that the FEC's defenses are impossible.

But this is not the law. As demonstrated above, the Supreme Court made clear in *WRTL II* that the government bore the burden of showing that WRTL's ads in that case were the functional equivalent of express advocacy and thus could be banned under the ruling of *McConnell*. The Court stated that if the ads were the same as those already addressed in *McConnell*, the government's burden would not be heavy; it would need only demonstrate the similarity and point to *McConnell*. *See* 127 S. Ct. at 2664. If, however, they were not obviously the same, the government's burden would be no different than in any other First Amendment case. *Id*. That is true for any as-applied challenge. If the plaintiffs situation is no different from

others on which the Court has already ruled, then the governments' case is a matter of simply pointing to that other ruling. If, however, the plaintiffs' circumstances are materially different, the government's burden is as it was in *WRTL II*. *See id*; *see also MCFL*, 479 U.S. at 256-59.

Here, the FEC cannot seriously dispute that the Plaintiffs are operating under fundamentally different circumstances than those in which contribution limits have been upheld. They are making independent expenditures on precisely the sort of "direct political expression" that the Supreme Court made clear must remain free notwithstanding limits on direct contributions to candidates. *See Buckley*, 424 U.S. at 21-22. SpeechNow.org bears striking similarity to the groups at issue in both *Citizens Against Rent Control* and *MCFL*. *See* 454 U.S. at 292-93; 479 U.S. at 241-42. Indeed, Plaintiffs raise precisely the same claims in this case that recently prevailed in the Fourth Circuit in a very similar case. *See Leake*, 525 F.3d at 291. As a result, Plaintiffs are fundamentally different as a matter of law from the national party committees and other large PACs on whose fundraising and circumstances the FEC relies. And contrary to the FEC's claims, there is simply no constitutional principle that holds a particular speaker has no right to engage in the speech he prefers because the government can devise other ways for him to speak. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2671 n.9 (calling the claim that a party can take out newspaper ads instead of television ads "too glib" because it assumes that the availability of different media is even relevant to the constitutionality of a limitation on speech and because it assumes that the two media are equivalent); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) (stating that the "First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). Accordingly, not only is the FEC wrong that its alleged facts and arguments preclude Plaintiffs'

proposed findings of fact, but the FEC's proposed facts in response are simply irrelevant to this case.

The FEC even goes so far as to claim that the Plaintiffs are seeking special rights to a particular level of contribution limits, *see* FEC's Response at 39-41, and to equal resources, influence and publicity, *see* FEC's Memorandum at 14-15. This argument is nonsensical on its face. Plaintiffs are not arguing that the speech of others should be limited in order that they may speak, as was argued in *Buckley*, 424 U.S. at 39, nor are they claiming a right to use the publications or resources of others, which was the issue in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 243-44 (1974), and *Pacific Gas and Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 9-12 (1986). Indeed, the Plaintiffs are arguing here that they should be left alone to try to compete in the marketplace of ideas, which is the animating principle of the First Amendment, as the Court affirmed in *Buckley*. *See* 424 U.S. at 14-15. The FEC turns these cases on their head, effectively arguing that any time a speaker attempts to overturn a law as it applies to them, he is seeking a special "privilege" that is unavailable to others. But, again, this is simply an attack on the very idea of as-applied challenges. If the FEC were correct, the Court in *WRTL II* could not have held that WRTL was free to broadcast its ads free of the electioneering communications ban that applied to other ads, nor could the Court in *MCFL* have held that certain non-profit corporations could not be subject to the regulations that applied to PACs. Indeed, if the FEC were correct, all individuals and groups who make independent expenditures would have to be treated the same, lest some speakers be granted "special rights" that others did not enjoy.

As for the FEC's reliance on *Davis v. FEC*, that case did not create a general "fairness doctrine" for all speakers, as the FEC seems to believe. In *Davis*, the Supreme Court struck

down two provisions that effectively punished self-financed candidates for spending their own money to fund their campaigns. *See* 128 S. Ct. 2759 (2008). The Court held that the provisions at issue—a law that raised contribution limits on the opponents of self-financed candidates and that increased the self-financed candidate's disclosure obligations—unconstitutionally burdened the speech of the self-financed candidate because they created a disincentive for him to finance his own campaign. *Id*. at 2771-72. The case stands for the proposition that attempting to equalize speech by limiting the freedom of some people to spend their own money violates the First Amendment. *Davis* supports Plaintiffs' position in this case because it makes clear that absent a compelling justification, the government cannot limit the right of individuals to spend their own money on their own speech. *See id*. at 2772. Indeed, *Davis* makes clear that the standard for demonstrating that speech is burdened is not terribly high. In *Davis*, the Court concluded that merely lowering contribution limits for opponents of self-financed candidates and increasing the disclosure obligations for the self-financed candidate unconstitutionally burdened his speech. *Id*. at 2770-72.

The FEC makes this "special privilege" argument to oppose proposed facts that demonstrate the burden of contribution limits on the Plaintiffs. *See* FEC's Memorandum at 14-15; FEC's Response at 39-41. But in proposing such facts, Plaintiffs are not claiming either that the contribution limits that apply to them should be raised slightly or that they are entitled to a particular level of publicity or influence. They are simply offering facts that show that the contribution limits are burdensome. Plaintiffs have illustrated this basic point in a number of different ways in their proposed findings of fact, many of which are points the Supreme Court has explicitly recognized. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2671 n.9 (stating that "PACs impose well-documented and onerous burdens, particularly on small nonprofits"); *Citizens Against Rent*

Control, 454 U.S. at 295-300 (contribution limits burden rights to both speech and association); *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958) (stating that the "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association"). These points are neither complicated nor controversial, and the Court should therefore enter Plaintiffs' proposed findings.

C. The FEC Does Not Substantially Dispute the Facts Relevant to This As-Applied Challenge.

Despite the FEC's effort to cloud the issues, it does not substantially dispute most of the Plaintiffs' proposed findings of fact, or at least the basic points that Plaintiffs seek to have entered as findings of fact, even if the FEC at times argues about particular facts that support those points. Indeed, the FEC's specific objections to actual proposed findings of fact—as opposed to arguments that the Court should not enter particular findings because the FEC thinks other facts are more pertinent—are primarily directed to the Plaintiffs' facts concerning the effects of contribution limits on the Plaintiffs and Plaintiffs' claim that SpeechNow.org poses no threat of corruption. *See* FEC's Response to Plaintiffs' Proposed Findings of Fact at 21-60. Thus, as demonstrated in more detail below, the FEC does not substantially dispute the truth of the basic facts about SpeechNow.org and the individual Plaintiffs, SpeechNow.org's proposed advertisements, the advisory opinion request, *see id*. at 1-21; and the FEC does not substantially dispute the truth of the basic facts concerning the organizational and reporting requirements for political committees. *See id*. at 60-70. Even as to the Plaintiffs' proposed findings of fact concerning the burden of contribution limits and concerns about corruption related to SpeechNow.org, the FEC does not dispute the basic points that Plaintiffs made in their proposed findings.

1. Facts Concerning SpeechNow.org and the Plaintiffs.

In the first 21 pages of its response to Plaintiffs' proposed findings of fact, the FEC takes issue with very few of the facts in Parts I through III of Plaintiffs' proposed findings. The exceptions are as follows.

First, the FEC claims that David Keating's motives about creating SpeechNow.org are irrelevant to the issues in this case. *See* FEC's Response to Plaintiffs' Proposed Findings of Fact at 2, 15-16. Plaintiffs will address this point in more detail in Part II, below, but they generally agree that a speaker's motives are irrelevant to whether his speech is protected under the First Amendment. *See infra* at 61. Indeed, the FEC's argument here makes clear that its claims that this is a "test case" and that donors seek access to and gratitude from candidates are irrelevant. The FEC's position appears to be Plaintiffs' own motives are irrelevant to show that their speech is protected, but somehow the motives of others are relevant to show that Plaintiffs' speech is not protected. This is nonsensical.

In any event, Plaintiffs are not seeking to introduce evidence of their motives to demonstrate that their speech is protected. Plaintiffs offer evidence of their motives only as general background information—for instance, to show the reasons David Keating created SpeechNow.org and the reasons the other Plaintiffs wish to associate with and finance SpeechNow.org, and, in other cases, only as rebuttal evidence to the FEC's claims that donors use independent spending to obtain access to and gratitude from candidates. *See, e.g.*, Plaintiffs' Proposed Findings of Fact at ¶¶ 115-17.

Second, the FEC seems to suggest that Plaintiffs misstated the standard for coordination in their proposed finding in ¶ 20. While the FEC is correct that the relevant standards permit involvement with candidates that is not "material" and discussion that is not "substantial," that

does not alter the fact that Mr. Keating did not violate those standards when he spoke to Mr. McGoff. That was the point of the proposed finding, and the FEC has not argued otherwise.

Third, the FEC takes issue with Plaintiffs' proposed finding in ¶ 21 concerning the reasons Mr. Keating chose to run ads against Mary Landrieu, claiming that other evidence shows that Mr. Keating only chose Ms. Landrieu after SpeechNow.org's consultant took too long preparing an ad cost estimate. *See* FEC's Response at 7. Whether the delay had any impact on Mr. Keating's decision or not, the FEC's point does not detract from the truth of the proposed finding at all. There are many candidates against whom SpeechNow.org could conceivably run ads. Mr. Keating has made that clear in his declaration and has explained his general approach to selecting candidates against whom to run ads. *See* Keating Decl. at ¶¶ 2, 29-30. The fact that he may sometimes select particular candidates over others based on practical considerations such as timing, cost, and other things, does not mean his choices are somehow inconsistent or haphazard, as the FEC suggests.

Fourth, the FEC claims that Mr. Keating has been inconsistent in his statements about disclosure. *See* FEC's Response at 9. Plaintiffs addressed this point in their response to the FEC's proposed findings of fact already. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 142-44. In short, Mr. Keating has not been inconsistent in the slightest. He has stated that SpeechNow.org will disclose all of its donors, and SpeechNow.org cannot accept earmarked donations, so there is no issue of whether SpeechNow.org will disclose donors who "fund" administrative costs, because no donors will specifically fund administrative costs. *See* Keating Decl. at ¶ 36. As to administrative expenses, Mr. Keating's position was to ask the FEC how it thinks he should disclose those. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 143-44.

Fifth, the FEC claims that the views of its general counsel and former Chairman David Mason are irrelevant and not indicative of what the Commission itself thinks about SpeechNow.org. *See* FEC's Response at 16-18. This is a curious claim in that the FEC does not appear to dispute the Plaintiffs' statements concerning the FEC's interpretation of the laws as they apply to the Plaintiffs. Plaintiffs included proposed findings concerning the general counsel's draft advisory opinion simply to make clear that the FEC's position on the laws' application to SpeechNow.org has been uniform and has not changed. As for the views of Chairman Mason, they are relevant to the FEC's claim that this is a test case. Mr. Keating thought there was indeed a chance that the FEC might approve SpeechNow.org's advisory opinion and allow it to operate. Chairman Mason's views indicate that that was not an unreasonable conclusion.

