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' BRIEF IN RESPONSE TO THE FEC'S PROPOSED FINDINGS OF FACT

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Pursuant to the parties' agreed schedule and this Court's orders of July 29, 2008, and October 17, 2008, Plaintiffs respectfully submit this response to the FEC's Proposed Findings of Fact.

INTRODUCTION

This is an action that challenges the application of contribution limits and the administrative, organizational, and continuous reporting requirements for PACs to the Plaintiffs, SpeechNow.org and several of its donors. SpeechNow.org is an independent group of citizens who want to band together and pool their money to spend on express advocacy for and against candidates. Plaintiffs' claims in this case are based on several fundamental principles in campaign finance law, among them that independent expenditures—that is, expenditures for express advocacy that are not coordinated with a candidate and are financed only by individuals—are core political speech that cannot be limited by the government; that individuals have a First Amendment right to band together and pool their money to spend on their own speech; and that their expenditures create no concerns about corruption as long as they are not coordinated with candidates and the group makes no contributions to candidates.

In their proposed findings of fact, Plaintiffs submitted a relatively brief statement of proposed facts that demonstrate that SpeechNow.org operates consistently with these basic principles and that the campaign finance laws that apply to them do not. Plaintiffs' facts thus cover what SpeechNow.org is and how it is organized and will operate, the FEC's positions concerning SpeechNow.org, the impact of the campaign finance laws on SpeechNow.org, and the like. Plaintiffs kept their proposed findings of fact focused and narrow and stated actual facts, rather than legal conclusions. Wherever possible, Plaintiffs separated proposed findings as to which there would likely be no objection from those to which objections were more likely in

order to make it easier for the FEC to respond and for the Court to discern where the parties agreed and where they disagreed. Plaintiffs relied on admissible evidence, rather than quotes from articles, the internet, or testimony in other cases. Plaintiffs did not view these factual submissions as an opportunity to make extended arguments about the parties' legal claims or to attempt to pass off legal conclusions as facts.

The FEC has taken a radically different approach, not only in its presentation of its proposed facts and the evidence on which it relies, but in the alleged facts that it chose to include. The FEC's brief is 136 pages long and includes 452 separate proposed findings of "fact" along with over 2,500 pages of exhibits. The vast majority of the FEC's proposed findings of fact are baseless assertions, legal conclusions, broad statements of opinion, and random quotes from academic articles and the popular press. Where the FEC manages to include actual facts, they are generally so argumentative as to make it difficult, if not impossible, to separate the rhetoric from the reality. From a strict evidentiary standpoint, the FEC relies repeatedly on inadmissible hearsay, on assertions that lack any foundation whatsoever, on claims that are not supported by the evidence cited, and on claims that are entirely irrelevant to the issues in this case. The FEC relies for many of its proposed facts on the unsworn report of its expert, Clyde Wilcox, which consists primarily of unsupported assertions, half-truths, and other claims that conflict with Mr. Wilcox's own academic writings or his deposition testimony. The FEC attempts to pass off as fact testimony the declarations of three witnesses—Ross Johnson, Robert Rozen, and P. Michael Calogero—who are actually providing expert opinion testimony, but for whom the FEC never submitted expert reports; it relies on declarations from other cases that involved entirely different fact patterns and legal issues from this one and are inadmissible in any event; and it relies on declarations from two additional witnesses—Kevin Yowell and

Michael Bright—that the FEC designated as witnesses after discovery in this case closed. Those are just a sample of the problems with the FEC's submission.

To make matters worse, the vast majority of the FEC's proposed facts are irrelevant to this dispute, because the FEC is attempting to introduce them in the service of arguing that the constitutional and statutory principles on which Plaintiffs' challenge is based are all wrong—not that the Plaintiffs' reliance on them is misplaced, but that the actual holdings, statutes, and rules themselves are wrong. The FEC seems to realize that it cannot prevail in light of those principles, so it has decided to reject them and try to remake much of campaign finance law from the ground up. Thus, the FEC wants to introduce hundreds of factual findings purporting to show that independent expenditures are corrupting and can be limited, notwithstanding the Supreme Court's holding to the contrary from *Buckley* on up through today. *See* FEC's Proposed Findings of Fact at ¶¶ 78-375. And the FEC wants to introduce hundreds of facts purporting to show that independent expenditures can be treated as "indirect" contributions to candidates even if they are not "technically coordinated," notwithstanding the holdings, statutes, and the FEC's own rules that say otherwise. *See id*. at ¶¶ 122-31, 163-80. Similarly, the FEC wants to argue that unincorporated associations pose the same concerns about corruption that corporations create, notwithstanding the fact that Congress and the Supreme Court have decided only that corporations pose such problems. *See id*. at ¶¶ 345-49. Finally, the FEC seeks to "prove" that only David Keating's speech is at issue in this case, despite the Supreme Court's conclusion that groups embody the speech and association rights of all of their members. *See id*. at ¶¶ 41-77.

In short, the FEC wants to use this case as an opportunity to argue that several fundamental principles of campaign finance law—not just Supreme Court holdings, but the

FEC's own rules and the statutes on which they are based—should not be what they are. This is an as-applied challenge, and yet the FEC wants to introduce hundreds of alleged facts based on thousands of pages of exhibits that purport to demonstrate the actions of every individual and group who has ever made independent expenditures *except* the Plaintiffs. If Plaintiffs had requested that this Court make hundreds of factual findings that purported to show that all contribution limits as they apply to anyone, anywhere are unconstitutional and that the Supreme Court was wrong in upholding them in *Buckley v. Valeo*, this Court would surely deny their request. Yet that is analogous to what the FEC is attempting to do here. As Plaintiffs argue in more detail in Part I, below, the bulk of the FEC's facts are not relevant to this case, and the Court should disregard them.

The FEC's facts demonstrate that many things have been said about campaign financing and independent groups and that it is relatively easy to characterize otherwise innocuous points (*e.g.*, independent expenditures are intended to affect the outcome of elections; candidates are sometimes grateful for independent expenditures; advocacy groups are typically run by knowledgeable people with experience in fundraising, media, and the other things that advocacy groups do; wealthy people support political causes and parties; some politicians have been convicted of violating the law, etc.) as though they were earth-shattering revelations or evidence of broad and troubling trends. But simply quoting a source does not make that quote a fact, or if a fact, make that fact relevant; and characterizing a claim with "always," "most," "usually," or "well-established" does not turn an assertion into a trend. Saying something is "amazing," "striking," or "massive" does not make it so. Hyperbolic terms, irrelevant claims, and inadmissible evidence do not become more truthful, pertinent, or admissible because they are offered in bulk.

The FEC's strategy appears to be an attempt to overwhelm the Plaintiffs (and the Court) with the sheer size and breadth of its submission, presumably on the theory that if the Plaintiffs cannot manage to rebut every one of the FEC's alleged facts, the FEC's facts win by default. But that is not how it works. A party submitting proposed findings of fact to a court must actually support those proposed findings with admissible evidence. *See, e.g.*, *Evans v. Williams*, No. 76-293 (ESH/JMF), 2006 U.S. Dist. LEXIS 61329, at *8 (D.D.C. Aug. 30, 2006) (stating, when considering objections to proposed findings of fact, that "[t]he crucial question is whether each proposed finding of fact is based on admissible evidence."). Only then is the opposing party required to respond and to rebut the fact with its own admissible evidence. *Cf.* Fed. R. Civ. Proc. 56(e)(2). *See also Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003) (noting that a district court had no duty to scour an affidavit containing inadmissible hearsay or references to unauthenticated documents "to glean what little admissible evidence it may have contained").[1]

This process is no different for cases being certified under 2 U.S.C. sec. 437h. Indeed, under Section 437h, the fact-finding process is even more abbreviated than in a typical case, because the whole point of the section is to move cases as quickly as possible to the appellate courts where the legal and constitutional issues can be decided. *See, e.g., Mott v. FEC*, 494 F. Supp. 131, 134 (D.D.C. 1980) (stating that Senator Buckley's purpose in proposing Section 437h

[1] Nor are the FEC's claims appropriate for judicial notice. Under Fed. R. Evid. 201, judicial notice may be taken of adjudicative facts only if they are "not subject to reasonable dispute." Courts may also take notice of "legislative facts," which are facts that help courts "determine the content of law and of policy" and allow them to exercise the "judgment or discretion in determining what course of action to take." *Ass'n of Nat. Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161-62 (D.C. Cir. 1979). *See also* Fed. R. Evid. 201 cmt. (a) (Advisory Comm. Notes 1972) (stating that legislative facts are facts that "have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body"). Examples of legislative facts of which judicial notice has been taken are that the period of human gestation is about 280 days or 9 months, *W.M. v. D.S.C.*, 591 A.2d 837 (D.C. 1991); that those who run in elections are interested to learn of the results, *White v. District of Columbia*, 537 A.2d 1133 (D.C. App. 1988); and the value of CDs, *Zellers v. U.S.*, 682 A.2d 1118 (D.C. 1996).

was "to provide[ ] for the expeditious review of the constitutional questions I have raised."). Thus, while the D.C. Circuit stated in *Buckley v. Valeo* that district courts can base their findings of fact on "submissions that may suitably be handled through judicial notice," it made clear that such "legislative facts" must be "supported by legislative history or works reasonably available, to the extent not controverted in material and substantial degree." 519 F.2d at 818. This was not an invitation to toss aside the rules of evidence and attempt to litigate a case on the basis of competing position papers. *See Mariani v. United States*, 80 F. Supp. 2d 352, 356 (M.D. Pa. 1999) (applying rules of evidence to proposed findings of fact for certification under Section 437h).

Indeed, as Plaintiffs demonstrate, the FEC repeatedly misstates or overstates information from the exhibits on which it relies. In one particularly egregious example, the FEC claims that Steven Moore, who formerly worked for the Club for Growth, was quoted in an article as saying that the Club "pour[ed] half a million of dollars" in independent ads into primary races. *See* FEC's Proposed Findings of Fact at ¶ 108. Yet it is clear from the article that Mr. Moore was talking about "direct contributions" to candidates, not independent expenditure ads. *See infra* Part II.D.2., ¶ 108. Direct contributions are subject to contribution limits and have nothing at all to do with this case.[2] However, in its quote, the FEC left out "direct campaign contributions," making it appear that Mr. Moore was discussing independent expenditure ads, when in fact he was discussing direct contributions to candidates. *Id.* This is not the only misquote from this article, as Plaintiffs demonstrate below. *See infra* ¶¶ 109-110, 239.

The FEC has tried mightily to involve the Club for Growth in this case. Mr. Keating is the Executive Director of the Club for Growth, and the Club is a very well-known and successful

[2] As Mr. Moore explained in the article, the Club raised hard dollar contributions from its members who contributed the money to candidates.

advocacy group in Washington, D.C. The FEC served discovery requests on Mr. Keating seeking information about Club activities, it has subpoenaed documents from the Club, and it is currently trying to have a confidentiality order lifted in another case that covers those documents. It spent over half of David Keating's deposition in this case questioning him about the Club's activities. *See* Keating Dep. (FEC Ex. 11). In its proposed findings of fact, the FEC refers to Club activities in no less than 20 paragraphs.[3] It points out that Fred Young is a Club donor and that he has attended Club functions that involved candidates in the past—facts that are completely irrelevant to this case. *See* FEC's Proposed Findings of Fact at ¶¶ 283-286. Most incredibly, it ascribes a position that the Club for Growth took in a dispute with the FEC to SpeechNow.org, even though David Keating testified in his deposition that "I don't think SpeechNow.org has taken a position on this."[4] FEC Ex. 11, Keating Dep. at 85:20-21. *Compare* FEC's Proposed Findings of Fact at ¶ 373 *with infra* at ¶ 373.

In light of the FEC's efforts, it is hard to conclude that its misquotes of Mr. Moore, and, indeed, Mr. Keating, were simple oversights or completely unbiased mistakes. Plaintiffs are not suggesting that the FEC has purposely fabricated quotes. But it has certainly not taken care to ensure that its claims about its so-called "evidence" are exactly accurate. And all of its mistakes seem to go in one direction.

There are many other examples of misstatements, misquotes, things taken out of context, and overblown claims throughout the FEC's Proposed Findings of Fact. *See infra*. This brief is unfortunately extremely long, and Plaintiffs certainly wish that they could have filed a shorter

[3] *See* FEC's Proposed Findings of Fact at ¶¶ 108, 109, 110, 231, 239, 272, 273, 282, 283, 284, 285,286, 373, 375, 411, 412, 413, 414, 415, 433.

[4] Similarly, the FEC claims that "Mr. Keating took no position on whether SpeechNow.org would disclose its disbursements for expenses such as candidate research or public opinion polls." FEC's Proposed Findings of Fact ¶ 374. But Mr. Keating did take a position in his deposition. He first said he wasn't sure what SpeechNow.org would do, and then suggested that the FEC give him guidance and "then we can work out whatever arrangement you might be happy with." *See* Keating Dep. at 185:18-186:8.

one. But if the Court will take the time to read it in its entirety, Plaintiffs are confident that it will view the FEC's claims about its evidence with a healthy degree of skepticism. In fact, in light of the many errors, misstatements, the staggering amount of hearsay on which it relies, and the many, many baseless assertions, hyperbole, and outright spin contained in the FEC's proposed findings of fact, Plaintiffs submit that the Court should disregard the entire thing, other than those facts specifically admitted.

Unfortunately, the primary result of the FEC's approach is to increase the girth of the parties' submissions. That is true not only because Plaintiffs must address the many, many evidentiary and other shortcomings in the FEC's proposed findings of fact, but because, as a precaution, the Plaintiffs now must submit facts to rebut the FEC's "facts," even those that are obviously irrelevant, baseless, or are simply not facts at all.

Accordingly, to keep the size of briefs to a manageable level, Plaintiffs have divided their response into two briefs. The instant brief is a direct response to the FEC's proposed findings of fact. Filed along with this brief is a second brief detailing the Plaintiffs' proposed rebuttal findings of fact. The instant response brief is divided into two parts. Part I sets forth a number of general objections that address common problems and shortcomings that occur throughout the FEC's proposed findings of fact. Thus, this Part addresses in more detail Plaintiffs' contention that the FEC's fundamental approach to this case is to deny basic principles of campaign-finance law. This Part also details the many problems with the substance of the FEC's evidencePart II is Plaintiffs' point-by-point response to the FEC's proposed findings of fact. This section tracks the sections in the FEC's brief and, for each, it includes objections as appropriate to each section up front; then it lists, to the extent possible, the facts that the Plaintiffs admit, and then responds to the remaining facts on a paragraph-by-paragraph basis. Trying to indicate agreement with the

FEC's facts is unfortunately a much more difficult exercise than it should be. The reason is that, throughout its brief, the FEC describes facts in the most hyperbolic and argumentative terms, it makes sweeping and unwarranted generalizations, it buries unobjectionable facts in paragraphs that make multiple additional objectionable claims, and it makes claims that are based on pure speculation or multiple layers of hearsay. Picking through these claims to separate fact from fancy is virtually impossible, but Plaintiffs have made a good-faith effort to demonstrate agreement between the parties where possible.

In addition to these two briefs, the Plaintiffs have also filed two separate motions requesting that the Court strike a number of the FEC's exhibits on evidentiary grounds.

Plaintiffs continue to believe, as they stated in their motion to certify and the parties' Joint Scheduling Report, that this is a straightforward case that presents primarily legal issues that can, and should, be decided on a relatively simple statement of facts. *See* Declaration of Steven M. Simpson in Support of Plaintiffs' Proposed Findings of Fact [hereinafter, "Simpson Decl."], Ex. 38, Joint Scheduling Report at 1, 3.[5] Indeed, when the parties were discussing the Scheduling Report, Plaintiffs raised the possibility of stipulating to certain facts to make the process of certification easier and more efficient, but the FEC declined. *See id*. at 5. The parties will now have to spend an enormous amount of time briefing and arguing about the truth and admissibility of a huge quantity of proposed findings of fact, the vast majority of which are irrelevant to the issues in this case. The alternative is to certify this case on a simple statement of facts that sets forth the Plaintiffs' activities and the FEC's draft advisory opinion and its conclusions about those activities, along with a handful of other clearly relevant facts that are not

[5] Plaintiffs' Exhibits 1 through 34 are attached to the Declaration of Steven M. Simpson in Support of Plaintiffs' Proposed Findings of Fact. Plaintiffs' Exhibits 35 through 48 are attached to the Declaration of Steven M. Simpson in Support of Plaintiffs' Response to Defendant's Proposed Findings of Fact. For sake of uniformity, all citations to Plaintiffs' Exhibits will be styled "Simpson Decl., Ex. X."

substantially disputed. Indeed, in light of the many problems with the FEC's proposed findings of fact, Plaintiffs believe that this is the only proper course.

I. GENERAL OBJECTIONS TO THE FEC'S PROPOSED FACTUAL FINDINGS

A. Most of the FEC's Proposed Findings of Fact Are Irrelevant Because the FEC Is Attempting to Use Them to Contradict Holdings and Legal Principles That Have Formed the Bedrock of Campaign Finance Law for Over Thirty Years.

The FEC contends that Plaintiffs are mounting a radical attack on statutes that have been on the books for over thirty years. But, in fact, it is the FEC whose position is radical and at odds with settled constitutional and campaign-finance principles. To defeat Plaintiffs' arguments, the FEC has decided to argue, not that Plaintiffs misstate or misapply these principles, but that the principles, including rules that the FEC has promulgated and the statutes on which they are based, are wrong and should be ignored. But the FEC is not free to ignore the laws and constitutional principles that that it is charged with enforcing. Accordingly, as demonstrated below, the facts that the FEC wishes to introduce in the service of these arguments—which includes most of the alleged facts in Section IV.A.1. of the FEC's Proposed Findings of Fact—are simply irrelevant to this case.

Plaintiffs mount an as-applied challenge in this case, not to all contribution limits and disclosure laws that apply to anyone in any context, but to the application of contribution limits and the administrative, organizational, and continuous reporting requirements for PACs to SpeechNow.org and several of its donors. While it is true, as the FEC points out, that the statutes the Plaintiffs challenge have been in existence for over thirty years, the Supreme Court has never directly ruled on whether those statutes can be applied to a group like SpeechNow.org and its supporters, who are independent of candidates and political party committees, make no donations to candidates or political party committees, and do not coordinate with candidates or political

party committees. Many commentators have noted that fact, both in general terms and about this case in particular. *See, e.g.*, Simpson Decl., Exs. 40-42. Indeed, when SpeechNow.org presented its advisory opinion request to the FEC last year, its then-chairman agreed with SpeechNow.org that the contribution limits it challenged could not be applied to it or its donors. *See* Simpson Decl., Ex. 15, Dissenting Opinion of FEC Chairman Mason to Draft Advisory Opinion 2007-32. Several lower courts have addressed the questions in this case as well, with the Fourth Circuit recently holding that contribution limits could not be constitutionally applied to a group that makes only independent expenditures. *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008). In short, the notion that Plaintiffs are making some radical challenge to statutes whose constitutionality has long since been settled is simply not true.

Indeed, far from being radical, Plaintiffs' case is based on several fundamental propositions of constitutional and campaign finance law that have been on the books for decades. The first of these is that independent expenditures are core political speech and may not be limited by the government. *See, e.g.*, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) [hereinafter *NCPAC*] (stating that "there is a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign"); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986) (holding that "[i]ndependent expenditures constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'"); *Buckley v. Valeo*, 424 U.S. 1, 46-48 (1976) (same).

The second principle is the flip side of the first: if an expenditure is not coordinated with a candidate or a political party committee, it is necessarily "independent" and thus, as the Supreme Court has held, it is core political speech and may not be limited. *See NCPAC*, 470

U.S. 496-97; *Buckley*, 424 U.S. at 47. Independence and coordination are objective terms with statutory and rule-based definitions. While the concepts are based on the Supreme Court's holdings that independent expenditures may not be limited, the terms themselves have specific definitions that are based on specific factors. Thus, the law defines an independent expenditure as an expenditure "expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). The second part of this definition embodies the concepts of independence versus coordination. That is, a coordinated expenditure is one that *is* made "in concert, or cooperation with or at the request or suggestion of" the candidate or the other entities listed in the statute; an independent expenditure is one that does not meet these criteria. *Id*. The FEC's rules go on to define the term coordination in more detail, but the basic concept is the same, and the factors listed in the rule that determine whether an expenditure is coordinated are objective. *See* 11 C.F.R. §§ 109.20(a) defining "coordinated"), 109.21(d) (listing "conduct standards" for coordinated communications).

Note that these terms have nothing to do with whether an expenditure "benefits" a candidate. Indeed, because independent expenditures are expenditures that "expressly advocate the election or defeat" of candidates, the fact that they will likely benefit candidates is implicit in the very concept of independent expenditure.[6] Nonetheless, if an expenditure meets the bright line rule established in the statute and the FEC's rules, it is necessarily independent of candidates and is thus core political speech and may not be limited. *See Buckley*, 424 U.S. at 46-47.

[6] As a result, the FEC's effort to inject hundreds of anecdotes and quotes regarding the extent to which independent expenditures "benefit" candidates is pointless and those proposed findings of fact are irrelevant. *See infra* Part II.D.1.

The third principle on which Plaintiffs' challenge is based is the fact that contributions do not pose concerns about corruption or its appearance unless they are made directly to candidates or to groups, such as PACs and political party committees, that either make contributions to candidates or work with and have access to candidates. *See, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 153-55 (2003) (upholding soft money regulations on the basis of the "close connection and alignment of interests," political party committees and candidates and officeholders); *Buckley*, 424 U.S. at 26-27 (upholding limits on contributions to candidates in order to prevent actual or apparent quid quo pro corruption). *See also Randall v. Sorrell*, 126 S.Ct. 2479, 2488 (2006) (stating that the Court has "repeatedly adhered to Buckley's constraints" in considering the constitutionality of campaign finance statutes over the last 30 years).

David Keating set up SpeechNow.org against the backdrop of these basic principles. *See* Keating Decl. at ¶ 6. Thus, SpeechNow.org makes only independent expenditures. Its by-laws ensure that it cannot coordinate its expenditures with candidates and that it and its members, agents and employees will comply with the FEC's rules governing coordinated communications to ensure that the association does not coordinate. *See* Keating Decl., Ex. H, *Bylaws* at Art. 10. And SpeechNow.org will make no contributions to candidates or accept any corporate or union donations or funds from PACs.

Now the FEC wants to introduce hundreds of proposed factual findings that purport to show that the constitutional and statutory principles on which Mr. Keating relied in creating SpeechNow.org and on which the Plaintiffs rely in this case are wrong.

Thus, when Plaintiffs say SpeechNow.org will make only independent expenditures, the FEC responds that that does not matter, because independent expenditures in fact cause corruption. *See* FEC's Proposed Findings of Fact, IV.B. and ¶¶ 163-314.

When Plaintiffs say that SpeechNow.org will not coordinate with candidates or party committees, the FEC contends that that does not matter, because even if a group does not engage in "technical coordination," donations to it and its expenditures can still be considered "indirect contributions" to a candidate. *See, e.g.*, FEC's Proposed Findings of Fact. IV.A.4. (¶¶ 122-31), IV.B.4-7 (¶¶ 150-86), IV.I.3. (¶¶ 342-44), ¶¶ 164-65. The FEC's own rules state that only a coordinated expenditure is considered an "in-kind" or "indirect" contribution to a candidate. Yet the FEC is now purporting to "prove" that its own rules, and the statute on which they are based, are wrong. *See, e.g.*, ¶ 164 (stating that contributions to groups that make independent expenditures can be "conceived of as indirect contributions") and ¶ 165 (stating that it does not matter "who cashes the check. It matters whether the money is spent to help elect the candidate").

When Plaintiffs say SpeechNow.org will make no contributions to candidates, the FEC responds that that does not matter, because its independent expenditures might "benefit" a candidate and thus contributions to it can be limited. *See, e.g., id*., IV.A. (¶¶ 79-131), IV.B.2 (137-139), IV.B.4-7 (¶¶ 150-86), IV.C. (¶¶ 185-247).

SpeechNow.org will follow the constitutional principles that the Supreme Court has said define the line between protected speech and potentially corrupting contributions, so the FEC now wants to argue that the line should be moved. Plaintiffs' argument is that the contribution limits as they apply to SpeechNow.org and its supporters conflict with constitutional and statutory principles. The FEC wants to argue that those principles conflict with the facts.