Finally, the FEC takes issue with Plaintiffs' proposed findings in ¶¶ 58-63 that if SpeechNow.org could accept the contributions from the individual Plaintiffs and Richard Marder, it would have enough money to produce and broadcast its ads. But this fact is not debatable; it is a simple matter of mathematics. While the FEC's claim that SpeechNow.org is physically capable of accepting amounts under the contribution limits is true, the fact remains that the individual plaintiffs and Mr. Marder are currently ready, willing and able to contribute enough money to SpeechNow.org to fund the ads it wants to run. Mr. Keating has explained the reason that SpeechNow.org has not accepted amounts under the contribution limits—because that would trigger the requirements for political committees but provide no assurance that SpeechNow.org would ever be able to raise enough money to actually produce and broadcast advertisements. Plaintiffs' Proposed Findings of Fact at ¶ 160; Keating Decl. at ¶¶ 45, 50.

Moreover, the FEC's claim that evidence in the record suggests that SpeechNow.org could raise the necessary funds is wrong. FEC's Response at 22. It will always be true that any group might be able to raise the necessary funds under any contribution limits if only they would try, but that truism is not "evidence" suggesting the group in fact could do so. The FEC's argument here is based on its unjustified supposition that everyone who signed up on SpeechNow.org's website would be willing to contribute a substantial amount of money to SpeechNow.org. The FEC points to the fact that one person offered to contribute $10,000 to SpeechNow.org. *See* FEC's Memorandum at 3-4. This is a curious point for the FEC to make, in that it makes clear that this individual believes he should be able to associate with SpeechNow.org by contributing $5000 *more* than the contribution limits allow. Plaintiffs appreciate that the FEC pointed this out, and they request that the Court enter it as a finding of fact. The fact that one person was willing to give $10,000 does not demonstrate that everyone who has indicated a desire to contribute to SpeechNow.org would be willing to contribute up to $5000, however. But if the Court decides to enter any facts that allegedly show SpeechNow.org could raise sufficient funds to produce and broadcast its ads from those who have signed up on its website, Plaintiffs ask the Court to extend the FEC's argument to its logical conclusion, and find that every single one of those individuals wants to contribute at least $10,000 to SpeechNow.org, meaning that the contribution limits cut their right of association in half.

Plaintiffs do not have to prove that it is impossible for them to raise money under contribution limits in order to maintain this case. The FEC's argument simply amounts to saying that SpeechNow.org and the individual Plaintiffs are permitted to speak alone and they are permitted to speak by associating with thousands of people who will give relatively small amounts of money to the association, but they are not permitted to speak by associating with the

group of individuals who are now assembled. This amounts to the government appointing itself arbiter of the right of association.

Beyond these points and a handful of objections that go to the manner in which Plaintiffs stated their proposed findings, the FEC admits the truth of the majority of the facts in Parts I-III of Plaintiffs proposed findings of fact. As discussed in more detail in Part II, below, the FEC's relevance and other objections to the facts in these sections are baseless. Accordingly, the Court should enter these proposed findings.

2. Facts Concerning the Effect of Contribution Limits on Plaintiffs.

The FEC's objections to the facts in Part IV of Plaintiffs proposed findings of fact fall into three main categories. First, the FEC attacks the Plaintiffs' experts on the grounds that they allegedly did not disclose information under Rule 26(a) and that they submitted new expert "reports" in the form of declarations. *See* FEC's Response at 23-24 (disclosures) and 29-30 (declarations). Second, the FEC contends that the claims of Plaintiffs' experts are largely unsupported. Third, the FEC claims that Plaintiffs' experts examined unrepresentative data that is irrelevant to this case.

The first claim is simply false. As demonstrated below, the declarations of Plaintiffs' experts are not new reports, and Plaintiffs made all appropriate disclosures for their experts under Rule 26(a). The second and third claims ignore the fact that the proposed findings in this section are, in the main, matters of common sense and otherwise obvious points that the FEC either does not dispute or cannot rationally dispute. For example, raising money under contribution limits is more difficult than raising money without contribution limits. The FEC recognizes the basic truth of this fact even if it tries to qualify it with the absurd claim that it is only true for "some organizations." *See* FEC's Response at 22. Likewise, producing and

broadcasting television ads is expensive. The FEC again recognizes the truth of this basic point even though it again tries to qualify that concession. *See id*. at 41 (stating "it is often true that communicating to large groups of voters requires significant amounts of money"). Indeed, in arguing that Plaintiffs' claim about the burden of contribution limits "is premised on the notion that there is a threshold level of political influence that contribution limits must accommodate" the FEC essentially concedes Plaintiffs' whole factual point. *Id.* This argument recognizes that contribution limits do indeed limit the amount of "political influence"—which is to say, speech—in which the Plaintiffs can engage. Otherwise, there would be no point in claiming, as the FEC does, that the Constitution does not require contribution limits to accommodate any particular level of speech.

In fact, the FEC is simply wrong that the Constitution does not establish a threshold level for contribution limits. The Supreme Court established that in *Randall v. Sorrell*, 548 U.S. 230, 248-53 (2006). In any event, the question in this case is not whether there is some particular threshold level for the contribution limits that apply to the Plaintiffs. Plaintiffs are not arguing that the Constitution requires the contribution limits to be raised slightly. Plaintiffs' position is that the limits cannot be applied to them at all, because SpeechNow.org makes only independent expenditures and thus the contribution limits serve no government interest. This is not a matter of degree, it is a matter of principle that turns on the type of group that SpeechNow.org is and the manner in which it chooses to speak. Plaintiffs do not have to demonstrate any particular level of burden imposed by the contribution limits to make their claim. They simply have to show that the limits burden their speech. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2660-61 (2007); *Citizens Against Rent Control*, 454 U.S. at 292-93; *Leake*, 525 F.3d at 277-78 (4th Cir. 2008). They have amply done so in their proposed findings of fact, and the FEC's arguments to the contrary are just

tinkering around the margins of otherwise simple truths about fundraising and the impact of contribution limits on fundraising.

While Plaintiffs offered these basic points through a number of proposed findings that illustrate the issues in some detail, the basic points can be summarized as follows: Speaking to a large audience of voters requires a large amount of money. *See* Plaintiffs' Proposed Findings of Fact at ¶ 98. Groups must raise this money either in small amounts from many donors or large amounts from fewer donors. *See id*. at ¶ 100. Raising money in small increments is more costly and time consuming than raising money in larger increments. *See id*. at ¶ 101-04. As a result, contribution limits make raising money harder than it would be without those limits, and that difficulty, and the attendant costs of contribution limits, increases as the average contribution a group is able to raise decreases (in other words, the smaller the average contribution, the higher the overall costs of fundraising). *See id*. at ¶ 67. Thus, the fact that average political contributions in this country are relatively low—in the range of a few hundred dollars—means that groups that have to raise money from many donors will have an even more difficult time because most of those donors will give only small amounts. *Id* at ¶¶ 66-70. Because raising money itself costs money, groups must have seed money to get started. *See id.* at ¶ 83. If we examine the actions of groups that raise money outside of contribution limits, we see these general principles demonstrated in the fact that groups tend to express a preference for large contributions over smaller ones. *See id*. at ¶¶ 104-112. For these reasons, contribution limits have a more significant impact on new and smaller groups, although any group will have an easier time raising money if the issues on which it focuses achieve some notoriety or if it is able to demonstrate a track record of success. *See id*. at ¶¶ 80, 86.

Contribution limits impose burdens in other ways as well. For example, they prevent individuals who wish to associate from taking full advantage of divisions of labor. *See id*. at ¶ 93. Because some individuals prefer to associate with others, rather than to speak out on their own, the impact of contribution limits can be to deter those individuals from speaking out. *See id*. at ¶ 94. Contribution limits also make it harder for donors to signal their preferences for some groups by making large contributions. *See id*. at ¶¶ 90,95. Finally, the more money a group must spend to raise funds, the less it will have to spend on its speech. *See id*. at ¶ 99.

These are not complicated or controversial points. Indeed, most of them are simple matters of logic or basic economics—intermediate undergraduate economics as the FEC points out. *See* FEC's Memorandum at 20. As stated above, the FEC does not dispute the fact that raising money under contribution limits is harder than raising money without those limits, and it therefore cannot seriously dispute that the reason for this is that raising money in smaller increments is more time consuming and costly than raising it in larger increments. Similarly, the FEC recognizes that groups prefer larger contributions over smaller ones in relying so heavily on the large donations made to 527s during 2004. *See* FEC's Proposed Findings of Fact at 44-47; Plaintiffs' Response to FEC's Proposed Findings of Fact at 76-79 (responding to FEC's Proposed Findings of Fact at ¶¶ 150-162). Indeed, for the FEC to claim to dispute the fact is bizarre on its face, for if groups did not prefer large over small contributions, contribution limits would serve no purpose. Moreover, the FEC's own expert's research shows that political contributions tend to be small. *See* Simpson Decl. Ex. 41, Wilcox et al., *Campaign Contributions and Democracy*, in IS THIS ANY WAY TO RUN A DEMOCRATIC GOVERNMENT 35, 36 (Stephen J. Wayne ed., 2004). Both the FEC and the California FPPC have claimed that imposing contribution limits on independent groups will decrease their independent spending.

See FEC's Proposed Findings of Fact at ¶ 223; Plaintiffs' Proposed Findings of Fact at ¶ 113 (FPPC). And the Supreme Court has already held both that associating with others allows individuals to speak more effectively and that contribution limits imposed on voluntary associations impact their ability to spend money on speech. *Citizens Against Rent Control*, 454 U.S. at 295-300.

In fact, some simple calculations based on statistics the FEC itself provides make absolutely clear that smaller groups operating under contribution limits are at an extreme disadvantage as compared with groups that are able to operate without those limits. The FEC cites to statistics about the growth in the number of nonconnected committees and their receipts, claiming that Plaintiffs' expert failed to take note of this evidence. FEC's Memorandum at 16. But these numbers make Plaintiffs', and Professor Milyo's, point. The FEC points out that the number of nonconnected committees grew from 1,321 in 1990 to 1,797 in 2006, while their aggregate receipts grew from $72 million to $350 million. *Id*. Based on these numbers, the average amount of receipts per nonconnected committee at each end of the range is roughly $54,000 raised per nonconnected committee in the 1990 cycle and roughly $194,000 raised per nonconnected committee in 2006 cycle.[5] Now compare those average receipts per nonconnected committee with the amounts raised in the 2004 election cycle by the 527s Professor Milyo discussed. The top ten 527s raised from roughly $10 million to roughly $72 million during that election cycle. *See* Milyo Decl. at 26, Table 1. In short, these 527s raised between 50 and 400 times the average amounts raised by nonconnected committees, even at the top of the range that the FEC cites. In fact, a quick review of the appendix in the Weisman & Hassan article on which the FEC relies makes clear that the average amounts raised by the majority of 527s during 2004

[5] These numbers are calculated by dividing the aggregate receipts by the number of nonconnected committees at each end of the range.

was vastly more than the average amounts raised by the nonconnected committees cited by the FEC. Weisman & Hassan indicates that eighty 527s raised more than $200,000 in the 2004 election cycle, which accounted for the vast majority of funds raised by 527s during that cycle. *See* FEC Ex. 55 at 104-05 (table 5.4)[6] Dividing the total net receipts by those eighty 527s yields an average amount raised per 527 of roughly $5 million (405,107,839 ÷ 80 = 5,063,848). This means that on average, the 527s were able to raise roughly 25 times more than the average receipts raised by nonconnected committees at the top of the FEC's range.