The FEC's argument can be summarized as follows: Independent expenditures are effective at influencing the outcome of elections. *See, e.g.*, FEC's Proposed Findings of Fact, IV.A. (¶¶ 79-131). Independent expenditures therefore benefit candidates, who will, in turn, be

grateful to those who produced the independent expenditures and those who funded them. *See, e.g., id.*, IV.B.-D.2. (¶¶ 132-240). As a result, candidates are likely to feel indebted to those who make or fund independent expenditures and might give them special favors or access. *See, e.g., id.*, D.3.-H.3. (¶¶ 241-308). But each of these points is irrelevant because it conflicts with basic, settled principles of constitutional and statutory campaign finance law.

1. The Degree of Independent Expenditures' "Effectiveness" is Irrelevant.

The FEC devotes 18 pages of its brief and 52 proposed findings of fact to the claim that independent expenditures are effective in influencing the outcome of elections. *See id.*, IV.A. While many independent expenditures are no doubt effective at influencing the outcome of elections—and the Plaintiffs certainly hope that SpeechNow.org's independent expenditures will be effective if it is able to make them—these facts are irrelevant to the issues in this case. Speech in general, and independent expenditures in particular, do not receive more or less protection under the First Amendment based on how effective they are. *See NCPAC*, 470 U.S. at 498; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

The FEC is essentially arguing that the more effective the independent expenditures are, the more they pose a danger of corruption, and thus the more important it is to limit contributions that go to fund them. *See, e.g.*, FEC's Proposed Findings of Fact at ¶¶ 78-375. Of course, this argument would apply to all independent expenditures, not just those made by groups, and would justify limiting independent expenditures as such, not just contributions that fund them. *See, e.g., id.* at ¶¶ 165, 171-73, 182-88, 224, 226-40; FEC Ex. 18, Wilcox Dep. at 178:19-179:2. Indeed, as the FEC acknowledges, this argument applies to contributions to and expenditures made by issue advocacy groups as well. *See, e.g., id.* at ¶¶ 81-95. In any event, the FEC's argument flies in the face of over thirty years of Supreme Court precedent. As the Supreme

Court has repeatedly stated, the whole point of speaking out about politics, and thus spending money on that speech, is often to influence the outcome of elections or to cause elected officials to change their positions, but that is not a reason to suppress such speech. *See NCPAC*, 470 U.S. at 498 (stating that "[t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages . . . can hardly be called corruption"); *Bellotti*, 435 U.S. at 790 ("To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'"); *Buckley*, 424 U.S. at 48 ("Advocacy of the election or defeat of candidates is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation."). Accordingly, the FEC's proposed findings of fact that purport to show the degree of effectiveness of independent expenditures are irrelevant to this case.

2. Whether Independent Expenditures may "Benefit" Candidates and Cause them to feel "Gratitude" is Irrelevant.

Perhaps the longest section in the FEC's proposed findings of fact is devoted to the argument that independent expenditures are valuable to candidates and thus will cause them to feel gratitude to those who make and fund independent expenditures, which will lead to corruption or its appearance. *See* FEC's Proposed Findings of Fact at ¶¶ 78-375. The FEC attempts to establish this point in many different ways, but they all come back to the same basic argument: Independent expenditures amount to indirect contributions to candidates, and thus those who fund them can be subject to contribution limits for the same reason that those who make direct contributions to candidates can be subject to contribution limits.

The problem with this entire line of argument is that it is an attack on the Supreme Court's holding in *Buckley* that independent expenditures are treated differently from direct contributions to candidates. Indeed, it is an attack on the very principle of independence, and thus the corresponding principle of coordination. Neither of those principles has anything to do with "benefit" to candidates or "gratitude" by them. Independence and coordination are statutorily-defined terms with specific meanings. The principles they embody are part of the basic fabric of campaign finance law. David Keating is not the only one who relied on these principles when he created SpeechNow.org; hundreds of groups and individuals rely on them every elections season, from PACs to issue advocacy organizations to individuals who make independent expenditures. Indeed, the FEC regularly publishes information for such people that makes perfectly clear the difference between independent expenditures and coordinated communications. *See, e.g.*, Fed. Election Comm'n, *Coordinated Communications and Independent Expenditures* 1 (Oct. 2007) (stating that the rules for independent expenditures versus coordinated communications differ significantly and that "[i]n general, amounts spent for coordinated communications are limited, but independent expenditures are unlimited").[7]

The FEC is thus attempting to argue that, contrary to statute and its own rules, and contrary to holdings from *Buckley* on up to today, when any of these groups and individuals makes an independent expenditure, the question is not whether it is independent under the statutes and rules. The question is whether it "benefits" a candidate and may cause the candidate to be "grateful" in return. But this is not the law, and thus the FEC's alleged "facts" that it claims support this argument are entirely irrelevant to this case.

As stated above, FECA defines independent expenditures as expenditures for express advocacy that are not "made in concert or cooperation with or at the request or suggestion of" a

[7] Available at http://www.fec.gov/pages/brochures/ie_brochure.pdf.

candidate or political party committee. 2 U.S.C. § 431(17). The FEC's rules then go on to provide further guidance on the line between independent expenditures and coordinated expenditures in 11 C.F.R. Part 109, "Coordinated and Independent Expenditures." *See* 11 C.F.R. § 109.1. Those rules make clear that independent expenditures are considered the expenditures of the person making them and are reported as such. *See id*. § 109.10. Coordinated expenditures, by contrast, are considered in-kind or "indirect" contributions to the candidates they benefit and are thus subject to contribution limits. *See id*. § 109.20(b).[8] The rules define coordination consistent with 2 U.S.C. § 431(17), *see id*. § 109.20(a), and then go on to create a subcategory of coordinated expenditures known as "coordinated communication," which are communications that are coordinated with a candidate or political party committee. Like coordinated expenditures, the payment for coordinated communications are considered in-kind contributions to candidates or political party committees. *See id*. § 109.21(b).

The rules defining coordination elaborate on the conduct standards that the statutory definition of independent expenditure uses (that is, in "concert or cooperation with or at the request or suggestion of" a candidate or political party committee). Thus, a communication is coordinated if it is made at the "request or suggestion" of a candidate, *id*. § 109.21(d)(1); if the candidate is "materially involved" in the communication, *id*. § 109.21(d)(2); if the communication is made after "substantial discussion" with the candidate, *id.* § 109.21(d)(3); if the party making the communication shares a "common vendor" or "former employee or independent contractor" within the same election cycle with the candidate, *id.* § 109(d)(4) & (5); or if the communication "disseminates, distributes, or republishes campaign material," *id*. §

[8] *See also* Fed. Election Comm'n, *Campaign Guide for Nonconnected Committees* 31 (May 2008) ("When a nonconnected committee pays for a communication that is coordinated with a candidate or party committee, the communication is an in-kind contribution to that candidate or party committee."). The guide is available at http://www.fec.gov/pdf/nongui.pdf.

109.21(d)(6). As stated in Plaintiffs' proposed findings of fact and supporting documentation, SpeechNow.org's bylaws prevent it from making coordinated communications as they are defined in 11 C.F.R. sec. 109.21(d). *See* Plaintiffs' Proposed Findings of Fact at ¶¶ 7-9.

The Supreme Court made clear in *Buckley* that the principles described above are the framework for determining the difference between an independent expenditure—which is core political speech of the person or group making it and may not be limited—and a coordinated expenditure—which is an in-kind or indirect contribution to a candidates and may be limited for the same reasons that direct contributions to candidates may be limited. *See* 424 U.S. at 46-47. Indeed, in *Buckley*, the Supreme Court rejected precisely the argument that the FEC wants to make here. The defendants in *Buckley* argued that independent expenditures posed concerns about corruption because they allowed "would-be contributors [to] avoid[ ] the contribution limitations by the simple expedient of paying directly for media advertisements or for other portions of a candidate's campaign activities." *Id*. at 46. The Court rejected this argument, pointing out that independent expenditures were "made totally independently of the candidate and the candidate's campaign" and contrasted them with coordinated communications or expenditures, which were treated as in-kind contributions to the candidate. *Id*. at 46-47. The Court even cited the House and Senate reports describing the difference between independent and coordinated expenditures:

> [A] person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent's, that would constitute an "independent" expenditure on behalf of a candidate . . . . However, if the advertisement was placed in cooperation with the candidate's campaign organization, then the amount would constitute a gift by the supporter and an expenditure by the candidate just as if there had been a direct contribution enabling the candidate to place the advertisement himself.

Id. at 46 n.53.

This framework has marked the difference between independent and coordinated expenditures for over thirty years. The distinction is rooted not just in the Supreme Court's cases, but in statute and FEC rules. Thousands of individuals and groups have come to rely on this distinction in making independent expenditures, which are held not to pose concerns about corruption, and coordinated expenditures, which are held to raise the same concerns about corruption as direct contributions to candidates. *See Buckley*, 424 U.S. at 46-47. After *Buckley*, Congress did not pass a new definition of independent expenditures that jettisoned the principle of coordination in favor of the principles of "benefit" and "gratitude." Yet that is what the FEC proposes to do in this case.[9]

The FEC wants to introduce hundreds of alleged "facts" to demonstrate that the definition of independent expenditures passed by Congress should not turn on whether the expenditures are coordinated with a candidate; the definition should turn on whether an expenditure "benefits" a candidate and causes him to feel "gratitude." *See* FEC's Proposed Findings of Fact at ¶¶ 78-314. Relying on its expert, Clyde Wilcox, the FEC sums up this point succinctly: "Large contributions to groups making independent expenditures 'can be conceived as indirect contributions—instead of giving the money directly to the candidate's campaign committee, the are given to an independent committee that also helps the candidate win.'" FEC's Proposed Findings of Fact at ¶ 164. "'It doesn't matter who cashes the check. It matters whether the money is spent to help elect the candidate.'" *Id*. at ¶ 165.

[9] Indeed, in subsection IV.A.4 of its proposed findings of fact, the FEC seeks to "prove" that independent expenditures benefit candidates even when they are not "technically coordinated." *See* FEC's Proposed Findings of Fact at 32. The entire section amounts to the FEC attacking its current definition of coordination on the ground that it does not prevent independent expenditures from benefitting candidates. The FEC tips its hand as to its true purpose in making this argument when it cites to testimony given in favor of a law that would have regulated independent expenditures of certain groups. *See id*. at ¶ 125. Congress did not pass that law, so apparently the FEC wants to try to use this case to impose a new definition of coordination on those who make independent expenditures.

But, according to Congress and the FEC's own rules, it *does* matter who cashes the check and it *does* matter whether the money is spent directly by the independent committee or the candidate. *See* 2 U.S.C. § 431(17); 11 C.F.R. § 109.21(d).[10] And, contrary to the FEC's bizarre claim, neither independent expenditures nor the contributions to groups that make them can be "conceived as indirect contributions." There is no such thing as an "indirect contribution" to a candidate that is not coordinated with that candidate or his agent or that does not otherwise meet the definition of an in-kind contribution.[11] The FEC is, in essence, arguing for the enforcement of what it believes is the "spirit" of the law, rather than what the law actually is. But as even the FEC's own Greg Scott, who heads the information division, recognized, there is no such thing as the "spirit" of the coordination rules. *See* Simpson Decl., Ex. 25, Transcript of Greg Scott Deposition at 169:16-170:6 ("Q. Do you or your subordinates at the information division ever tell persons who call in to the help line that they have to comply with the spirit of the coordination laws?" A. "No. We would be citing the regulations and saying this is what you need to comply with. We wouldn't reference the spirit.").

Along the same lines, the FEC proposes to introduce facts that allegedly show that it is "hard to police" coordination and that it does not matter if expenditures are not "technically coordinated" with a candidate. *See, e.g.*, FEC's Proposed Findings of Fact at ¶¶ 108-09. But the FEC is barking up the wrong tree. If the FEC thinks it is hard to police coordination, that "technical" independence should not matter to whether expenditures create concerns about

[10] The FEC makes this clear in various publications. For instance, in one it states "[w]hen financing communications in connection with federal elections, it is important to understand that the rules differ significantly depending on whether the communication is coordinated with a candidate or party committee or is produced and distributed independently. In general, amounts spent for coordinated communications are limited, but independent expenditures are unlimited." Fed. Election Comm'n, *Coordinated Communications and Independent Expenditures* 1 (Oct. 2007), available at http://www.fec.gov/pages/brochures/ie_brochure.pdf. *See also* Fed. Election Comm'n, *Campaign Guide for Nonconnected Committees* 35.