In short, Plaintiffs' basic point is undeniable. Being free of contribution limits allows groups to raise vastly more money than they otherwise could, and the Court should enter as findings of fact the points in the preceding paragraph. The FEC's argument simply amounts to saying that groups that wish to raise money should be satisfied with less. They should speak at the level that a few hundred thousand dollars allows, rather than the level that tens of millions of dollars allows. But it is not up to the FEC to play traffic cop to American's rights to free speech. The FEC is not entitled to decide that a particular amount of speech or decibel level is "adequate" or that speakers should be satisfied to reach a few thousand listeners rather than millions. *See, e.g.*, *WRTL II*, 127 S.Ct. at 2669 ("'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'") (quoting *Thornhill v. Alabama*, 310 U.S. 88 (1940)); *Buckley*, 424 U.S. at 58 ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people—individually as citizens and candidates and collectively as

[6] The article states that there were forty 527s during 2004 that raised less than $200,000, but that the 527s that raised more than $200,000 accounted for almost all of the money that went into 527s during that cycle. *See* FEC Ex. 55 at 81, 81 n.3.

associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.").

Thus, in the main, Plaintiffs' experts are not saying anything that either the FEC or its expert or the Supreme Court have not recognized already. The testimony of Plaintiffs' experts simply makes these points in greater detail. But the Court need not make every finding on these points in exactly the manner that Plaintiffs propose. The basic facts are accurate and uncontroversial, and the Court should enter them despite the FEC's many hair-splitting arguments to the contrary.

a. The declarations of Plaintiffs' experts are not new reports; they are the proper vehicle for expert testimony.

The FEC's claim that Plaintiffs are improperly relying on "new" expert reports in the form of declarations is baseless. Plaintiffs presented their experts' testimony in the form of declarations because that is the proper form in which witness testimony is supposed to be offered. *See, e.g.*, *Nnadili v. Chevron U.S.A. Inc.*, 435 F. Supp. 2d 93, 105 (D.D.C. 2006) (stating that an "unsworn expert report is not competent to be considered on a motion for summary judgment") (citing *Fowle v. C&C Cola*, 868 F.2d 59, 67 (3d Cir. 1989)); *Pack v. Damon Corp.*, 434 F.3d 810, 815 (6th Cir. 2006) (stating that an unsworn expert report "is hearsay, which may not be considered on a motion for summary judgment"). By contrast, the purpose of an expert report is to give the opposing side fair notice of the substance of the experts' opinions, not to take the place of expert testimony. *See, e.g., Sommerfield v. City of Chicago*, No. 06-3132, 2008 U.S. Dist. LEXIS 88760, at *37 (N.D. Ill. Nov. 3, 2008) ("The purpose of an expert report is to facilitate an effective cross-examination, minimize the expense of deposing experts, the shortening of direct examination, and the prevention of ambush at

trial."). In any event, the declarations of Plaintiffs' experts are nearly identical to their reports, so the FEC should not be heard to complain.

The FEC complains that Professor Milyo added new substantive arguments to his declaration, but that vastly overstates the minor differences between his declaration and his report and misapprehends the legal standard for expert reports. Paragraph 36 of Professor Milyo's declaration, which the FEC claims is a "completely new argument," FEC's Response at 31, simply presents a slightly more expansive introduction to the economic concepts of scarcity, opportunity costs, and utility maximization. *See* Milyo Decl. at ¶ 36. This is not a new opinion (or even really an opinion at all), but just a way to clarify some basic concepts on which Professor Milyo relied in his report.[7] The FEC's complaints about the changes to paragraphs 37-39 and paragraph 44 of Professor Milyo's declaration are similarly hollow. The changes in these paragraphs amount to minor word changes and slight amplifications of points made in Professor Milyo's report.[8] Nor does paragraph 44 amount to either a substantive addition or a new argument as the FEC claims. This paragraph simply summarizes conclusions that Professor Milyo had already made in his expert report about the equi-marginal principle and the concept of revealed preference. *See* FEC Ex. 157 at 7-8 (Section 4.2), 9 (Section 4.4). Professor Milyo made all of these points clear in his original report and the FEC had ample opportunity to cross-examine him about them in his deposition. Indeed, the FEC refers to these points as simple

[7] *Compare* FEC Ex. 157 at 8 ("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. . . .") *with* Milyo Decl. at ¶ 36 ("Therefore, the fundraising cost per dollar raised increases with the amount of money that a group raises.").

[8] *Compare* FEC Ex. 157 at 8 ("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.") *with* Milyo Decl. at ¶ 39 ("Now consider the effect of any binding constraint on raising funds from large donors; such a constraint forces the group to re-allocate 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 raised (and therefore the total funds available for independent expenditures) must be lower than they would be if the group was unconstrained.").

undergraduate-level theories, so it is not clear why the FEC is complaining that Professor Milyo stated these simple theories slightly differently in his declaration than he did in his report.

The FEC completely misapprehends the standards governing expert reports and expert testimony. Neither the Federal Rules of Civil Procedure nor the Federal Rules of Evidence limit expert testimony to precisely what is said in the report. The purpose of the report is simply to put the opposing party on notice; not to provide verbatim testimony. *Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th Cir. 2006) ("[Rule] 26(a)(2)(B) does not limit an expert's testimony simply to reading his report. No language in the rule would suggest such a limitation. The rule contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report."); *Dorsett v. Am. Isuzu Motors, Inc.*, 805 F. Supp. 1212, 1223 (E.D. Pa. 1992) ("Since the court recognizes that it is not possible to submit a verbatim transcript of an expert's testimony as an expert report, the court has never required that everything an expert testifies to be contained in the report. So long as the report is sufficient to put the opposing party on notice as to what the expert would say, the court will allow the expert to say it.") (emphasis removed). The minor differences between Professor Milyo's declaration and his report are well within these standards.

b. Plaintiffs made all appropriate disclosures in connection with their expert reports.

The FEC complains both that Plaintiffs did not make appropriate disclosures in their experts' declarations and that they did not make those disclosures prior to filing those declarations in Court. See FEC's Response at 29-30. The first claim makes no sense. As stated above, it is the purpose of the expert *report* to provide notice of the expert's opinions and the disclosures required by Rule 26(a)(2). Once made, as they were here, there is no obligation to make the same disclosures in the experts' testimony. *See* Fed. R. Civ. P. 26(a)(2) (stating that

disclosures must be made to the opposing *parties*). In any event, Plaintiffs *did* include the curriculum vita for both Professor Milyo and Rodney Smith as exhibits to their declarations, as well as the reports produced to the FEC. As a result, both witnesses' publications as well as Professor Milyo's past work for the Institute for Justice and his affiliation with the Center for Competitive Politics and the Cato Institute were before the Court. Smith Decl., Ex. A; Milyo Decl., Ex. A.[9] Although the amount Professor Milyo was paid and his prior expert testimony were not included in the declarations, this information was included in Professor Milyo's report, which is all that Rule 26(a)(2) requires. *See* FEC Ex. 157 at 1.

The FEC's complaints about Rodney Smith's disclosures is particularly strange. The FEC claims that he did not disclose his prior testimony as an expert witness, *see* FEC's Response at 24, but as the FEC knows from Mr. Smith's deposition, he has never been an expert witness before. *See* FEC Ex. 15, Smith Dep. at 17:19-21. Accordingly, there was nothing to disclose. Similarly, Mr. Smith has written one book—MONEY, POWER & ELECTIONS: HOW CAMPAIGN FINANCE REFORM SUBVERTS AMERICAN DEMOCRACY—which is listed on the vita that was produced to the FEC along with his report and was attached to his declaration. FEC Ex. 156 at 13. Again, it is not clear what else the FEC thinks he should have disclosed.[10]

As for the amount Mr. Smith was paid, that was not disclosed in his expert report for the simple reason that at the time he produced his report he had refused any payment for his work.

[9] The FEC also argues that the biographical information omitted from Prof. Milyo's sworn testimony be entered as facts because they are allegedly probative of potential bias. FEC's Response at 31-32. The FEC has not indicated how, if at all, this alleged bias has manifested in Prof. Milyo's testimony, but if this Court elects to enter this information into the factual record, Plaintiffs request that this Court also adopt the following facts tending to show bias on the part of the FEC's expert: Clyde Wilcox is a former employee of the FEC. FEC Ex. 1 (Wilcox CV at 1); Clyde Wilcox has served as an expert witness for the FEC in the past. FEC Ex. 1 (Wilcox CV at 35); Clyde Wilcox was paid approximately $50,000 for his services in this case. FEC. Ex. 18, Wilcox Dep. at 75:18-21 ("Q. Do you know the total amount you've been paid? A. No. I know that the top line budget I think is $50,000, but I'm not there yet. I might probably be there by the end of the day . . . .").

[10] Mr. Smith has also written two op-eds in the last ten years. Smith Reply Decl. at ¶ 6. Plaintiffs do not believe that the op-eds are considered "publications" that must be disclosed in an expert report, but in any event they note that Professor Wilcox did not list specific op-eds that he wrote.

See Declaration of Rodney Smith in Support of Plaintiffs' Reply Memorandum (hereinafter Smith Reply Decl.) at ¶ 2. Plaintiffs' counsel offered to pay Mr. Smith for his report when he submitted it, but he initially decided simply to perform his services pro bono. *Id*. Plaintiffs' counsel continued to offer payment to him and he only reconsidered the day before his deposition, deciding to accept $250 per hour for his services. *Id*. at ¶ 3. He informed the FEC of his hourly rate of compensation in his deposition, so it is not clear why the FEC is complaining about it now. *See* FEC Ex. 15, Smith Dep. at 17:3-8. Rule 26(e) requires supplementation of expert disclosures only if the information has not otherwise been disclosed through other discovery. Since the FEC knew Mr. Smith was being paid from his deposition, there was nothing more to disclose. Mr. Smith has since been paid a total of $5000 for 20 hours of work in this case, which includes the time he spent in connection with his deposition. *See* Smith Reply Decl. at ¶ 4.

Finally, the FEC makes much of the fact that the Plaintiffs turned over a draft of Mr. Smith's report the morning of his deposition. The failure to disclose this draft earlier was inadvertent and, in any event, could not possibly have caused the FEC any prejudice. The FEC served subpoenas on Plaintiffs one week before Mr. Smith's deposition seeking documents from both Mr. Smith and Professor Milyo. The subpoenas required productions of several categories of documents two days before Mr. Smith's deposition. Plaintiffs complied, producing all of the requested documents—including other drafts of Mr. Smith's report—on that day. Unfortunately, they overlooked an additional draft of Mr. Smith's report, and they did not discover this error until the morning of Mr. Smith's deposition. Plaintiffs produced the draft to the FEC via email at 10:03 am, less than one half hour after the deposition began. FEC Ex. 155, Email from Paul Sherman to Steve Hajjar, Robert Bonham, Graham Wilson, Kevin Deeley, and Greg Mueller

(Sept. 18, 2008, 10:03 a.m.) at 1. Plaintiffs' counsel informed counsel for the FEC that they were free to take as much time to review the draft report and extend the deposition if necessary into the evening to account for the late production of the draft. *See* Declaration of Bert Gall in Support of Plaintiffs' Reply Memorandum at ¶ 4. The FEC, however, did not take counsel up on its offer to take additional time to review the draft report. As a result, Mr. Smith's deposition concluded at 4:37 p.m. *Id.* at ¶ 5. The FEC questioned Mr. Smith for a mere four hours and seventeen minutes. It could easily have taken a long break to review the draft report and still finished the deposition well within business hours. Indeed, given Plaintiffs' willingness to accommodate the FEC on this issue, it could have taken even longer or even continued the deposition into the next day. As a result, the FEC should not now be heard to complain.