[11] Other types of in-kind contributions not relevant to this point include direct non-monetary contributions to candidates of such things as below-market services, materials that help a campaign, and the like. *See* 11 C.F.R. § 100.52(d)(1) (defining in-kind contributions).

corruption, and that whether independent expenditures cause concerns about corruption should turn on "benefit" and "gratitude" rather than coordination, the FEC should ask Congress to pass a new definition of independent expenditures so the FEC can start regulating independent expenditures on different grounds than it currently does.[12] Until Congress does so, however, the FEC is not entitled to argue that Congress got it wrong and that the FEC proposes to "prove" that a new standard of independent expenditures should prevail. *Cf. Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 621-622 (1996) ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one."); *Doraiswamy v. Secretary of Labor*, 555 F.2d 832, 843 (D.C. Cir. 1976) (stating that "[w]ithout a doubt, 'an administrative agency is bound not only by the precepts of its governing statute but also by those incorporated into its own regulations'") (citing *Nader v. Nuclear Regulatory Com.*, 513 F.2d 1045, 1051 (D.C. Cir. 1975)); *Thompson v. Sullivan*, 980 F.2d 280, 282 (4th Cir. 1992) (admonishing Department of Health and Human Services for taking a litigation position contrary to both statute and circuit law).

The FEC's argument is not made more viable by the fact that it is focusing on the contributions to SpeechNow.org and arguing that groups like SpeechNow.org can be used by donors as conduits to gain access and influence over candidates. *See, e.g.*, FEC's Proposed Findings of Fact at ¶¶ 137-39; 150-180. A conduit must lead somewhere that is legally relevant for it to be used to connect donor dollars to candidate corruption. But donations to SpeechNow.org lead only to independent expenditures. The only way that a group like SpeechNow.org can be used as a conduit to gain access to and influence over candidates is if independent expenditures, themselves, are held to lead to access, influence and thus corruption—

[12] Indeed, the FEC has not even changed its own rules to try to deal with the alleged concerns with "benefit" to candidates and policing coordination.

not just independent expenditures by groups, but those by individuals as well. The FEC recognizes this, as does its expert. *See, e.g., id*. at ¶ 165 ("Because '[i]ndependent expenditure spending can help a candidate as surely as a direct contribution' it has a similar 'potential for evoking gratitude and special favors.'"); FEC Ex. 18, Wilcox Dep. at 178:19-179:2 (admitting that same logic applies to all independent spending). Indeed, the FEC includes pages of facts purporting to prove that even independent spending by issue advocacy groups poses concerns about corruption. *See* FEC's Proposed Findings of Fact at ¶¶ 81-95.

The FEC can no more attempt to "prove" in this case that independence and coordination are irrelevant to determining whether independent expenditures cause corruption than it could decide to start prosecuting individuals or *MCFL* organizations who make large independent expenditures on the grounds that they might use those independent expenditures to gain access to and influence over candidates. The answer to both is that Congress has established the definition of independent expenditures, and the FEC has passed rules to implement that definition. *Cf. Ry. Labor Executives Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 659, 664-67 (D.C. Cir. 1994) (en banc) (holding that administrative agency's authority begins and ends with the authority Congress granted it). The FEC is not permitted to ignore a statute and its own rules and try to prove that independence is something other than what it is. *See Civil Aeronautics Bd. v. Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961) (An agency "is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do."); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 n. 4 (1994) (An agency is "bound not only by the ultimate purposes Congress has selected but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.").

While it is true that the Court in *Buckley* and *NCPAC* noted that "it does not presently appear" that independent expenditures create concerns about corruption, that was not an invitation to the FEC to decide, on its own, to try to rewrite the statute that defines independent expenditures. Indeed, just two years ago, the Court refused to revisit *Buckley* and to overturn its framework for considering campaign finance cases. *See Randall*, 126 S.Ct. 2489-90 (refusing to overturn *Buckley*'s holding that expenditure cannot be limited). Thus, it is highly unlikely that the Court would now decide to reconsider its holding that independent expenditures are core political speech that do not create concerns about corruption and may not be limited. It is certain, however, that whether or not Congress decides one day to change the law on independent expenditures and replace "benefit" or "gratitude" with coordination, the power to do so lies with Congress, not the FEC. *See Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986) ("The statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer . . . If the [statute] falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.").

The FEC is not simply arguing in favor of the contribution limits that apply to the Plaintiffs. It is trying to uphold those contribution limits as they apply to the Plaintiffs by destroying the principle of independence and the statutes and rules that embody that principle as they apply to everyone. Indeed, the FEC is asking this Court to make factual findings that independent expenditures made by anyone—individuals, issue advocacy groups and anyone in between—cause corruption and thus can be limited. In essence, the FEC is trying to force Plaintiffs into a facial challenge. But this is an as-applied challenge involving one group and a

handful of individuals. The findings that the FEC proposes are vastly beyond the scope of this case and should be ignored.[13]

For all of these reasons, the FEC should not be permitted to reargue several Supreme Court cases and to try to "prove" that its own rules and the statute on which they are based are wrong. Accordingly, the facts on which the FEC relies in Sections IV.A through IV.I are irrelevant and beyond the scope of this case.

B. Most of the FEC's Proposed Findings of Fact Are Simply Quotes, Baseless Assertions, and Broad Generalizations Dressed Up As Facts.

The vast bulk of the FEC's proposed findings of fact are not facts at all, they are simply quotes, baseless assertions, and broad generalizations offered as facts. *See* FEC's Proposed Findings of Fact at ¶¶ 18-113. In effect, the FEC has dumped over 2500 pages of exhibits on the Court from which it has quoted liberally and selectively and asked the Court to trust that everything stated is accurate, that every person quoted is correct and can be relied on for the truth of the matter asserted, that every broad generalization the FEC makes is supported by facts, even when those facts are not offered. But quotes and broad generalizations are not facts. *See, e.g.*, *Mariani v. United States*, 80 F. Supp. 2d 352, 356 (M.D. Pa. 1999) (stating in action to be certified under 2 U.S.C. § 437h, that proposed findings that "merely quote or restate another

[13] Plaintiffs recognize that they included a handful of proposed findings of fact in their opening brief to support the point that SpeechNow.org poses no threat of corruption. *See* Plaintiffs' Proposed Findings of Fact at ¶¶ 115-30. The primary point of that section is to demonstrate that SpeechNow.org makes only independent expenditures with individual funds, which, under the law, may not be limited. *See, e.g.*,*id.* at ¶¶ 119-124, 127. However, some of the proposed findings of fact in that section are essentially rebuttal facts that Plaintiffs included in anticipation of the FEC's arguments. Thus, Plaintiffs included facts showing that they are not seeking access to or gratitude of candidates, *see id*. at ¶¶ 115-17; that the FEC's expert's own research demonstrates that most donors have ideological motives, *see id*. at ¶ 118; that there is no empirical research showing a connection between independent expenditures and corruption, *see id.* at ¶ 125-27; that the presidential candidates have made comments consistent with the Supreme Court's observation in *Buckley* that candidates do not necessarily approve independent expenditures on their behalf, *see id*. at ¶ 128; and that many individuals and groups make independent expenditures but not direct contributions, *see id*. at ¶ 130. As stated herein, Plaintiffs do not believe these issues are relevant. Indeed, as Plaintiffs argued in their motion to certify, they believe this case could be certified on a very simply statement of facts. If the Court agrees and refuses to make findings on the subjects that Plaintiffs' contend are irrelevant, obviously Plaintiffs' proposed findings of fact on those matters would not be included in the Court's findings either.

person's testimony or statement . . . are not appropriate as findings of fact."). Indeed, quotes are merely inadmissible hearsay, and the FEC offers the vast majority of the quotes in its proposed findings for the truth of the matter stated.[14]

The FEC attempts to avoid hearsay problems and to give its proposed findings of fact a gloss of reliability by relying heavily on the report of its expert, Clyde Wilcox. However, Wilcox's report itself is inadmissible hearsay, and the FEC has not even bothered to offer his views in the form of a sworn declaration. As Plaintiffs argue in their accompanying motion to strike, this, among other problems with Professor Wilcox's report, makes it unreliable and therefore not admissible evidence in this case.[15]

But even beyond those problems, Professor Wilcox's report suffers from the same basic problem as the FEC's proposed findings of fact. The Wilcox report is simply a string of quotes, baseless assertions, and broad generalizations offered as expert opinions. The FEC has, in effect, attempted to launder hearsay and unsupported claims through its expert report, presumably on the theory that if an expert quotes someone else or makes a broad, unsupported claim, it must be admissible evidence. But expert testimony must rely on facts or data, it must be based on some reliable principles and methods, and the expert must reliably apply those principles and methods to the facts. *See* Fed. R. Evid. 702. Simply having an expert string together a number of quotes and examples does not make those examples admissible or true. *See, e.g.*, *Miller & Sons Drywall, Inc. v. Comm'r*, 89 T.C.M. (CCH) 1279 (T.C. 2005) ("While an expert can rely on data that is not admissible to form his opinion, such reliance does not elevate the evidence to be

[14] Plaintiffs have filed separate motions in limine to strike the hearsay evidence, among other exhibits, on which the FEC relies for many of its proposed findings of fact.

[15] Because Plaintiffs are moving to strike Professor Wilcox's report in its entirety, they do not in their responses to the FEC individual proposed findings of fact in Part II continuously object to Professor Wilcox's report as inadmissible, and instead focus on other, additional objections to his report and the claims made therein. However, Plaintiffs' responses to specific claims that rely on Professor Wilcox's report should not be taken as an admission that Plaintiffs believe his report is admissible. It is not.

admissible for the truth of the matter asserted."); *United States v. Katz*, 213 F.2d 799, 801 (1st Cir. 1954) ("But the fact that an expert may use hearsay as a ground of opinion does not make the hearsay admissible."). And an expert's broad, unsupported conclusions and baseless assertions are no more reliable than if the party, herself, offered them. *See Freeland v. Iridium World Communs., Ltd.*, 545 F. Supp. 2d 59, 87 (D.D.C. 2008) ("Expert testimony may not be permitted where it is based upon speculation."); *Groobert v. President & Dirs. of Georgetown College*, 219 F. Supp. 2d 1, 6 (D.D.C. 2002) ("Expert testimony that rests solely on 'subjective belief or unsupported speculation' is not reliable.").

Indeed, Professor Wilcox's deposition revealed that his report is simply a compilation of quotes and specific examples organized into what amounts to a position paper. Professor Wilcox conducted no research or statistical analysis for his report. *See* Wilcox Dep. at 74:1-17. The FEC asked him to answer the specific questions posed and then sent him the declarations from the *McConnell* case that he cites and a number of other newspaper and academic articles. *See* Wilcox Dep. at 66:6-10; 71:4-8; 73:20-74:5; 81:21-82:8; 114:9-16; 123:20-124:11; Simpson Decl., Ex. 39, Email from Graham Wilson to Clyde Wilcox (July 11, 2008) (5:09 p.m.). Professor Wilcox had his research assistant track down a number of additional newspaper and academic articles. *See* Wilcox Dep. at 100:4-11; 122:5-123:16. He then wrote a report, citing and quoting the examples from these articles. *See* Wilcox Dep. at 73:18-22-74:1-17; *see also id*. at 76:2-20. Here is Professor Wilcox's own description of his approach:

> Q. Okay. What process or procedure did you undertake to answer those questions?
>
> A. You know, I thought about them for a while. I kind of reviewed in my mind various evidence that I had over the years. I reread some articles and I looked at the literature and I made a few interviews. You know, there really wasn't a lot of time, right. This was not like a scholarly, you know. They didn't ask me to go out and commission brand-new research. They said think about these issues,

> gather evidence and come to a conclusion. I asked questions of a few other scholars in a few cases. A lot of overlap.

Id. at 74:1-17.