Moreover, there are only slight differences between the late-produced draft and the other drafts that Plaintiffs produced on time. The FEC claims that the late-produced draft of Mr. Smith's report did not include a statement 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." FEC's Response at 25. But this is not true. On page four of that draft, Mr. Smith states "[a]s a consequence [of contribution limits mandated by campaign-finance reform] most start-up advocacy groups and non-wealthy candidates are effectively out of business before they ever start trying to raise money." FEC Ex. 155 at 7 (page 4 of Smith report). In the final report, Smith simply chose to use the sentence a second time on a later page, but that is not a substantive difference between the drafts at all. FEC Ex. 156 at 9. The FEC's assertion that the statement "had been inserted late in the process after interactions with Plaintiffs' counsel" is just not so. FEC's Response at 25.

Similarly, the FEC also complains that the statement that "the contribution limits mandated by campaign finance reform severely cripple their ability to accumulate enough cash reserves to effectively finance their growth" does not explicitly appear in the first (late-produced) draft of Mr. Smith's report. FEC's Response at 25. While technically true, this is a distinction without a difference, because the basic point appears throughout that first draft and all subsequent drafts of his report. The quoted sentence does not reflect some new opinion that Smith only expressed after talking to Plaintiffs' counsel. It is but a single statement of the central point of Smith's whole report, which is that contribution limits impede fundraising by new organizations and non-wealthy candidates. Numerous sentences in every version of the report echo this sentiment. *Compare* FEC Ex. 155 at 5 (page 1 of Smith report) ("These forces of change [*Buckley* and BCRA] 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.") *with* FEC Ex. 156 at 3 (page 2 of Smith report) (same). The principle was always there and the FEC was always aware of it. Indeed, the FEC questioned Mr. Smith thoroughly on this point in his deposition. *E.g.*, FEC Ex. 15, Smith Dep. at 119:21-123:18.

The cases on which the FEC relies in claiming that the late-produced draft prejudiced their ability to depose Mr. Smith involved either drafts that were never produced or drafts that revealed extensive changes done at the request of counsel. *See Elm Grove Coal Co. v. Dir., O.W.C.P*, 480 F.3d 278, 299-301 (4th Cir. 2007) (draft reports considered work product and never turned over); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 564 F. Supp. 2d 322, 341 (D.N.J. 2008) (expert witness misrepresented to opposing party whether any drafts had been turned over

to counsel); *EEOC v. United Parcel Servs., Inc.*, 149 F. Supp. 2d 1115, 1139-40 (N.D. Cal. 2000) (draft reports revealed extensive alterations done at suggestion of counsel). These cases are all obviously distinguishable. The late-produced report is not a reason for this Court to disregard Mr. Smith's testimony.

c. The testimony of Plaintiffs' experts is grounded in data, experience, logic, and simple principles of economics.

As stated above, the FEC spends a great deal of space in their response nitpicking Plaintiffs' experts around the margins without substantially countering any of the basic points they make. The FEC even claims in its memorandum that Plaintiffs' experts never "interviewed" any fundraisers or political insiders, former politicians, or individuals who run independent groups. *See* FEC's Memorandum at 18. This is true. Professor Milyo chose instead to rely on logic, the principles of economics, and hard data. Data cannot be vague, hyperbolic, speculative, or forgetful. Data do not make things up, tell interviewers what it thinks they want to hear, or rely on multiple levels of hearsay. *Cf.* FEC Ex. 1, Wilcox Report at 14, 18, 21. Professor Milyo did not call any former politicians on the telephone to see what they thought or cull quotes from articles of other people's views of still others' claims about many others' motives. *Cf.* FEC Ex. 1 at 8, 25; *id.* at 9-11. Professor Milyo did not have to try to remember the names of allegedly trustworthy newspaper reporters on whose accounts he relied, because he did not rely on newspaper accounts in his report. *Cf.* FEC Ex. 18, Wilcox Dep. at 112:9-22 ("Yeah. You know what? I really have a bad time remembering names."). He made no sweeping conclusions based on reports that featured cartoon characters to make their points. *Cf.* FEC Ex. 1 at 12; Simpson Decl. Ex. 18 at 21 (picture of cartoon "fat cat" lighting cigar with money); FEC Ex. 18, 245:1-4 ("Q: Do you have any concerns about the fact that the cover of this report depicts a giant gorilla throwing money off of the state capitol building? A. I must admit. It does

set you back a bit."). As a result, Professor Milyo's conclusions, while perhaps less entertaining than Professor Wilcox's, were narrower and more modest, and thus much more reliable. As for Mr. Smith, it is true that he did not talk to any fundraisers. The reason is simple. He is one, and he has been for over thirty years. Smith Decl. Ex. A.

Plaintiffs have already addressed the broad claims the FEC lodges against the facts in Part III of their proposed findings of fact. Here, they will address the most salient specific points in the FEC's response.

First, the FEC takes issue with Plaintiffs' proposed finding, based on Rodney Smith's declaration, that during the 1999-2000 election cycle, roughly 3.5 million Americans made political contributions and that most were small donations. The FEC responds that this information is less probative and material than the FEC's proposed findings that purport to show that the national party committees raised lots of money after BCRA, much of it from small donors. *See* FEC's Response at 23. This argument is rather like saying that it is easy to start a successful hamburger franchise because McDonalds sells billions of burgers every year. Indeed, the whole point of Smith's report is that smaller groups have a hard time raising funds under contribution limits. He does not claim in his report that the national party committees have a hard time raising money under the limits.

The FEC also misrepresents Smith's testimony. It claims that "[a]t 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." *Id.* But as Smith made clear in both his expert report and deposition testimony, he calculated the sub-$200 statistic by dividing the average contribution made into total receipts. *See* Smith Decl. at ¶ 23; FEC Ex. 15, Smith Dep. at 136:11-22. Similarly, the FEC claims that

"[h]e later admitted that the total number of donors had been derived from a national poll." FEC's Response at 23. This is false. Mr. Smith made clear in his deposition that he derived the figure himself, and his review of the poll by McLaughlin & Associates verified the accuracy of his own independent calculation. FEC Ex. 15, Smith Dep. at 137:6-12 ("In other words, John McLaughlin is a friend of mine, and he had done an independent survey that verified my approximations in terms of how many donors—based on his—two million Republicans and a million-five Democrats. So his independent pole [sic] supported what I had done independently.").

Second, the FEC claims that a number of basic points about the economics of fundraising are unsupported. *See* FEC's Response at 26-28. Thus, for instance, the FEC claims that Rodney Smith's statement that there is an inverse relationship between fundraising costs and the average contribution is unsupported. *Id*. at 26. But this is a basic logical point about the nature of any business operation, whether fundraising or otherwise. The point is simply that it costs money to raise money and that the less raised per dollar spent, the higher the costs will necessarily be. Likewise, the FEC objects to the simple claim that every fundraising operation must spend money to acquire donors. *Id*. at 27. Is the FEC claiming that acquiring new donors is a costless enterprise? The FEC's objections to such straightforward points continue throughout its response, and in each case it demands more "support" for such claims. Mr. Smith has been a fundraiser for over three decades. His testimony on these basic points is the support for them. Again, they are not terribly complicated points, and they are based on Mr. Smith's thirty plus years of experience as a fundraiser.

Third, the FEC claims that Professor Milyo's data concerning the fundraising of 527 groups is not necessarily representative of all independent groups. *See id*. at 29-32, 44-49. But

Professor Milyo recognized as much, and this criticism does not detract from his point in relying on this data. The purpose of examining the fundraising of other 527s is simply to demonstrate two basic facts. First, groups express a preference for large contributions over smaller ones, both when they are starting up and as an ongoing matter. As stated above, this is a point that the FEC cannot seriously dispute. Second, restricting the amount of money that groups can raise will limit the amounts that it can spend. Here again, the FEC has admitted as much in contending, in its own proposed findings of fact, that without contribution limits, independent groups will spend far more money than under contribution limits. FEC's Proposed Findings of Fact at ¶ 223; Plaintiffs' Response to FEC's Proposed Findings of Fact at ¶ 223. Indeed, the comparison above between the nonconnected committee statistics on which the FEC relies and 527s from 2004 makes both of these points crystal clear.

In any event, the FEC's claim about the representativeness of 527s contradicts its own reliance on those groups. Plaintiffs relied on data concerning 527 fundraising to illustrate a few simple, essentially irrefutable points. The FEC, by contrast, relies on information concerning the very same 527s it contends are irrelevant to this case as evidence of everything from the effectiveness of their spending, to the motives of donors, to the claim that independent groups lead to corruption. On these points, the FEC's complaint is absolutely correct—those groups are not representative of SpeechNow.org and cannot be used to support the many broad conclusions the FEC wishes to draw.

Fourth, as with Mr. Smith, the FEC nitpicks Professor Milyo's explanation of basic economic principles—such as specialization, division of labor, comparative advantage, economies of scale, and revealed preferences—and what those principles demonstrate about the effect of contribution limits on independent groups. FEC's Memorandum at 18-22; FEC's

Response at ¶¶ 91, 93-97, 99-103. In several instances, the FEC derides this discussion as conjecture. But the principles of economics are not conjecture, and Professor Milyo did not simply announce these principles in a vacuum and leave it at that. He first illustrated the principles and then examined their application to specific examples, namely, fundraising by 527s.

For example, in Section IV of his declaration, Professor Milyo discusses what economic theory reveals about, among other things, the means by which groups prefer to raise money and the importance of large contributors (i.e., political patrons). Then, in Sections VII and VIII of his declaration, which form the bases of several of Plaintiffs' proposed findings of fact, he discusses the evidence on those same topics. Thus, the FEC falls into the strange pattern of criticizing Professor Milyo for not providing any evidence on a certain topic, and then later criticizing the evidence that he does, in fact, present on the topic. *Compare* FEC's Response at 39 (alleging that Professor Milyo "presents no evidence" about the role played by political patrons) *with Id.* at 32-33 (claiming that the evidence Milyo offers about the role of political patronage should be discounted); *compare also* FEC's Response at 44 (alleging Professor Milyo did "not consider the realities of political fundraising" in concluding that contribution limits result in less spending on independent expenditures) *with id.* at 44-49 (arguing that Professor Milyo's analysis of the data with which he demonstrates that contribution limits reduce the funds available for independent expenditures is flawed). The FEC's claims are thus attacks on the form of Professor Milyo's report and declaration; they are not legitimate attacks on substance.

Fifth, the FEC claims that the report of the California Fair Political Practices Commission on which it relies (the "Gorilla Report") does not support Plaintiffs' claim that the FPPC believes that contribution limits would limit the spending of independent groups. This claim is

nonsensical. The Gorilla Report devotes an entire section to calculating the amounts of money that would not have been spent if contribution limits were imposed on independent groups. *See* Simpson Decl. Ex. 18 at 41-47. The FEC itself relied on the Gorilla Report for precisely that point in its own proposed findings of fact, and it makes the same point in other ways as well. *See* FEC's Proposed Findings of Fact at ¶ 223 (quoting FEC Ex. 1, Wilcox Report at 14-15). And both individuals whom Plaintiffs deposed from the FPPC also recognized the basic point. It is true, as the FEC contends, that Ross Johnson qualified his testimony on that point by saying he could not say whether it would be true for all groups at all times that contribution limits will impact the amount they can spend. But he admitted that that the point was valid for the groups included in the Gorilla Report itself. *See* FEC Ex. 10, Johnson Dep. at 73:11-18. Plaintiffs' point in relying on this evidence is simply to point out that both the FEC and the California FPPC intend contribution limits to limit the amount of money available for independent groups to spend and that evidence exists that contribution limits actually have that affect. Whether it will always be true across the board in every case is not the point. Indeed, it is much more relevant that the FEC and other enforcement agencies rely on contribution limits to have that effect, because that demonstrates that the purpose of applying the limits to independent groups is, at least in part, to limit expenditures.