With one minor exception, Professor Wilcox did not draw on his own experiences in making the claims that he made in his report.[16] Nor does he rely on empirical research to support his broad claims. *See* Declaration of Jeffrey Milyo in Support of Plaintiffs' Response to Defendants' Proposed Findings of Fact at ¶¶ 3(c), (d) [hereinafter "Milyo Rebuttal Decl."]. When he does cite to actual empirical research, it is either for simple statistics,[17] or irrelevant points,[18] or it does not support his broad claims,[19] or it actively undermines them.[20]

A good example of this latter point is Wilcox's own research. For example, Wilcox states in his report that many individuals who contribute to candidates "are 'investors' who give in part or primarily to protect or promote their business interests" and then goes on to argue that these donors will us independent groups to unduly influence politicians. FEC Ex. 1, Wilcox Rep. at 6. Yet his own research shows that the vast majority of donors are so-called "ideologues" who give, not for business reasons, but because they care about issues and want to elect candidates who support those issues. *See* Simpson Decl, Ex. 22, Financiers of Congressional Elections at 45 (stating that "[f]ew donors indicated that material or solidary goals were very important" and that "[d]onors most often cited policy-related factors or personal connections when asked about the factors that motivate them to make individual contributions.

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[16] The one exception to this is where Professor Wilcox states that when he worked at the FEC in the 1980s, campaigns often sent interns to copy their opponents' campaign reports.

[17] For example, in the section on the History of Party Soft Money, Wilcox cites statistics concerning the amount of money raised in soft money donations during the 1990s and early 2000s. *See* FEC Ex. 1, at 7. He also cites statistics on the amounts that donors gave to 527s in the 2004 election, *id*. at 11, and the amounts that independent expenditure groups have spent in California. *Id*. at 12.

[18] For example, Wilcox cites studies that purport to show that "money is important in gaining access by lobbyists and in influencing the congressional agenda." FEC Ex. 1, at 22.

[19] For instance, Wilcox claims that "scholars have generally concluded that independent expenditures do help candidates" but cites only one study for this claim. FEC Ex. 1, at 13 (citing Engstrom & Kenny).

[20] *See infra* at 30.

Business-related reasons were acknowledged much less often."); FEC Ex. 18, Wilcox Dep. at 225:19-226:3. Indeed, even so-called investors often list ideological motives for their giving. *See* Simpson Decl., Ex. 22 at 49.

Indeed, many of the broad claims that Wilcox makes in his report contrast markedly with statements he has made in his more serious writing. For instance, Wilcox claims in his report that "[t]he danger of large direct contributions to candidates is well established in political science." Yet, in his professional writings, Wilcox has stated that "[d]ebate persists in the United States about the meaning of 'corruption,'" and "the question of whether contributions lead to an 'undue influence' of donors on policymakers." Simpson Decl., Ex. 40. He has also noted that "it is exceedingly difficult to *prove* that corruption has occurred, and many observers doubt that corruption is common." *Id*. at373 (emphasis in original). *See also* Rebuttal Declaration of Jeffrey Milyo [hereinafter Milyo Rebuttal Decl.] at ¶ 12.

Similarly, Wilcox states that "[t]he history of contributions to party soft-money committees and to 527 and 501(c) groups suggests that donors will make large indirect contributions as a way to avoid contribution limits and to win the favor of policymakers." FEC Ex. 1, at 6. Yet in an article he co-authored that actually compared soft money donations with 527 donations, the authors state, "[t]herefore, it follows that the considerations that stimulated soft money giving do not automatically transfer to 527 committees." FEC Ex. 55, *Interest Groups and Advocacy Organizations After BCRA* at 120. Indeed, the article makes clear that Wilcox's claim that "[o]verall, individuals associated with the business community gave more to 527s in 2004 than they had given in party soft money in 2000" (Wilcox Rep. at 11) is a misleading half-truth. As the article states, "the net affect of the abolition of soft money, therefore, was not to reduce the role of all individuals who had earned their wealth in a business

but to substantially displace the role of large, publicly owned corporations" with donors associated with smaller businesses who "are much freer, and more able financially, to pursue a personal political agenda." FEC Ex. 55, at 120. One of the reasons for this, as the article states, is that "officeholders do not ask for the contributions to 527s, so the potential reward is no longer so direct." *Id*. This is in stark contrast to Wilcox's claim throughout his report that individuals who donate to independent groups will gain influence over candidates who are grateful for their support. Moreover, in the article, the authors express misgivings about even using terms like "individuals associated with the business community" as Wilcox does. They state "[w]hile we have significant reservations about treating an individual employee's contributions as if they reflect the same concerns as an employer's, we nevertheless find the grouping useful because of the question we are trying to answer." *Id*. at 114.

And despite Wilcox's apparent antipathy toward interest group money in his report, in his professional writings he has stated that "[b]y providing services to help candidates develop their messages and by providing funds to help them articulate and deliver their messages, interest groups play a valuable and important role in a privately funded political system." Clyde Wilcox et al., Interest Groups in American Campaigns: The New Face of Electioneering 157 (2d ed. 2005).. Indeed, in contrast to Wilcox the expert, Wilcox the scholar celebrates the benefits of interest group money in elections:

> Interest group funding of candidates has important positive consequences for elections. For many non-incumbent candidates, interest group resources are essential to launching their campaigns. Running for office costs money, and many unknown candidates have a hard time attracting contributions. . . . interest groups can provide crucial resources at this stage, contributing the *seed money* that helps non-incumbents get their campaigns under way."

Id. (emphasis added). *See also id*. (stating that "by encouraging their members to give to political action committees and to candidates that their group supports, interest groups provide members with an additional avenue for political participation").

Wilcox the scholar is also considerably more skeptical of the common stereotypes that Wilcox the expert employs throughout his report: "The common stereotype of a political donor is a wealthy businessman or woman giving money to a congressional candidate, expecting in return favorable treatment for their business. . . . Yet we know little about the people who make contributions to congressional candidates or about why they give." Simspon Decl., Ex. 41, Wilcox *et al*., Is This Any Way to Run a Democratic Government? at 36.

Moreover, Wilcox's own sources often undercut his claims. Thus, although he argues throughout his report that independent expenditures pose a significant threat of corruption (s*ee, e.g.*, FEC Ex. 1, at 6, 10, 13) in two of the sources on which he relies, the authors state that the research does not support that claim. *See* Simpson Decl., Ex. 42, Michael Malbin, *Rethinking the Campaign Finance Agenda*, 6 The Forum, Issue 1, Art. 3, 2002, at 1, 3-4 (referring to the idea that independent spending can be equated with contributions "from the quasi-bribery perspective" as a "questionable empirical claim"); Simpson Decl., Ex. 43, Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 Pol. Res. Q. 885, 889 (2002) (stating that "it is rare to find independent expenditures figuring prominently in more rigorous examinations of the role money plays in the political process"). And despite his definite claims about the effect of independent spending on elections (*see* FEC Ex. 1, at 13), another study he cites notes "we also have abundant evidence that money, by itself, does not defeat incumbents. Only in combination with potent issues and high-quality challengers do even the best financed campaigns have a decent chance of succeeding." Simpson Decl., Ex. 44, Gary

C. Jacobson, *The Effect of the AFL-CIO's "Voter Education" Campaigns on the 1996 House Elections*, 61 THE Journal of Politics 185 (1999)at 186.

Beyond the few empirical studies that Wilcox cites, the rest of Wilcox's claims rely on other people's arguments, other people's conclusions, a handful of examples that do not justify his broad claims, or his own baseless assertions. The fact that a number of writers have made the same conclusory statements, however, does not make those statements true or provide any independent support for Professor Wilcox's conclusions. *See Joy v. Bell Helicopter Textrom, Inc*. 999 F.2d 549, 568 (D.C. Cir. 1993) (rejecting expert testimony that was "based solely on guesswork, speculation, and conjecture"). Like the FEC's entire submission, it is simply repetition dressed up as evidence.

As Plaintiffs' expert, Jeffrey Milyo, states in his declaration in rebuttal to the Wilcox report, Wilcox's argument can be summarized as follows: "Allowing unlimited contributions to groups that make independent expenditures may or may not lead to some instances of illegal activities." Milyo Rebuttal Decl. at ¶ 17. In short, the Wilcox report demonstrates nothing relevant to this case at all. *See generally id*.

As Professor Milyo summarizes, "[o]verall, I find the Wilcox report to be riddled with logical errors and factual omissions" that do "not appear to be random; in every instance, these errors and omissions serve to support Wilcox's argument." *Id*. at ¶ 50. Wilcox "articulates a grossly inaccurate and incomplete characterization of the relevant social science scholarship on the 'danger' of large contributions" that, once again, are "strongly biased in support of his argument." *Id*. at ¶ 51. Wilcox "cites several articles published in edited volumes, but ignores selections from those same volumes that contradict his jaundiced view of large contributions," and he "approvingly cites selected passages from an author," but "does not refer to other relevant

passages from the same article that contradict his argument." *Id*. at ¶ 52. Wilcox "ignores inconvenient evidence from a high profile article in his report, but he does include the same article in the required reading list" for a course he teaches at Georgetown. *Id*. He "recognizes that political corruption and undue influence are somewhat nebulous concepts and that the existence of corruption is nearly impossible to prove; that is, until he writes his expert report." *Id*. at 53. Thus, as Professor Milyo concludes, "[b]ased on this pattern of errors and omissions, I conclude that Wilcox has not faithfully and competently utilized his expertise in producing his report." *Id*. at 54. In light of the hurried manner in which Professor Wilcox admitted he prepared his report, none of this is surprising. *See* FEC Ex. 18, at 73:18-22-74:1-17, 76:2-20.

As further demonstrated below, the FEC's Proposed Findings of Fact demonstrate little more than that a number of people have said things that the FEC agrees with. They should be disregarded in their entirety.

II. RESPONSES AND OBJECTIONS TO SPECIFIC FACTUAL CLAIMS IN THE FEC'S BRIEF

As stated above, the Plaintiffs are not obliged to contest every assertion included in the FEC's brief simply because the FEC has asserted it. Instead, the burden is on the FEC to demonstrate that its factual assertions are relevant and supported by admissible evidence. *See Evans v. Williams*, No. 76-293 (ESH/JMF), 2006 U.S. Dist. LEXIS 61329, at *8 (D.D.C. Aug. 30, 2006); Fed. R. Civ. P. 56(e)(1). As demonstrated below, the vast majority of the FEC's factual assertions are based on inadmissible hearsay (usually multiple layers of hearsay), rank speculation, and baseless assertions. Many more are just the FEC's hyperbolic and argumentative characterizations of otherwise innocuous points, its unwarranted inferences and suppositions about the motives of individuals who give money to groups or candidates, or just

plain spin. Many of the FEC's claims are simply not supported by the evidence they cite, and many are irrelevant to the issues in this case.

This part is organized according to the sections in the FEC's brief and each section heading includes a reference to the relevant paragraph numbers in the FEC's brief. Each of the following subsections begins with general objections to the FEC's claims in a section, if any. Then it summarizes the factual claims to which Plaintiffs have no objection, if any, and it concludes with a point-by-point list response to those claims for which a more detailed response is necessary. For convenience's sake, Plaintiffs use "admit" or "deny" where appropriate to indicate agreement or disagreement with particular assertions, and they explain their disagreement where necessary.[21]

A. "I. The Parties" (¶¶ 1-19)

Plaintiffs have no objection to the proposed findings of fact in this section.

B. "II. SpeechNow.org Was Formed to Serve as a 'Test Case'" (¶¶ 20-40)

1. General Objections

While many of the facts listed in this section are true, they, and the FEC's overall point in including them, are entirely irrelevant to this dispute. The FEC has not claimed that Plaintiffs lack standing to bring their constitutional claims, nor could it. As Plaintiffs have argued previously in this case, and as they demonstrated in their opening brief on proposed findings of fact, they face a credible threat of prosecution that is more than enough to establish standing to assert their constitutional challenges. *See, e.g., Chamber of Commerce v. FEC*, 69 F.3d 600, 603-04 (D.C. Cir. 1995) (stating that a party raising First Amendment claims has standing to bring a pre-enforcement challenge "if First Amendment rights are arguably chilled, so long as

[21] Note that Plaintiffs respond in this section even to paragraphs that rely on evidence they are moving to strike in their accompanying motions. Where such evidence is cited in any particular paragraph, Plaintiffs objections are in addition to the objections they have made in their motions to strike.

there is a credible threat of prosecution"). Moreover, § 437h clearly establishes that Plaintiffs have standing to assert their constitutional claims. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 11-12 (1976) (holding that it was "clear that Congress, in enacting 2 U.S.C. §437h . . . intended to provide judicial review to the extent permitted by Art. III); *United States v. George Washington Univ.*, 26 F. Supp. 2d 162, 166 (D.D.C. 1998) (stating that although "Congress cannot waive the injury-in-fact requirement . . . it may, via statute, 'grant an express right of action to persons who otherwise would be barred by prudential standing rules.') (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). *See also CalMed*, 453 U.S. at 188 n.6 (stating that individual members and officers of the plaintiff political committees "have a sufficiently concrete stake in this controversy to establish standing to raise the constitutional claims at issue"); *Athens Lumber Co., Inc. v. FEC*, 689 F.2d 1006, 1014 (11th Cir. 1982) (President of corporation had standing to raise corporate claims under § 437h because he was "subject to the same threat of criminal and civil penalties [as the corporation] and therefore has equal incentive to litigate all the issues raised in the complaint.").