3. Facts Showing that SpeechNow.org Creates No Concerns About Corruption.

The FEC does not seriously dispute the basic facts included in Part V of the Plaintiffs proposed findings of fact. Again, it primarily tries to qualify certain points or simply makes irrelevant assertions in response.

First, the FEC complains about Plaintiffs' proposed facts that make clear that Plaintiffs do not care about access to or gratitude from candidates. But these facts are included only in

rebuttal to claims the FEC makes. As stated below, Plaintiffs agree that evidence of the motives of speakers or donors is irrelevant, other than as basic background information. But if the Court is going to include evidence of the alleged motives of others, it should include evidence of the Plaintiffs' motives.

Second, the FEC objects to Plaintiffs' reliance on its expert's research showing that most donors give for ideological reasons. Plaintiffs recognize that some donors indicate what Professor Wilcox has termed "investor motives," but as Plaintiffs demonstrated in their response to the FEC's proposed findings of fact, even so-called investor donors often indicate ideological or political motives for giving, and the simple fact that many donors give for "business reasons" is neither surprising nor evidence of corruption. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 36.

Third, the FEC objects to Plaintiffs' proposed finding that "whatever concerns about corruption may be raised by a group's independent expenditures would also be raised by an individual's independent expenditures." FEC's Response at 55 (discussing Plaintiffs' Proposed Findings of Fact at ¶ 122). Plaintiffs included this fact in anticipation of the FEC's arguments that independent spending poses concerns about corruption, and thus it is a rebuttal fact. As Plaintiffs have made clear in their response to the FEC's proposed findings, they do not believe that the FEC can argue in this case that independent spending poses concerns about corruption in light of the Supreme Court's holdings as well as statutes and FEC rules that define the difference between independent and coordinated expenditures. SpeechNow.org will make only the former, so by definition it cannot create concerns about corruption, at least not by making independent expenditures. But if the FEC is permitted to include facts that allegedly show that independent expenditures cause corruption or that independent spending can be considered an "indirect

contribution" to candidates, then Plaintiffs should be permitted to argue that that point proves too much; if it were true, then all independent spending would cause corruption and could be limited. In other words, as stated in Plaintiffs' proposed finding of fact 122, whatever concerns exist about independent spending by groups will exist as well about independent spending by individuals. The FEC's facile claim that "an expenditure cap is not at issue in this case" is beside the point. Plaintiffs' point is that by arguing that independent expenditures create the prospect of access and gratitude and thus cause concerns about corruption, the FEC is placing the constitutional protections for independent expenditures at issue in the case. Its own expert recognized as much. *See* FEC Ex. 18, Wilcox Dep. at 178:19-179:2 ("Q. Okay. So the logic of your argument would apply equally to individuals making independent expenditures? A. I would argue that individuals making independent expenditures creates the possibility of corruption, yes.").[11] Plaintiffs should not be prevented from making this argument simply because the FEC does not like the implications of its own arguments.

Finally, the FEC takes issue with Professor Milyo's statement that there is no empirical evidence that limits on contributions to groups like SpeechNow.org have any impact on corruption or the appearance of corruption. The FEC's response is to claim that there is no evidence of the lack of such an impact either. *See* FEC's Response at 59. That is, of course, true, but it is much simpler just to say that there is no evidence. The FEC then claims that one of Professor Milyo's studies shows evidence that disclosure laws and restrictions on contributions can improve perceived political efficacy. *Id*. This overstates the point from the study, but it is

[11] The FEC states that, "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." FEC's Response at 55. However, as Plaintiffs' proposed finding cites to Professor Wilcox's deposition and Professor Milyo's declaration, it appears that the FEC is actually referring to Professor Wilcox. Even if the FEC is referring to Professor Milyo, what he said or did not say about specific risks is irrelevant. What is relevant, as explained above, is whether there is any principled distinction between independent expenditures by groups and independent expenditures by individuals.

irrelevant in any event as "perceived political efficacy" has nothing to do with corruption. Finally, notwithstanding the FEC's admission of the basic point of this fact—that there is no empirical evidence that contribution limits on groups like SpeechNow.org combat corruption—the FEC goes on to claim it provided lots of evidence on this point in its own proposed facts. However, as the Plaintiffs demonstrated in painstaking detail in their response to the FEC's proposed findings, its so-called evidence consists of little more that conjecture, supposition, innuendo, hearsay, and hyperbole.

4. Facts Demonstrating the Burden of the PAC Requirements.

The FEC does not dispute the majority of the Plaintiffs' proposed facts in Part VI of their proposed findings of fact. Plaintiffs reply to the FEC's general arguments in Part II.E, below.

II. Plaintiffs' Responses to the FEC's Arguments in Its Memorandum in Support of Its Response to the Plaintiffs Proposed Findings of Fact.

A. The FEC's Proposed Findings of Fact on Whether This Is a "Test Case" Are Irrelevant.

Plaintiffs have already addressed the FEC claims that this is a "test case," pointing out that the FEC has not argued that Plaintiffs' lack standing to assert their claims, nor could it. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 41-46. As the FEC repeatedly states in its responses to Plaintiffs' proposed findings of fact, the Plaintiffs' motives for speaking are irrelevant. *See* FEC's Memorandum at 23; FEC's Response at 2 ("David Keating's political opinions and motivation for founding SpeechNow.org are not relevant to the constitutionality of the challenged provisions."). While it is appropriate for Plaintiffs to introduce basic background information about why Mr. Keating founded SpeechNow.org and why the other plaintiffs wish to finance and associate with it, the FEC is otherwise correct. As the Supreme Court has recognized, "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *WRTL II*, 127 S. Ct. at 2666 (quoting M.

Redish, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 91 (2001)). Indeed, the FEC tried mightily to make *WRTL II* about the speakers' motives as well. *See, e.g., id*. at 2668 ("This evidence goes to WRTL's subjective intent in running the ads, and we have already explained that WRTL's intent is irrelevant in an as-applied challenge."). The Supreme Court rebuffed its efforts there, and this Court should do the same here.

The FEC claims that the alleged fact that this is a "test case" casts doubt on plaintiffs' claims that they cannot start operations or fundraising without contributions above the limits. *See* FEC's Memorandum at 1. But, as demonstrated above, Plaintiffs do not have to show that they cannot possibly raise money under the contribution limits or start their operations as a PAC. Plaintiffs need only show that the contribution limits burden their rights to speech and association. *See supra* at 12-13. That Plaintiffs have done so is crystal clear as a matter of law. The FEC's argument is another species of its claim that the Plaintiffs cannot even bring this case until they demonstrate that the laws they challenge make their speech absolutely impossible. But this is wrong as a matter of law, as Plaintiffs demonstrated above.

Indeed, the FEC's "test case" argument is simply another effort to divert attention from the issues. The FEC itself believes that the laws Plaintiffs are challenging were clear on their face and that Plaintiffs had to have known what the FEC's advisory opinion would say. *See* FEC's Response at 15-16; Simpson Decl. Ex. 14, FEC's Responses to Plaintiffs' Requests for Admission 1-9. And the FEC has, in other cases, argued that parties should seek advisory opinions before going to court. *Christian Civic League of Me., Inc. v. FEC*, 433 F. Supp. 2d 81, 87 n.3 (D.D.C. 2006). In short, the FEC itself obviously believes that to operate free of the contribution limits and PAC requirements, Plaintiffs had to request an advisory opinion and then challenge those laws in court. And, indeed, David Keating recognized that these steps would

likely be necessary when he created SpeechNow.org. So what, exactly, is the FEC's point? That Plaintiffs did what the FEC recognizes they had to do to operate free of contribution limits and PAC requirements? That David Keating created SpeechNow.org with the intent of speaking in a way that the law prevented the Plaintiffs from speaking? If Plaintiffs' desire to speak and associate free of contribution limits and PAC requirements makes this a "test case," then every First Amendment challenge is a test case on the same grounds, because every one necessarily involves someone who wants to speak in a particular manner and a law that prevents them from doing so.

At its heart, the FEC's position seems to be that Plaintiffs should not want to create a group that operates outside contribution limits and PAC requirements. They should just comply with the law and stop complaining, and that having decided not to do that somehow makes the Plaintiffs "bad." Again, this is an argument that is available to the government in every single First Amendment challenge that has ever been or will ever be brought. It is no more relevant here than in any other case.

Finally, it is worth pointing out yet another example of the FEC's fast and loose use of evidence. The FEC claims that one of the Plaintiffs' attorneys, Paul Sherman, created an email account for SpeechNow.org. In fact, the email account was created by Mr. Keating; Plaintiffs' attorneys had nothing to do with it. The document in question (FEC Ex. 146 at SNK0327) does have Mr. Sherman's name on it, but the email is clearly not "from Paul Sherman to David Keating" as the FEC claims. The email is from "Gmail Team [mail-noreply@gmail.com]" to David Keating. Mr. Sherman's name appears only in the header above the actual email, and there is a very simple explanation for this. Mr. Sherman printed the email out in order to produce it to the FEC in August of 2008, when Plaintiffs were responding to the FEC's

document requests in this case. *See* Declaration of Paul Sherman in Support of Plaintiffs' Reply Memorandum at ¶ 3. In the process of producing documents, the individual plaintiffs forwarded electronic versions of any documents and emails that did not already exist in hard copy to the Plaintiffs' counsel, and counsel printed them out and produced them to the FEC. Microsoft Outlook, counsel's email software, automatically places the user's name on any email printed from that user's system. *Id*. For most of the emails, counsel managed to print them without that header appearing, or they simply removed the headers from the document after it was printed, but in this case, counsel simply did not delete the header prior to producing the email. *Id*.

The FEC might have considered this possibility—or at least that there was something peculiar about the email—in that it is clearly from the "Gmail Team" and not Mr. Sherman, and it does not indicate anywhere that Mr. Sherman forwarded any email to Mr. Keating or had anything to do with the Gmail account at all. Mr. Sherman's name simply appears at the top of the document, much like letterhead. This is not a reason to jump to the conclusion that Mr. Sherman set up the account for Mr. Keating, but it seems the FEC never considers any possible interpretation of its so-called "evidence" that varies from its preexisting convictions about what that evidence is supposed to prove.

B. Whether Plaintiffs Can Speak Individually or by Using Means Other Than Television Advertisements Is Irrelevant.

The FEC argues that Plaintiffs' facts concerning the burdens of contribution limits should not be entered because Plaintiffs can either speak alone or speak in other ways. FEC's Memorandum at 4-6. But the FEC is simply mischaracterizing the facts that Plaintiffs introduce, which are about the problems—resulting from the contribution limits and PAC requirements—that Plaintiffs face in associating together in order to speak more effectively than they otherwise could alone. Of course, it is obviously true that the individual Plaintiffs can simply not associate

with one another or can do things like make fliers, yard signs, and homemade videos that a few insomniacs may watch at 3:00 a.m. on cable television. But the availability of other means of communication is irrelevant. If constraints on speech could be justified by the fact that other means of speech are available, then there would be no such thing as free speech. Speaking on television would be unprotected because billboards are available; speaking through billboards would lose protection because yard signs are available; posting yard signs would lose protection because pamphlets are available; handing out pamphlets would lose protection because face-to-face conversation is available, and so on.