This Court has already denied the FEC's argument that Plaintiffs Burkhardt and Russo lack standing to assert their constitutional claims, and it has granted Plaintiffs' motion to certify the issues in this case under section 437h. *See* Order granting motion to certify (doc. 40). Thus, no purpose is served by the FEC arguing about Plaintiffs' motives in creating SpeechNow.org or bringing this challenge, and the Court should refuse to certify facts that go to that argument. *See FEC v. Wis. Right to Life, Inc.* 127 S. Ct. 2652, 2665 (2007) (holding that the motives of the speaker are irrelevant to determining whether speech is protected).

The Plaintiffs have explained in detail the reasons Mr. Keating created SpeechNow.org and the circumstances of their requesting an advisory opinion from the FEC and filing this

lawsuit. *See, e.g.*, Plaintiffs' Proposed Findings of Fact at ¶¶ 1-11; FEC Ex. 11, Keating Dep. at 114:22-115:11. Mr. Keating explained in his deposition that he has had an interest in free speech issues for a very long time and has wanted to do something about regulations on speech that he believes violate the First Amendment. *See* FEC Ex. 11, at 116:15-119:12. As Mr. Keating stated, he created SpeechNow.org because he wanted "to have an organization that would be responsive to people that are concerned about the types of things that are [addressed] by campaign regulations but also allow people to speak. I was thinking was there some way to have an organization that can do that and everybody could be happy with." *Id*. at 119:6-12. This desire led to the creation of SpeechNow.org, and Mr. Keating has done everything that one could do to operate SpeechNow.org short of actually becoming a political committee, accepting the pledged donations, and running ads in violation of the law. *See* Plaintiffs' Proposed Findings of Fact at ¶¶ 1-11. The fact that Mr. Keating knew that requesting an advisory opinion from the FEC would be necessary and that the issue would likely end up in litigation should surprise no one. Nor should it be surprising that Mr. Keating consulted with lawyers. The campaign finance laws are complicated and Mr. Keating has had dealings with them before. Indeed, trying to create a group like SpeechNow.org without consulting with lawyers would be positively irrational. The FEC wants this to be "just a test case," so it has ignored all of that. The FEC's argument is pointless and irrelevant.

2. Facts Plaintiffs Admit in Section II.

Without admitting their relevancy or adopting the FEC's characterizations of the facts, Plaintiffs admit that the facts contained in the following paragraphs are true: 21, 24, 25, 26; 28-29, 31, 32, 35, 37-40.

3. Specific Responses to Remaining Proposed Findings of Fact in Section II.

20. Denied. David Keating created SpeechNow.org for the reasons stated in his declaration in this matter. Further, the "joint project" statement was not made by David Keating or any of SpeechNow.org's members. *See* FEC's Proposed Findings of Fact ¶ 33.

22. Denied. This paragraph contains legal conclusions, not facts, and it misstates the holdings of the cited cases. Those cases speak for themselves.

23. This paragraph contains legal conclusions, not facts, and is irrelevant in any event. Moreover, the cited cases are not precedent in the D.C. Circuit. *See* FEC's Response to Plaintiffs' Motion to Certify at 5 n.5 (citing *Alexander v. Tomlinson*, 507 F. Supp. 2d 2, 14 (D.D.C. 2007) and D.C. Cir. rule 32.1(b)(1)(A) for proposition that the D.C. Circuit's decision in *NCPAC* has no precedential value).

27. The facts in this paragraph are accurate except the claim that Mr. Young provided support for the Center for Competitive Politics since its inception. In fact, Mr. Young only stated that he had "offered" support to the organization when it began. His support did not begin until the spring of 2007.

30. The facts in this paragraph are generally accurate, but, for reasons that are not clear, the FEC insists on referring to SpeechNow.org's members as "board members." SpeechNow.org has no board or board members; it has 5 governing members.[22] *See* Plaintiffs' Proposed Findings of Fact at ¶ 4.

31. This statement is accurate, although incomplete. A fuller statement of what SpeechNow.org knew or contemplated about legal action when it was created can be found in Plaintiffs Proposed Findings of Fact and David Keating's declaration. Moreover, Plaintiffs do not concede the accuracy of the other cited paragraphs.

[22] The FEC does this throughout its proposed findings of fact for reasons that are not clear. Plaintiffs will not take the time to object to every instance of this; instead, Plaintiffs make a standing objection to the FEC's use of the term "board" or "board member" to describe SpeechNow.org's members.

32. The FEC claims in paragraph 23 that the issues in this case have been litigated before in the D.C. Circuit. Thus, the FEC's claim that this case is a "new challenge" appears to be wrong. Otherwise, the facts stated in this paragraph are accurate.

33. Denied. How Mr. Keating knew Mr. Young is irrelevant to the issues in this case. Moreover, as the FEC recognizes, this case has nothing to do with "McCain-Feingold" so the FEC is simply drawing the inferences it wants from this email. When asked in his deposition whether he called Mr. Young "with a proposition to bring a test case," Mr. Keating stated, "Well, I spoke to Fred Young because I thought he would be a potential donor to the organization." Keating Dep. at 120:17-121:18.

34. The first sentence of this paragraph is accurate, but the second is not. First, Mr. Coupal did not say he was "not surprised" in the cited portion of his deposition and it is not clear what the FEC is even claiming in this sentence. Mr. Coupal stated in the cited portion of his deposition that David Keating mentioned that litigation was "a possibility" when he asked Mr. Coupal to become a member of SpeechNow.org. Coupal Dep. at 35. When asked what he thought of that, Mr. Coupal stated that "Organizations are involved in litigation all the time. The purpose of the organization was to freely associate, to support candidates who believed as the members of the organization do." *Id*. at 36. When asked again whether he had any reaction to being told litigation might occur, Mr. Coupal stated, "Well, as an attorney, not really. You know, both in my experience with Pacific Legal Foundation and as the former director of legal affairs for Howard Jarvis Taxpayer Association, litigation is frequently used for public policy ends." *Id*.

36. Denied. The email was not written by David Keating or anyone working on behalf of SpeechNow.org; it was written by Ed Crane. Although Mr. Crane is a member of

SpeechNow.org, there is no indication in the email that Mr. Crane was writing on behalf of SpeechNow.org. Indeed, the FEC devotes an entire section of its brief to the proposition that only David Keating speaks for SpeechNow.org. *See* FEC's Proposed Findings of Fact at 10-18. Yet, here, the FEC claims with no support whatsoever that Mr. Crane was speaking for SpeechNow.org, rather than for himself.

C. "III. SpeechNow's Advertisements Constitute the Speech of David Keating – Who Is Solely Responsible for Its Activities, and Not the Speech of Its Contributors." (¶¶ 41-77)

1. General Objections

While many of the facts on which the FEC's claims are based in this section are true, the FEC's claim that SpeechNow.org's advertisements are the speech of David Keating and not its contributors is a legal conclusion, not a factual conclusion. Moreover, the FEC is simply attempting to deny the Supreme Court's holdings that individuals who pool their money and speak collectively are all exercising First Amendment rights both to association and speech. Accordingly, the alleged facts in this section are irrelevant.

The Supreme Court has long held that the right to pool one's money with others and thus to amplify one's speech is a right fully protected under the First Amendment. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981). By associating and pooling funds with others, "individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control*, 454 U.S. at 294. Thus, any limits on the ability of the group to associate or to raise or spend its funds necessarily limits all of the members' rights both to speech and association. *See id.*, 454 U.S. at 299 ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."). As the Supreme Court stated in *NCPAC*, "[t]o say that [a groups] collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources." 470 U.S. at 495. *See also* id. at 299-300 (stating that the rights of

speech and association "blend and overlap" and are both implicated by contribution limits imposed on groups that support or oppose ballot issues).

Indeed, in *NCPAC*, the Supreme Court rejected precisely the argument the FEC wishes to make here. *See* 470 U.S. at 495. That case involved a restriction on the amount of money a group could spend on independent expenditures, and the FEC argued that the independent expenditures was not the speech of the contributors, but the speech only of those who operated the group and actually decided what specific words it would utter. The Court rejected that argument, stating, "the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise, they would not part with their money." *Id*.

Thus, the Supreme Court has squarely held that by contributing to groups like SpeechNow.org, individuals who "like the message" are exercising not only their rights to association, but their rights to free speech. The FEC's proposed finding of "fact" that the speech at issue in this case is only David Keating's is thus a legal conclusion, and an incorrect legal conclusion at that. Moreover, most of the FEC's claims in this section are argumentative and attempt to characterize otherwise entirely innocuous facts as supporting its incorrect thesis. An alternative description of the facts in this section is that a number of individuals who are deeply committed to free speech decided to join together to create and/or finance a group that would try to protect First Amendment rights. Several of them knew each other previously, some did not, but all are united by their desire to protect the First Amendment. To do so, they are attempting to utilize the right of association in exactly the manner it was designed to be utilized: by employing a division of labor that capitalizes on each others' strengths and allows them to exercise their rights through collective action. Regardless of their level of support and

involvement in the association's daily activities, all will keep abreast of what the association is doing and will continue to support it in the future.

2. Facts Plaintiffs Admit in Section III.

Without admitting their relevancy or adopting the FEC's characterizations of the facts, Plaintiffs admit that the facts contained in the following paragraphs are true: 42, 45, 46, 48-51, 56, 58, 59, 65, 68, 69, 71, 72, 75, 76, 77.

3. Specific Responses to Remaining Proposed Findings of Fact in Section III.

41. Denied. This is not a fact but a summary of other proposed facts, many of which are mischaracterized.

44. The first sentence is true, but the second is not. Fred Young, Brad Russo, and Scott Burkhardt are not "merely potential contributors" to SpeechNow.org. They are individuals who have sworn under penalty of perjury that they will make the donations to SpeechNow.org that they have pledged when they are legally able to do so.

47. It is true, as the first sentence states, that at present Mr. Keating is responsible for SpeechNow.org's daily activities. But the second sentence is false. Mr. Keating did not testify that "at present, there is no plan for that to change." In fact, Mr. Keating testified that he would like to have enough of a budget to hire a staff for SpeechNow.org to help him with its activities in the future. FEC Ex. 11, Keating Dep. at 150. When he said that he has no plans to change the way SpeechNow.org operates, he said "nothing right now." *Id*. But from the context, it is crystal clear that Mr. Keating meant that he cannot change anything about SpeechNow.org's operations until this case is resolved. *See id*. at 149-150. In fact, that was implicit in the question that prompted this discussion. *See id*. at 149:8 (asking "do you have a timeline in mind if you are granted your relief . . . ?").

52. It is true that the individual plaintiffs have not made contributions to SpeechNow.org yet, but it is not because "SpeechNow.org has chosen not to accept donations." As Plaintiffs have made clear in their proposed findings of fact, SpeechNow.org cannot accept donations above the contribution limits and accepting even small contributions will trigger political committee status.

53. Denied. This paragraph inaccurately summarizes other facts.

54. The first sentence is true, but the second is misleading. Mr. Keating simply answered a question asking whether he expected to pick candidates in whose races SpeechNow.org will run ads in the future. He did not say that he would be the only one doing so. FEC. Ex. 11, Keating Dep. at 162. As stated earlier, Mr. Keating testified that he would like to hire a staff to help him run all aspects of SpeechNow.org and that he cannot predict precisely how SpeechNow.org will operate in the future. *See id*. at 149-150. Indeed, the FEC recognizes this in its own proposed facts. *See* FEC's Proposed Findings of Fact ¶ 58.

55. It is true that at various points, Mr. Keating considered running ads for various candidates, including those listed in the exhibits referenced. However, the exhibits do not support the FEC's claims about why Mr. Keating ultimately decided to run ads against Congressman Burton and Senator Landrieu. Accordingly, this paragraph is irrelevant.

57. This paragraph is true, but the portion about Mr. Keating never checking what Landrieu's opponent thought is odd and irrelevant given that at the time Mr. Keating decided to run ads against her, Senator Landrieu's opponent was not known. Mr. Keating explained his thinking in this regard in his deposition. FEC Ex. 11, Keating Dep. at 157-58.

60. The facts stated in this paragraph are true, but irrelevant. While Mr. Young used the term "the insider's list" in his email, the information that Mr. Keating sent to

SpeechNow.org's members was press reports and other publicly available information that Mr. Keating posts on SpeechNow.org's website. *See* www.speechnow.org. Mr. Keating has sent the same information to all of SpeechNow.org's supporters. *See* FEC Ex. 11, Keating Dep. at 138:9-10.

61. This paragraph is partly true, but misleading. Mr. Keating testified that all of SpeechNow.org's supporters likely received the same information and said that others would receive the same information that the members do even if they "could not donate a lot of money but could be helpful to the cause in some fashion." *See* FEC Ex. 11, Keating Dep. at 139:8-11. What this and the preceding paragraph demonstrate is that David Keating has given and is willing to give a lot of different people information about SpeechNow.org if they express an interest in the association in some fashion, or if they simply wish to view its website.

62. Denied. This is vague and inaccurately summarizes other paragraphs.

63. The specific facts in this paragraph are accurate, but the FEC's characterizations that his role is "limited" and "passive in all other respects" than those listed are not. Indeed, the other paragraphs in this section demonstrate that Fred Young is very interested in keeping abreast of everything SpeechNow.org does and is committed to its mission. Moreover, Mr. Young has submitted a sworn declaration stating that he will give SpeechNow.org $110,000 if he is legally able to do so. Declaration of Fred Young [hereinafter Young Decl.] at ¶¶ 6, 8.

64. Mr. Young has signed a sworn declaration stating that he will donate $110,000 to SpeechNow.org if he is legally able to do so. Young Decl. at ¶¶ 6, 8. The FEC's characterization of this as "ostensibly desired" is meaningless and argumentative. It is true that he discussed the precise amount with counsel before deciding what amount to donate to SpeechNow.org.

66. The first sentence is false. Mr. Young wants to finance SpeechNow.org and has made clear that he wishes to finance ads that SpeechNow.org wants to produce and broadcast. *See, e.g.*, FEC Ex. 19, Young Dep. at 92:11-93:4. It appears that in his deposition Mr. Young meant that he had not contemplated whether his name would go on ads that he could pay for; not that he has not contemplated financing any ads. *See id.* at 93:6-17. In any event, Mr. Young has made clear that he wants to finance ads; he just does not want to *produce and broadcast* them himself.

67. Denied. This paragraph is argumentative and inaccurately summarizes other paragraphs.

73. The alleged facts in this paragraph are confusing and irrelevant. The FEC counsel asked Mr. Keating during his deposition whether he understood that if counsel used the term "board members" during the deposition, he meant SpeechNow.org's "members." Mr. Keating said he understood. Keating Dep. at 135. But during the questioning, Mr. Keating stated that he did not understand what counsel was asking, and simply stated that SpeechNow.org has "five people that function much like what other organizations would call a board of directors." *Id*. at 136. He also referred to the terms "member" and "supporter" as "rhetorical." *Id*. at 137. This discussion had nothing to do with the email the FEC cites. Indeed, in the cited exhibit, it appears that Mr. Keating is referring to the term "member" as it is used in the D.C. Unincorporated Nonprofit Associations Act, not SpeechNow.org's bylaws. *See* FEC Ex. 20 (SNK0159).

74. The specific facts stated in this paragraph are accurate, but the FEC's description of SpeechNow.org's members as "the five people who act as the board of directors" is meaningless because SpeechNow.org is not a corporation and does not have a "board of directors." SpeechNow.org has "members" and the D.C. Unincorporated Nonprofits Act uses

the term "members." It is not clear what the FEC means by "board of directors," so the description is meaningless and irrelevant.

D. "IV. Unlimited Contributions To an Association Devoted to Independent Candidate Expenditures Pose a Danger of Corruption or its Appearance.

"IV.A. Independent Expenditures Are Effective in Determining the Outcome of Elections and Have Gotten More Effective Over Time, Even Though They Are Not Coordinated with a Campaign." (¶¶ 78-131)

1. General Objections

As Plaintiffs demonstrated in Part I, all of the facts in this section are irrelevant because they purport to demonstrate that decades-old precedent, statutes, and rules are wrong and should be ignored. They are also irrelevant because, as demonstrated in Part I, the general level of "effectiveness" of independent expenditure ads has nothing to do with whether they are protected speech under the First Amendment. The facts in this section are also cumulative and redundant under Federal Rule of Evidence 403. Even assuming that some evidence of the effectiveness of independent expenditures is relevant, the FEC's nearly 18 pages and 52 separate proposed findings of fact is vast overkill and demonstrates nothing more than that the people quoted think that ads are effective. The FEC does not even attempt to explain what "effective" means. In nearly all federal and most state elections, both candidates spend large amounts of money on political advertisements, and yet one of the candidates always loses. To say that the ads run on behalf of the loser were "effective" at influencing the outcome is senseless. The most that can be said is that independent expenditure ads can be effective and that some candidates appreciate them. But the FEC has not and could not prove that all or even the majority of independent expenditure ads are effective at influencing the outcome of elections. Some are and some are

not; but saying anything more than that depends entirely on the specific ad and the specific circumstances in which it was used.

All of that said, Plaintiffs are willing to stipulate that many independent expenditure ads are effective at influencing the views of voters, candidates, and the public in general, that many candidates appreciate them, and that the groups that produce and broadcast such ads think they are effective at influencing the outcome of elections, provided that the FEC stipulates that independent expenditure ads are effective at conveying the views and messages of the individuals and groups that produce and broadcast them.

2. Specific Responses to Proposed Findings of Fact in Section IV.A.

"1. Independent Expenditures Can Have a Significant Impact on Elections Generally"

78. Denied. This paragraphs merely purports to summarize proposed findings from other paragraphs. It does not state any facts.

79. This is simply a baseless statement by the FEC's expert that lacks any support at all. The FEC has not demonstrated any "broad consensus" about independent expenditure ads. However, Plaintiffs do not dispute that independent expenditure ads are designed to get specific candidates elected. Nor do they dispute that those who produce and broadcast those ads believe them to be effective in some sense. However, "effectiveness" is an elusive concept that depends not only on many specific facts and circumstances, but on the ultimate goals and intentions of the person running the ad. *See infra* ¶ 81. Many people run independent expenditure ads because they want to affect the debate, inject particular topics and issues into a debate or election, and the like. *See infra* ¶ 109-110. Moreover, there are many examples of elections in which a large amount of independent spending, and spending in general, did not result in the candidate getting elected. *See infra* ¶ 81. Accordingly, there is no one definition or understanding of

"effectiveness" on the basis of which Plaintiffs, or anyone, could agree to the FEC's broad statements in this paragraph.

80. Denied. One empirical analysis does not demonstrate that empirical analyses in general "confirm the effectiveness of independent expenditures." Indeed, the study cited dealt with Senate elections only. Moreover, the quote in this paragraph is hearsay.

81. Plaintiffs admit that "money spent outside the regular campaigns on 'voter education' can have an impact on election results." But the cited article dealt with issue campaigns, and the author even noted that the effect of independent spending in elections, and money in general, is far from clear: "But we also have abundant evidence that money, by itself, does not defeat incumbents. Only in combination with potent issues and high-quality challengers do even the best-financed campaigns have a decent chance of succeeding." Jacobson at 186. Similarly, on page 193, Jacobson says "Labor's 'voter education' drive achieved its goal only when the Democratic candidate conducted a vigorous local campaign, confirming the need for all three conditions – plenty of money, potent issues, and capable challengers – to defeat House incumbents." This is a perfect example of the FEC's—and its Professor Wilcox's—fast and loose use of citations to academic studies, and, indeed, its citations to all of its evidence. What this paragraph demonstrates is precisely what Plaintiffs stated above: some ads help and others do not, but to say more than that requires an analysis of the specific circumstances of each ad and race in which it is run.

82. Denied. Professor Wilcox simply cites four examples in his report. Four examples do not demonstrate universality. *See* Wilcox Rep. at 14.

83. Denied. This is simply a statement of opinion by Elaine Bloom about issue ads run in her race without any support for the claim that the ads were "deciding factors." It is hearsay and simply shows that some candidates believe issue ads are useful.

84. Denied. This is double hearsay and simply shows that Mr. Daschle apparently made this statement to Mr. Wilcox.

85. Denied. This is hearsay. Professor Wilcox is simply relying on his own article that in turn relies on another article for this information. At best, this simply shows that Allen Raymond made this claim; it does not show that the claim is true. Moreover, neither the FEC nor Prof. Wilcox point out that Senator Feingold criticized some ads run on his behalf and asked that they not be run. *See* Clyde Wilcox, *Russ Feingold's Reform Experiment*, Campaigns & Elections Sept. 1999 at 28. Thus, while Allen Raymond might have thought the independent spending benefited Senator Feingold, the Senator himself apparently disagreed. This is further evidence that the FEC's own evidence does not come close to demonstrating any consensus about anything.

86. Plaintiffs do not dispute that, as general matter, independent expenditures are produced similarly to candidate ads, but that does not prove their general level of effectiveness, because the effectiveness of candidate ads is far from clear and depends on many specific factors, as demonstrated in paragraph 81, above.

87. Denied. This is a baseless assertion with no supporting evidence.

88. Denied. These are unsupported hearsay statements that demonstrate only that Mr. Pennington argued as he did in his declaration. Moreover, they pertain to issue advertising.

89. Admitted.

90. Denied. This is hearsay and shows only the general views of Mr. Lamson. Plaintiffs do not dispute that some ads are "important" in some elections or that some political consultants believe as much.

91. Denied. This is hearsay and shows only the general views of Ms. Beckett. Plaintiffs do not dispute that some ads are can affect the outcome of elections.

92. Plaintiffs agree that the amount of money groups spend on independent ads indicates that the groups, themselves, believe they are effective. But this also supports the conclusion that the groups believe that independent ads are a very important means of exercising First Amendment rights and attempting to convince voters to support candidates that those groups believe will favorably affect the direction of our government. The FEC cannot have it both ways. It cannot argue on the one hand that groups are willing to spend a lot of money on independent ads, but then contend that those independent ads are unnecessary for SpeechNow.org and its supporters to effectively exercise their First Amendment rights. *See* FEC's Proposed Findings of Fact at ¶¶ 376-437.

93. Plaintiffs agree that not all independent ads help candidates, but they deny the remaining assertions in this paragraph, which are baseless and neither the FEC nor Professor Wilcox provide any evidence to support them.

94. Plaintiffs agree that some issue advocacy campaigns have likely helped candidates.

95. This paragraph is irrelevant for the reasons stated at the beginning of this section and for the added reason that this case has nothing to do with BCRA or the electioneering communications that were at issue in that case. The first sentence of this paragraph is true; the second is baseless and thus denied; the third is true; and the fourth is baseless and thus denied.

"2. There Are Many Specific Examples of Independent Expenditures Having a Significant Impact on an Election" (¶¶ 96-115)

96. This statement is unsupported and merely a summary. Despite the FEC's claim that there are "many specific elections where such ads appeared to have a dramatic affect [*sic*] on the final result," the FEC only cites seven specific examples of independent ads that were run in five elections (that is, some of the ads cited were run in the same elections, and other examples are just general statements about effectiveness, not specific examples of ads in specific elections). *See* ¶¶ 97-106, 107, 110, 112. Even leaving aside the fact that this subsection (IV.A.2.) is entirely based on hearsay, speculation, and baseless assertions, seven ads run in five elections does not even come close to demonstrating "many" of anything at all. The FEC tries to trump up this section simply by citing the same ads in the same elections repeatedly. Thus, it relies on statements about the Swift Boat Vet ads in nine of the nineteen paragraphs in this section (*see* ¶¶ 99-106), and it relies on other ads run in the same presidential election in another two paragraphs *see* ¶¶ 107, 112), meaning that *over half of the statements in this subsection deal with only one election.* (Another two paragraphs refer to ads run in primaries for the 2004 presidential election. *See* ¶¶ 108, 109). Indeed, judged against the FEC's claims in the previous subsection (IV.A.1), the dearth of examples in this one should be taken as affirmative evidence that the FEC's claims about the general effectiveness of independent ads and any consensus on that topic are positively false. To put it mildly, the FEC's descriptions of its alleged "facts" simply cannot be trusted.