As Plaintiffs have made clear, the burden is not on them to demonstrate that they cannot take advantage of every form of speech the FEC can imagine. *See, e.g., Meyer v. Grant*, 486 U.S. at 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *MCFL*, 479 U.S. at 255 (holding that an organization could not be required to speak in a "more burdensome" manner than it chose). Instead, the FEC must show that the burdens imposed by contribution limits do not violate the First Amendment. *See WRTL II*, 127 S. Ct. at 2664.

As the Court stated in *WRTL II*,

> the response that a speaker should just take out a newspaper ad, or use a website, rather than complain that it cannot speak through a broadcast communication . . . is too glib. Even assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech, newspaper ads and websites are not reasonable alternatives to broadcast speech in terms of impact and effectiveness.

127 S. Ct. at 2671 n.9. The government cannot demand that speakers settle for second best when it comes to First Amendment rights. *See Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (plurality opinion) ("Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If that

is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective."). *Cf. Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987) ("'It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him.'") (quoting *Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring)); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757, n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means . . . .").

Indeed, the FEC's argument simply amounts to denying that there is such a thing as a right to associate and to speak as a group. But the Supreme Court has long recognized the fundamental importance of the right of association, both in the context of groups speaking out about matters related to an election, *see Citizens Against Rent Control*, 454 U.S. at 295, and in broader contexts. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (noting that the freedom of association is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society"). The FEC is free to argue on the merits that these precedents do not apply in the context of this case, but the Court should not simply ignore Plaintiffs' proposed findings of fact because the FEC wants to make that argument.

Finally, the FEC attempts to rely on *Buckley* for the proposition that contribution limits are not burdensome because they only require people to spend their money on "direct political expression." FEC's Memorandum at 4. But, as stated above, this point supports the Plaintiffs' case, because direct political expression in the form of independent expenditures is exactly the speech in which they will engage. In making the quoted statement, the Court in *Buckley* was offering reassurance that even with limits on contributions to candidates and candidate

committees, "direct political expression" would remain free from regulation. *Buckley*, 424 U.S. at 22. As the Court explained later:

> The Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—*while leaving persons free to engage in independent political expression*, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

Id. at 28-29 (emphasis added). In short, the Court allowed limits on the narrow aspect of political association—large *campaign* contributions—that posed a threat of corruption only because the broad arena of independent political speech would remain free. *Id.* Now the FEC contends that the broad arena of independent speech and "direct political expression" is subject to regulation on the same grounds. But this gets the Court's reasoning in *Buckley* exactly backwards. Accordingly, Plaintiffs' proposed findings about the effect of contribution limits and PAC requirements on their ability to associate in order to engage in independent speech are relevant; the FEC's proposed findings about individuals being able to speak by themselves are not.

C. The FEC's Arguments About the Impact of Contribution Limits on the Plaintiffs Are Either Arguments About the Merits, Nitpicking Around the Margins of Obvious Points, Or Are Just Wrong.

As with its other arguments, the FEC's claim that contribution limits do not prevent groups from raising "significant" sums is beside the point. The FEC is simply arguing, as it has throughout its response briefs, that Plaintiffs bear the burden of proving that contribution limits make fundraising absolutely impossible. But that is not the standard, as Plaintiffs have made clear already. *See, e.g.*, *Davis*, 128 S. Ct. at 2772 (holding unconstitutional a law because it burdened the "*vigorous exercise* of the right to use personal funds to finance campaign speech") (emphasis added).

The FEC's reliance on *Buckley* for the proposition that contribution limits simply require candidates and political committees to raise money from a greater number of persons does not change this. *See* FEC's Memorandum at 6. As stated above, *Buckley*'s statement applied to candidates and groups that made large contributions to candidates, not those who only make independent expenditures. Indeed, *Buckley* upheld contribution limits on candidates and political committees in part on the assumption that the limits would simply channel contributions away from candidates into "direct political expression"—that is, into the spending in which SpeechNow.org will engage. *See* 424 U.S. at 21-22. The FEC's argument thus amounts to the type of bait and switch that the Supreme Court rejected in *WRTL II*.[12] *Buckley* upheld limits on contributions to candidates because the limits helped prevent corruption but did not limit direct political expression. Yet the FEC now wants to apply those limits to SpeechNow.org, which does not pose concerns about corruption—because it makes only independent expenditures—but does engage in direct political expression.

In any event, as demonstrated below, the specific arguments in this section rely on obviously irrelevant comparisons to the fundraising abilities of the largest players in the campaign finance world—national party committees and national politicians. Indeed, in relying on these examples, the FEC ends up making the Plaintiffs' basic point about contribution limits: while large, well-established groups are able to raise funds under the limits, they impose much more significant burdens on smaller groups. The FEC's arguments do not detract from this point one bit; they are just an attempt to change the subject.

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[12] As the Court stated in *WRTL II*,

> It would be a constitutional "bait and switch" to conclude that corporate campaign speech may be banned in part because corporate issue advocacy is not, and then assert that corporate issue advocacy may be banned as well, pursuant to the same asserted compelling interest, through a broad conception of what constitutes the functional equivalent of campaign speech, or by relying on the inability to distinguish campaign speech from issue advocacy.

127 S. Ct. at 2673 (emphasis removed).

1. The History of Political Party and Presidential Fundraising Is Irrelevant to the Burden That Contribution Limits Would Impose on SpeechNow.org.

The FEC claims that the contribution limits do not impose a burden on SpeechNow.org because the national party committees have increased the number of donors since BCRA's limits on soft money donations. However, as Plaintiffs pointed out earlier, this is like arguing that the economic downturn is meaningless for small businesses because McDonalds continues to sell hamburgers. The national political party committees are the largest and most sophisticated players in the campaign finance world. They have been operating for decades, have dedicated teams of professional fundraisers, extensive donors lists, and large cash reserves to devote to fundraising. The national political parties are the most well known "brands" in campaign finance, and they are necessarily associated with candidates and politicians who are constantly in the public eye and therefore providing the party committees with constant free publicity. Moreover, party committees can accept up to $28,500 annually, as compared to $5000 for PACs, so their ability to raise funds is obviously enhanced as compared to other groups. *See* 2 U.S.C. § 441a(a)(1)(B); Price Index Increases for Expenditure and Contribution Limitations, 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007). Indeed, far from detracting from the testimony of Rodney Smith, the FEC's reliance on his past fundraising successes actually confirms his point: a sophisticated fundraising apparatus and enormous amounts of free publicity make a difference in a group's ability to raise funds. The FEC's comparison between the national party committees and *any* other group, let alone a group like SpeechNow.org, is positively ludicrous.

Moreover, the FEC provides no context at all on which to base its claim that the increase in donors to the national party committees is somehow relevant to the burden that contribution limits impose on SpeechNow.org. For instance, the FEC does not indicate how much money the national party committees had to spend to increase their donor base, where those new donors

came from or how they were discovered or their reasons for donating. As for the FEC's claim that the national party committees were not adversely affected by BCRA's soft money limits, the article on which the FEC relies actually shows that "[t]he RNC's total funding (including hard and soft money) was down 14 percent as compared to 2002 and the DNC's total was down 19 percent." FEC Ex. 135 at 5. This amounted to a drop in funding for the DNC of roughly $30 million and a drop in funding for the RNC of roughly $40 million. Just these *decreases* in funding would be enough to finance SpeechNow.org's entire operations for years. In short, the FEC's comparison in this section is absurd.

2. The FEC's Claim That Fundraising Costs Have Decreased Over Time Is Unsupported and Irrelevant.

The FEC claims that fundraising costs have gone down over time, but the evidence on which it relies does not support its claims. The FEC simply relies on a number of quotes and statements from articles—all of which are inadmissible hearsay—that make the facile point that it is possible to raise money over the Internet. FEC's Memorandum at 11-12. Plaintiffs do not dispute this obvious point, but it has nothing to do with whether contribution limits burden Plaintiffs' First Amendment rights. Indeed, the FEC's arguments in this section are as irrelevant as those it made about the national party committees in that it simply relies on the fundraising successes of presidential candidates.

For example, Clyde Wilcox's article on Internet fundraising focuses exclusively on how presidential campaigns have attempted to raise funds over time. *See* FEC Ex. 152. Likewise, the quote from Joe Trippi and the statements culled from the *Washington Post* article discuss how the presidential campaigns of Howard Dean and John Kerry, respectively, were able to raise large sums of money on the Internet. Thus, in relying on these examples, the FEC has simply managed to support Rodney Smith's point that "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." Smith Decl. at ¶ 42; *see also* FEC Ex. 15, Smith Dep. at 25:3-8 ("[In] terms of trying to persuade [potential donors] to make the contribution, [the Internet is] not particularly effective, unless you've got some huge amount of outside independent media exposure."). Indeed, the FEC recognizes the truth of this basic point when, in a different section of its memorandum, it attempts to downplay Professor Milyo's evidence that 527s in 2004 preferred large contributions to small ones by stating "the 'newly formed' groups were able to raise such large funds because they were closely associated with the two major political parties and their presidential candidates." FEC's Memorandum at 17. Although this does not detract from Professor Milyo's point that the 527s preferred large contributions over smaller ones, it is nonetheless an admission that the presidential candidates and national political parties make fundraising much easier.

The FEC claims that Mr. Smith's opinions should be discounted because Mr. Smith's "report presents no data which disputes that fundraising is now cheaper than it has ever been . . . ." FEC's Memorandum at 13. But the FEC has presented no data that shows that fundraising *is* cheaper now than it has been. Instead, the FEC simply relies on an article that concludes, based on the fact that a presidential campaign sent the author numerous emails in a single day, that fundraising on the Internet must be cheaper than by mail. FEC Ex. 152 at 7 ("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."). In short, the FEC simply made up the claim that fundraising costs have gone down over time, and then claimed that Mr. Smith did not refute it.

3. Facts Concerning the Manner in Which the Contribution Limits Affect Plaintiffs Are Clearly Relevant.

The FEC criticizes the Plaintiffs' reliance on a handful of facts showing that the burdens of contribution limits fall particularly hard on groups, like SpeechNow.org, that are not promoting high-profile issues. FEC's Memorandum at 13-15. But the Supreme Court has made clear that the burdens of the campaign finance laws can fall disproportionately on smaller groups. *See WRTL II*, 127 S.Ct. at 2671 n. 9; *MCFL*, 479 U.S. at 254-55. And the Court has made clear that those with unpopular views are often most in need of First Amendment protections. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002) ("Even if the interest in preventing fraud could adequately support the ordinance insofar as it applies to commercial transactions and the solicitation of funds, that interest provides no support for its application . . . to enlisting support for unpopular causes."); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 n.8 (1995) ("Arguably, the disclosure requirement places a more significant burden on advocates of unpopular causes than on defenders of the status quo.").

As stated above, the Plaintiffs' point is not that they are entitled to a particular constitutional standard because of the views they espouse. Plaintiffs are simply offering a explanation of why the contribution limits make fundraising particularly difficult for them. Indeed, the point here is simply the flip side of the obvious truth that larger, nationally known groups that address high-profile issues will be much more able to raise funds than groups that do not enjoy these attributes. In order to argue that fundraising is easy under contribution limits, the FEC repeatedly relies on evidence of the fundraising of national party committees and

presidential candidates.[13] Yet here it claims that SpeechNow.org is not permitted to make the point that high-profile groups are the exception, and not the norm. Plaintiffs' proposed findings showing that groups without high-profile issues or free publicity have a harder time raising funds are clearly relevant, and the Court should enter them.

Moreover, the FEC's claim that Plaintiffs are suggesting that the "Constitution must equalize the relative financial resources or political influence of competing political actors" is nonsense. FEC's Memorandum at 14. As stated above, Plaintiffs' are not claiming a right to equal publicity or influence, nor are they claiming a right to use the resources of others. Plaintiffs are simply claiming a right to be left alone. Only in Orwellian double-speak can this be interpreted as a request for a subsidy. Indeed, only by assuming that regulation of speech is the norm can the FEC conclude that a request to be freed from regulation amounts to a request for special privileges. But this is not the law. *See, e.g,*, *WRTL II*, 127 S. Ct. at 2669 (stating that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor"). As stated above, the cases on which the FEC relies in this section do not support its warped argument. *See supra* at 16.

Contrary to the FEC's claim, Plaintiffs' proposed findings are not "premised on the notion that it would be acceptable for Congress to impose contribution limits on popular groups and constitutionally required for Congress to remove [those limits] for advocates of less popular causes." FEC's Memorandum at 14. Plaintiffs' challenge is premised on the fact that

[13] To be sure, the FEC is not a model of consistency in its use of this kind of evidence. When evidence regarding candidates and contribution limits is harmful to its position, the FEC claims that evidence is irrelevant. For example, Plaintiffs offer the proposed finding that "[s]tate legislative candidates spend significantly less on their campaigns in states with contribution limits, all else constant." Plaintiffs' Proposed Findings of Fact at ¶ 114. One reason the FEC objects to this finding is that the study upon which it is based "concerns candidate spending and direct contribution limits; it doesn't have anything to do with independent expenditures or groups like SpeechNow." FEC's Response at 52 (emphasis in original). The FEC's other objection is an absurd claim that Professor Milyo mischaracterizes the cited study. But he does no such thing; he accurately relates the study's empirical finding supporting the proposed finding of fact. *Compare* Milyo Decl. at ¶ 65 *with* FEC Ex. 153 at 472 (Table A1: Differences in Means: Races with incumbents).

SpeechNow.org makes only independent expenditures and thus poses no concerns about corruption. But in gauging the burden of the contribution limits, it is useful and relevant for the court in deciding the merits of this as-applied challenge to actually understand how those burdens affect the Plaintiffs. In short, there is another side to the FEC's story that the only relevant actors in the world of campaign finance are the national party committees and PACs that allegedly have no trouble raising funds, and Plaintiffs want to tell it. The Supreme Court typically examines the burden of laws that affect First Amendment rights on a wide spectrum of people, and certainly examines those burdens as they apply to plaintiffs in as-applied cases. There is no good reason for preventing Plaintiffs from providing information on which courts typically rely.

4. The FEC Admits Plaintiffs' Basic Facts Concerning the Importance of Large Contributions for Start-up Groups.

The FEC spends much space attempting to deny the simple truth that groups prefer to raise large contributions over small contributions, but then it ends up admitting the basic points anyway. Thus, in discussing Professor Milyo's review of the fundraising by 527s, the FEC states that the "fact that some of the 'newly formed' groups . . . received higher contributions on average . . . is simply a reflection of their ability to raise extremely large contributions." FEC's Memorandum at 17. The FEC then states that "[t]he older groups would no doubt have gladly accepted the large contributions raised by the primary groups referred to as the 'shadow party' groups, had they been able to raise such large contributions." *Id*. In short, when allowed to do so, groups will prefer large contributions over small contributions. Add to this the FEC's recognition that raising funds under contribution limits is more difficult than raising them outside of contribution limits, the basic, common sense points about the economics of fundraising (*e.g.*, it costs money to raise money; the smaller the average contribution, the higher the costs; the only

ways to increase fundraising are either to add new donors or increase the size of contributions, etc.) and the reality that launching a new group requires seed funds, and Plaintiffs' basic points about the burden of contribution limits are established.

Plaintiffs have never claimed that these points are terribly complicated or earth-shattering. As stated above, they are largely matters of simple logic and economics along with some basic information about the realities of fundraising. Indeed, their essential simplicity and obviousness are a large part of the reason Plaintiffs were prepared to have this case certified on the record as it existed at the preliminary injunction stage. What is surprising is the fact that the FEC spends so much effort to refute them. But, given its admissions of Plaintiffs' basic points, the FEC's arguments are just tinkering around the margins.

For example, the FEC claims that Professor Milyo's reliance on the fundraising of 527s is misplaced because some of them were found to have violated the law. FEC's Memorandum at 16. This is true, but entirely irrelevant to Professor Milyo's point, which is simply that the groups demonstrated a clear preference for large contributions over smaller ones. Similarly, the FEC claims that those groups are not representative of 527 groups more generally. *Id*. at 18. But Professor Milyo never claimed that they were necessarily representative of all 527s. Given the simplicity of the basic point he was making, however, and the fact that the FEC recognizes its truth, this is a minor complaint. The FEC also contends that Professor Milyo fails to consider the many successful nonconnected PACs that have raised money under the limits. *Id*. at 16. But, as demonstrated above, the statistics on which the FEC relies actually make Plaintiffs' point. They show that the average receipts of nonconnected committees during the time period the FEC cites ranged from roughly $54,000 to roughly $194,000 for each PAC. Comparing these numbers to 527s demonstrates unequivocally that groups unconstrained by contribution limits can raise

vastly more money in short period of time than those subject to limits. *See supra* at 27-28. Indeed, both the FEC and the California FPPC, on whose report and testimony the FEC relies, admit precisely this point.

The FEC also criticizes the empirical work done by Professor Milyo as "unrepresentative," but ignores other tests Milyo performed that validated his conclusions concerning the largest 527 groups. The FEC states that "Milyo conceded in his deposition that 'it's possible that these top 527 political groups are unrepresentative of the size distribution of contributions' to 527 groups generally." FEC's Memorandum at 17-18. But Professor Milyo made clear that he performed other tests to check his results. Specifically, Professor Milyo examined a random selection of other 527 groups to verify that they exhibited a similar pattern and found that "the patterns [for this second group] look very similar to what I saw for large groups." FEC Ex. 12 at 320:9-10. The FEC criticizes Professor Milyo for selecting groups based on the letters of his last name, but this is silly. *See* FEC's Response at 47-48. His method yielded a random selection, which was all he was attempting to do.

In sum, the FEC simply splits hairs, but the Plaintiffs' basic point about contribution limits is clear: they burden the ability of groups to raise funds.

5. The FEC's Argument About Specialization of Labor Is Specious.

The FEC claims that contribution limits do not "prevent individuals with different skill sets or resources from coming together for the purpose of disseminating campaign messages." FEC's Memorandum at 19. Again, it is true that contribution limits do not absolutely prohibit individuals from attempting to take advantage of specialization and divisions of labor. But Plaintiffs' point was not that contribution limits absolutely prevent this from happening, but that they prevent individuals from "taking full and effective advantage" of specialization, economies of scale, and divisions of labor. *See* Plaintiffs' Proposed Findings of Fact at ¶ 93. This is yet

another version of the FEC's argument that if a regulation does not absolutely prohibit particular speech or conduct, it is not burdensome. But the FEC cannot reasonably dispute the fact that the contribution limits prevent SpeechNow.org and the other Plaintiffs from taking full advantage of Fred Young's wealth and that they prevent Fred Young from, in turn, taking full advantage of David Keating's expertise. Again, this is a simply matter of common sense. The Supreme Court has made clear that one major benefit of the right of association is that it allows individuals to make their speech more effective by joining with others. *See Citizens Against Rent Control*, 454 U.S. at 295-96. The Court should enter Plaintiffs' simple findings on this point.

6. The FEC's Criticisms Do Not Undermine the Basic Fact That a Restriction on Contributions Leaves Less Money to Devote to Expenditures.

As Plaintiffs stated in their response to the FEC's proposed findings of fact, they intend to rely on *Citizens Against Rent Control* and to argue that a limit on contributions to SpeechNow.org necessarily amounts to a limit on its expenditures. Indeed, as shown above and in Plaintiffs' response to the FEC's proposed findings of fact, both the FEC and the California FPPC are banking on contribution limits doing just that. *See* Plaintiffs' Response to FEC's Proposed Findings of Fact at 97 (¶ 223); Plaintiffs' Proposed Findings of Fact at ¶ 113. The FEC's own statistics show that nonconnected committees, which operate under contribution limits, have raised vastly less money than have 527s, which are not subject to the limits. *See supra* at 27-28. As a result, the FEC's nitpicking of Plaintiffs' facts is pointless. The point is not controversial and the facts are not complicated or speculative. They are what they are, and the Court should enter them as findings of fact.

In claiming otherwise, the FEC simply compares groups like SpeechNow.org to the national party committees, which, as stated earlier, are simply not comparable to groups like SpeechNow.org, let alone most groups. The FEC also attempts to cast aspersions on Professor

Milyo's analysis because it relies on "a theory from an 'undergraduate intermediate microeconomics textbook.'" FEC's Memorandum at 20. The FEC's point appears to be that if someone relies on fundamental principles of economics that every college student learns, one's conclusions are suspect. On this theory, the FEC will next criticize bridge builders for relying on the insights of Sir Isaac Newton.

Indeed, as noted above, the FEC's primary criticism of Professor Milyo appears to be directed to the manner in which he wrote his report and declaration. The FEC's complains that Professor Milyo's theories are not backed up by any facts. That is true in the sections in which he discusses those theories, but then Professor Milyo goes on to illustrate how those theories apply by examining actual data, so the FEC's claim that he examined nothing to back up his theories is just wrong. Certainly, Professor Milyo did not bother simply to call other people on the phone or have his research assistant copy quotes from their articles, as Professor Wilcox did. But that is not a criticism of Professor Milyo, it is a criticism of what amounts to the "position paper" that Professor Wilcox submitted for the FEC. *See* FEC Ex. 18, Wilcox Dep. at 70:19-22, 71:11-16.

D. Plaintiffs Agree with the FEC That the Motives of Speakers and Donors Are Irrelevant to This Case.

The FEC complains about the inclusion of three proposed findings that make clear that the Plaintiffs do not care about access or gratitude. The point was apparently lost on the FEC that Plaintiffs included these facts in anticipation of the FEC's reliance on the claim that many donors to independent groups are seeking access to and gratitude from candidates. In short, they are facts submitted in rebuttal to claims the FEC wants to make. Plaintiffs agree with the FEC that the motives of both speakers and donors are obviously irrelevant to the issues in this case. The Supreme Court made that point crystal clear in *WRTL II* in response to the FEC's repeated

claims that WRTL's speech should be held to be the functional equivalent of express advocacy because WRTL had allegedly expressed a desire elsewhere to affect the outcome of elections. *See* 127 S. Ct. at 2666, 2668. The FEC now makes the same argument here, only with the added twist that now it is arguing that *other* people's motives are relevant to whether SpeechNow.org poses a threat of corruption, but somehow the Plaintiffs' motives are not relevant to the same question. While Plaintiffs agree that their motives and the motives of others are irrelevant, if the Court is going to make findings to this effect with respect to others (which it should not) then it ought at least to adopt the proposed findings about the Plaintiffs' motives.

E. The FEC's Arguments About the Burdens of the PAC Requirements Are All Arguments About the Merits, Not Disputes About Facts.

The Supreme Court has recognized repeatedly that "PACs impose well-documented and onerous burdens, particularly on small nonprofits." *WRTL II*, 127 S. Ct. at 2671 n.9 (2007). *See also Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990) (noting that PAC registration and reporting requirements "burden expressive activity."); *MCFL*, 479 U.S. at 254-55 (1986) (PAC regulations "require a far more complex and formalized organization than many small groups could manage.") (plurality opinion). Relying on these cases, Plaintiffs will argue that the organizational, administrative, and continuous reporting requirements for PACs unconstitutionally burden Plaintiffs' rights to speech and association. Accordingly, Plaintiffs included in their proposed findings a straightforward recitation of the basic facts that demonstrate how the PAC requirements operate and the burdens they impose. For the most part, the FEC did not seriously dispute the truth of these facts. *See* FEC's Response at 60-68. Nevertheless, the FEC argues that many of these facts are irrelevant or otherwise improper as findings of fact. All of those claims are baseless.

First, the FEC contends that Mr. Keating's view that being labeled a PAC will make it more difficult to raise money is irrelevant. FEC's Memorandum at 24-25. Mr. Keating's view was included in two proposed facts that simply make clear one of the reasons he does not want SpeechNow.org to have to register as a PAC. Plaintiffs' Proposed Findings of Fact at ¶¶ 133-34. Plaintiffs offered them as Mr. Keating's views, based on his experiences, not as absolute facts that apply to all groups in all circumstances. They provide additional background information that help to explain Mr. Keating's reasons for creating SpeechNow.org. The FEC is thus attacking these two simple points out of context. Moreover, the FEC's claim that Mr. Keating's views are "speculative" misperceives the reasons Plaintiffs included them. They are David Keating's views, based on his experiences; there is thus nothing "speculative" about them. Indeed, Mr. Keating's view that many people have negative views of PACs is hardly outlandish.

Second, the FEC claims that the "fulfillment of its statutory duty to provide assistance to political committees" is not evidence of burden. *See* FEC's Memorandum at 26-27. The FEC essentially argues that it is statutorily required to try to help groups comply with the laws and that its efforts alleviate the burden of compliance, not increase it. But this argument ignores the point of highlighting the FEC's efforts to help people comply. Whether the FEC intends its efforts to alleviate the burden, those efforts are directly proportional to the burden that the laws impose. As an example, if the FEC published only one page of instructions for its forms and never received any calls to its help line, that would say something very different about the burden of compliance than if it published a one-hundred page manual, held regular seminars for those who must comply, and received thousands of calls, as the FEC in fact does. *See, e.g.*, Plaintiffs' Proposed Findings of Fact at ¶¶ 147, 148, 150. Indeed, there is perhaps no better evidence to demonstrate the amount of instruction the public requires to understand and comply

with these laws than the FEC itself. The fact that the FEC is statutorily required to provide this assistance to the public does not change the fact that the FEC decides to give the amount of instruction that is proportional to the complexities of the law. The requirements for PACs themselves are mandated by statute, but that did not change the Supreme Court's conclusion in *MCFL* that these requirements are burdensome. 479 U.S. at 254-55.

Finally, the FEC claims that the requirements for PACs are not burdensome because its own employee, Greg Scott, said they are not, and because Mr. Keating stated once that he can "handle" those requirements. FEC's Memorandum at 27-28. But the views of FEC employees and Mr. Keating's off-hand statements do not render the requirements for PACs not burdensome as a matter of law. If it were this simple for the FEC to demonstrate that the laws were not burdensome, the Supreme Court would never have concluded that they were. *See, e.g.*, *WRTL II*, 127 S. Ct. at 2664; *MCFL*, 479 U.S. at 254-55. The question in constitutional cases is whether laws impose unjustified burdens as a matter of law, not whether it is possible for particular individuals to comply with them. *See, e.g.*, *Davis*, 128 S. Ct. at 2772 (holding unconstitutional a law under which "the *vigorous exercise* of the right to use personal funds to finance campaign speech produces fundraising advantages for opponents in the competitive context of electoral politics.") (emphasis added).

CONCLUSION

For the foregoing reasons, the Court should enter the Plaintiffs' proposed findings of fact and those of the FEC's to which Plaintiffs did not object.

Dated: December 12, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th Day of December 2008, a true and correct copy of Plaintiffs' REPLY MEMORANDUM IN SUPPORT OF THEIR PROPOSED FINDINGS OF FACT FOR CERTIFICATION along with the DECLARATIONS OF RODNEY SMITH, PAUL M. SHERMAN, AND ROBERT GALL was filed electronically using the court's ECF system and sent via the ECF electronic notification system to the following counsel of record:

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/s/ Steven M. Simpson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF RODNEY SMITH IN SUPPORT OF OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR PROPOSED FINDINGS OF FACT FOR CERTIFICATION

I, RODNEY SMITH, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the District of Columbia, and over the age of 18 years. I make this declaration in support of Plaintiffs' Reply Memorandum in Support of Their Proposed Findings of Fact for Certification under 2 U.S.C. § 437h.

2. I am being compensated for my work in this case at a rate of $250 an hour. When Steve Simpson at the Institute for Justice first contacted me about serving as an expert witness in this matter, he offered to compensate me for my time spent on the case, but I declined and said

that I would not charge for my time. My reason for declining compensation was that I wanted to do the project pro bono because I believe in the right of people to speak freely about politics.

3. Mr. Simpson continued to offer to pay me even after I wrote my report for the case, pointing out that being deposed would take time and that Plaintiffs' counsel felt it was only fair that I be paid. After considering the issue more and thinking about the time I was spending on the case, I decided to accept compensation in the form of $250 an hour. I had never served as an expert witness before and did not fully appreciate the time I would have to spend, and, frankly, I felt that it was very decent of Plaintiffs' counsel to offer to pay me, so I decided to accept the offer.

4. Because I did not decide to accept compensation until the day before I was deposed, I did not receive any payments until after my deposition. To date, the amount of compensation I have received for my work on this case is $5000 for 20 hours of work; this includes the time I spent at my deposition and preparing for it. I don't expect to receive any more payment for work on this case.

5. I understand that the FEC has said that I did not include a list of all of my publications during the last ten years in my expert report. The only thing I've written that I consider substantive enough in that period to be called a "publication" is my book, which forms the basis of my expert report. My report clearly states that it is based on my book on page 1; the title of book appears there and in my curriculum vita.

6. The only other things I recall writing – besides work-related materials like direct-mail pieces and phone scripts – in the last ten years were two op-ed pieces I wrote for the Washington Times. (An op-ed that I wrote for the Washington Post was published just over ten years before my report was submitted). I don't think of it as a "publication," but I also filed, through my

attorney, an amicus brief in the *McConnell v. FEC* case; I recall being asked about that at my deposition.

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

Executed this 12th day of December, 2008.

Rodney Smith

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF PAUL M. SHERMAN IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR PROPOSED FINDINGS OF FACT FOR CERTIFICATION

1. I am an attorney representing the plaintiffs in the above-captioned matter. I am a member in good standing of the Bar of the District of Columbia and have been admitted to the United States District Court for the District of Columbia. I make this declaration based upon my own knowledge and in support of Plaintiffs' Memorandum in Support of Their Proposed Findings of Fact for Certification.

2. In the FEC's Memorandum in Response to Plaintiffs' Proposed Findings of Fact, the FEC cites an email that I purportedly sent to David Keating as evidence of "the creation of a SpeechNow email account at gmail.com by one of SpeechNow's attorneys." FEC's Memorandum at 2.

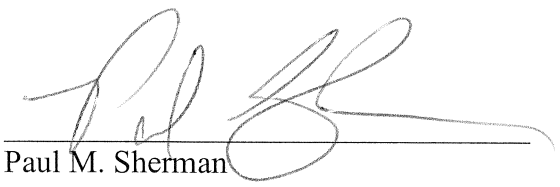
3. I did not create SpeechNow.org's Gmail account, nor did I send that email. Indeed, I did not begin working at the Institute for Justice until July 2, 2007, nine days after the email was sent. The FEC is confused because my name appears *above* the header, at the top of the page on which the email is printed. The reason my name appears there is that David Keating saved the email as a separate file and then forwarded it to my workplace email account so that I could print it up and produce it to the FEC. I printed the email in Microsoft Outlook, which automatically places the computer-user's name at the top of any printed email, regardless of who originally sent the email. *See* Exhibit A (test email from Paul Sherman to Robert Frommer, dated Dec. 12, 2008, printed by Bert Gall). On most of the emails we produced, Plaintiffs' counsel simply removed my name from the top of the page after it was printed, but evidently we overlooked it on this email.

4. Despite the presence of my name at the top of the page, the email header clearly indicates that it was sent to David Keating by the "Gmail Team [mail-noreply@gmail.com]." *See* Exhibit B (email from Gmail Team to David Keating, dated June 23, 2007, SNK0327).

5. I am not now, nor have I ever been, a member of the "Gmail Team."

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

Executed: December 12, 2008.



Paul M. Sherman

Sherman Declaration
Exhibit A

Bert Gall

From: Paul Sherman
Sent: Friday, December 12, 2008 12:12 AM
To: Robert Frommer
Subject: Test email

This is a test email. As you can see, Bert Gall's name appears at the top of this page, even though the email was sent from Paul Sherman to Robert Frommer.

Sherman Declaration
Exhibit B

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DECLARATION OF ROBERT GALL IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR PROPOSED FINDINGS OF FACT FOR CERTIFICATION

I, ROBERT GALL, declare under penalty of perjury that the following is true:

1. I am a citizen of the United States, a resident of the District of Columbia, and over the age of 18 years. I make this declaration in support of Plaintiffs' Reply Memorandum in Support of Their Proposed Findings of Fact for Certification under 2 U.S.C. § 437h.

2. I am an attorney at the Institute for Justice; I represent the Plaintiffs in this matter. On September 18, 2008, I defended the deposition of Rodney Smith, one of Plaintiffs' expert witnesses. That deposition took place at a conference room in the office of the FEC's general counsel.

3. Just before the start of the deposition, as I was reviewing copies of Mr. Smith's subpoenaed documents that had been produced to the FEC, I realized that we may not have provided the FEC with a copy of one of Mr. Smith's drafts of his expert report. I immediately contacted my colleagues and asked them to determine whether that draft had been produced and asked them to email it to the FEC's counsel if it had not. At 10:03 a.m., my colleague Paul Sherman e-mailed a copy to the FEC's counsel.

4. The first break in the deposition was at 10:35 a.m. At that time, I checked my Blackberry and saw Mr. Sherman's e-mail. Mr. Hajjar, who was taking the deposition, and his co-counsel had already left the room. When they returned, I told them that we had just produced the draft report. Mr. Hajjar indicated that he knew that, and I believe that he had at least one printed-out copy of the draft report with him. I told him that we had inadvertently not produced the draft on September 16, 2008, when we produced the other documents responsive to the FEC's subpoena of Mr. Smith's documents. I also told him that he and his colleagues were free to take as much time as necessary to review the draft report, and that Mr. Smith and I wouldn't leave until they had had enough time to review it and ask questions about it. I assured him that that the changes between the draft report and the final report were minor.

5. Despite my willingness to provide extra time to review the draft report and to extend the deposition if necessary, Mr. Hajjar and his colleagues did not take me up on my offer of extra time. I do not recall Mr. Hajjar complaining to me about the late production, and he certainly did not state, either on or off the record, that he would need to carry over the deposition to another day. Instead, he ended the deposition at 4:37 p.m.

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

Executed: December 12, 2008.

Robert Gall