97. The claim that the ad is "widely believed" to have had an impact on this election is unsupported, but Plaintiffs have no reason to believe it is false. Whether the ad used "harsh language and imagery" is irrelevant (is the FEC contending that "harsh language and imagery"

means an ad is not protected speech or that the content of ads has anything to do with the constitutionality of contribution limits?).

98-105. Plaintiffs admit that the Swift Boat Vet ads are a famous example of independent ads that likely impacted an election and that most observers agree with that basic point. Beyond that, the specific statements in these paragraphs are all hearsay or baseless assertions and are denied. These paragraphs are also cumulative, redundant, and irrelevant.

106. Denied. This is a baseless assertion.

107. Plaintiffs do not dispute that the ad mentioned was likely effective. The remaining facts stated in this paragraph are denied. They are based on inadmissible hearsay and are irrelevant in any event.

108. Denied. Plaintiffs have already admitted that the ads run by the Club for Growth are effective, so the alleged "facts" in this and the following two paragraphs are cumulative. Moreover, this paragraph and the following two paragraphs are further examples of the FEC selectively quoting and even blatantly misquoting its own exhibits. The most egregious example is in this paragraph where the FEC claims that Mr. Moore was discussing Club for Growth expenditures on independent ads, when he was in fact discussing direct contributions to candidates. The FEC claims that Mr. Moore stated in FEC exhibit 50 that the Club for Growth "intervenes quite heavily in primary races" by running independent expenditure ads and that the Club has "pour[ed] half a million dollars into a primary race" through such ads. But in the article (which appears to be a published version of remarks made at symposium or conference) Mr. Moore makes clear that he was referring to direct campaign contributions to candidates, not independent expenditure ads. FEC Ex. 50 at 196-97. As he states, "the other thing that is a bit unique about the Club for Growth is that our main mission is not to run TV ads and radio ads,

but to actually raise hard dollar contributions for the candidates who are running for the House [and] Senate." *Id*. at 195. He then explains that the Club has "30,000 members around the country" who make the direct contribution to the candidates. *Id*. at 195-96. He then states that the Club "actually intervenes quite heavily in primary races" and, in the sentence quoted by the FEC, states, "we were able to have great success, partly because if you put half a million dollars of *direct campaign contributions* into a primary race, you could have a very dramatic impact in the outcome of that election." *Id*. at 196-97 (emphasis added). The FEC simply left out "direct campaign contributions" and thus made it appear that Mr. Moore was discussing independent expenditure ads, when he was not. *See* FEC's Proposed Findings of Fact at ¶ 108. Direct contributions to candidates are subject to contribution limits and have nothing to do with this case, because SpeechNow.org makes no direct contributions to candidates. This is a good example of why courts generally do not rely on hearsay, baseless assertions, and speculation.

109-110. Denied. Again, the FEC misstates and selectively quotes from the cited article. As stated above, Mr. Moore makes clear that by "effective" he was sometimes referring to the effectiveness of direct contributions to candidates. At other times, he was referring to issue ads and the fact that they are effective ways to exercise First Amendment rights and to affect the issues being discussed during the 2004 presidential race by the parties, the politicians, the media, and voters. *See* FEC Ex. 50 at 195-196, 197-200. Moreover, Plaintiffs have been unable to find the full quotes attributed to Mr. Moore by the FEC in both paragraphs. The beginning of both quotes appears in the articles, but Plaintiffs were unable to find a source for the last four sentences attributed to Mr. Moore in paragraph 109 (beginning with "When we ran this ad…") or the last sentence in paragraph 110 ("And in fact, this issue was very, very damaging to Daschle.").

111. As Plaintiffs have stated at every opportunity, they hope that SpeechNow.org's ads are highly effective at influencing the outcome of elections so that they will influence the protections afforded First Amendment rights. However, other than as background information, Mr. Keating's employment at the Club for Growth is irrelevant to this case.

112. Plaintiffs admit that independent ads for Mr. Kerry were likely effective and helpful in some sense, but they deny the remainder of this paragraph on the ground that it is hearsay and simply an opinion by former President Clinton.

113. This paragraph does not contain any facts other than the fact that the cited letters say what they say. The letters purport only to show an organization that relies on donations thanking a large donor by telling him that his donation was effective in doing what the organization does. There is nothing surprising or particularly noteworthy about this and it has no relevance to the issues in this case. In any event, the letters are hearsay.

114. Denied. The FPPC report cited—*Independent Expenditures: The Giant Gorilla in Campaign Finance* (FEC Ex. 47) [the "Gorilla Report"]—nothing even close to the FEC's claims. It simply demonstrates that independent expenditure groups spent a good deal of money in the California elections on which the report focused. In fact, in seven out of the twelve races featured in the section that allegedly demonstrates the impact of independent spending, the candidates that received the most independent spending on their behalf *lost*. *See* FEC Ex. 47 at 23-40. Similarly, the report states that "[o]f the nearly $12 million spent on 'independent expenditures' for legislative races in the 2008 primary election, 78% was spent in just 10 legislative races." Again, however, in half of those contests, the candidate receiving the most independent expenditure support lost. *See* FEC Ex. 47 at 61-67. *See also* Deposition Transcript of Susie Swatt Dep. (FEC Ex. 17) at 66-69, 80-85. Susie Swatt, the person who wrote the report

for the FPPC, admitted that, with respect to the seven races mentioned above, "in these seven races, no, it does not appear that independent expenditure[s] influenced the outcome of the elections." But given the fact that these were the majority of races mentioned, this proves that independent spending, alone, demonstrates nothing at all.

Indeed, Ms. Swatt's quote demonstrates her bias—and the biases of Ross Johnson and the FPPC—against independent expenditures. If a candidate lost after receiving more independent expenditures than his or her opponent, Ms. Swatt concludes that independent expenditures had no influence on the outcome of the election. If the candidate won, she concludes that the independent expenditures did have an influence. But this simplistic view focuses on amounts spent on independent expenditures to the exclusion of all else. For example, perhaps the winner simply ran a better campaign or was a better candidate. Or perhaps the independent expenditures that supported the winner raised issues that mattered to the voters or that caused the winner to change his positions in a way that benefitted his campaign. Or perhaps voters simply grew tired of hearing or seeing ads on behalf of the loser or became disillusioned by the fact that the loser was so heavily favored by outside groups. *See* FEC Ex. 17, Swatt Dep. at 73:14-20 (admitting the "possibility" that independent expenditures could have a negative impact on the candidate who they supported "depending upon the independent expenditure communications put out"). The fact is, very little is known about the impact of independent spending in campaigns, as two sources on which Professor Wilcox relied make clear. *See* Simpson Decl., Ex. 46, Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 Political Research Quarterly 885 (2002) at 889 (stating that "it is rare to find independent expenditures figuring prominently in more rigorous examinations of the role money plays in the political process"); Ex. 47, Jacobson at 186 (Only in combination with potent issues and high-

quality challengers do even the best financed campaigns have a decent chance of succeeding."). As Ms. Swatt admitted, the Gorilla Report considered none of these points. *See* FEC Ex. 17, Swatt Dep. at 83:20-84:6 (stating "one factor is obviously looking at the numbers, which is all this report sought to do. You could also look at other factors in terms of a campaign, which I didn't put in here . . . This was purely a report that was done based upon the independent expenditure dollars that were spent"). *See also id.* at 73:10-75:19, 79:2-80:6 (listing other factors not considered in Gorilla Report that could impact a campaign).

Moreover, all but three of the largest contributors to the 25 "largest independent expenditure committees" were PACs. *See* FEC Ex. 47 at 11-20. Similarly, out of the 25 contributors who contributed the most money to all independent expenditure committees, all but two were PACs. *See id.* at 22. But SpeechNow.org will not receive any money from PACs; it will only accept individual donations. In short, the Gorilla Report is worthless propaganda. *See* also *infra* text preceding ¶¶ 168-180.

115. Denied. The example cited by Mr. Johnson does not demonstrate that independent expenditures can affect who runs. Even assuming the example is true, it only shows that one independent expenditure group was formed in California to support a particular candidate. But the example is questionable at best and it is likely based on double hearsay. The same example appears in the FPPC report cited in the previous paragraph as a block quote from Derek Cressman of Common Cause. *See* FEC Ex. 47 at 8. As Mr. Cressman stated in the quote, "[t]his does not mean that O'Connell will win, or even that he will necessarily even run, but it does get Mr. O'Connell over the first hurdle of fundraising credibility." *Id.* It appears from Mr. Johnson's deposition that he was relying on this quote from the report and there is no indication

in his declaration that he independently verified the information in the quote. FEC Ex. 10, Johnson Dep. at 22:23-24:2.

"3. Independent Expenditures Have Become More Effective over Time" (¶¶ 116-121)

116. Denied. The statement in this paragraph is a baseless assertion that lacks any evidence at all, and the paragraphs that follow do not demonstrate that the quality of independent expenditures or candidate-focused issue advocacy has increased over time. Indeed, the examples in paragraphs 117-120 are all from the last several years, and they do not demonstrate any increase in quality of independent expenditures even during that time.

117. Denied. Professor Wilcox's report does not support the claim that "most independent expenditure and issue advocacy campaigns" are designed, studied, etc. by professionals. The cited study appears to deal only with some issue advocacy campaigns in 2000 and the quotes are hearsay.

118. Denied. The FEC has not demonstrated that any "recent increase in the quality of independent expenditures" has occurred, and the statements in this paragraph are all hearsay. Moreover, it is not at all clear from this paragraph that the cited examples pertain to issue advocacy or independent expenditures, nor is it clear whether they pertain to advertisements at all as opposed to voter mobilization efforts. Finally, the FEC cites a different article from the one that Professor Wilcox cites in his report for this claim, and the one cited in the Wilcox report does not appear to have anything to do with independent expenditures. *See* Wilcox Rep. at 16.

119. Denied. The alleged "extensiveness of the professionalism of many of these campaigns" is not evidenced at all by the cited example, because it is only one example and it simply shows, assuming it is true, that one organization conducted polls and research,

presumably before running ads, although that is not even clear from the example. In any event, this paragraph is based on inadmissible hearsay.

120. Denied. The relevance of this paragraph is not clear, nor even what "reached out" to voters "with from 8 to 12 contacts" means or has to do with independent ads. Moreover, this is all hearsay.

121. Denied. This is a baseless assertion that is not supported by the paragraphs it cites.

"4. Technical Coordination with a Candidate Is Unnecessary for an Independent Expenditure to Effectively Supplement a Campaign." (¶¶ 122-131)

This entire subsection (IV.A.4., ¶¶ 122-131) is irrelevant for the reasons stated in Part I.A., above. As stated in Part I.A., coordination is a specifically-defined term that has nothing to do with "benefit" or whether an independent expenditure "effectively supplements" a campaign as long as that expenditure does not come within the FEC's rules governing coordination. This entire subsection is simply another way for the FEC to attack the idea of independence and its own rules governing coordination. Indeed, independent expenditures, by definition, cannot be coordinated, so it makes no sense to say that "technical coordination" is not necessary for an independent expenditure to be beneficial or useful to a candidate or campaign. If an independent expenditure were "technically coordinated" it would cease being an independent expenditure and would become a direct contribution that was subject to contribution limits. If it were not coordinated, then it would remain an independent expenditure. Thus, there is no middle ground or third category of independent expenditures that are somewhere between coordination and non-coordination with which to compare fully independent expenditures and thus to measure which one is more valuable to a campaign than the other. Saying that an independent expenditure is "still valuable to a candidate even though it is not technically coordinated" is therefore the same

thing as saying that something is an independent expenditure. As an independent expenditure, it has whatever value it has, and this subsection does not, nor could it, provide any evidence that independent expenditures are valuable "even without coordination." In short, that claim amounts to a tautology, because all independent expenditures are, by definition, not coordinated. This section thus amounts to the FEC's tacit attack on its own coordination rules and the statute on which they are based.

Indeed, this entire subsection is based on the notion that there is something illicit about those who make independent expenditures using publicly available information to determine the most effective way to make independent expenditures. The FEC refers to this as "synchronizing" with a campaign and implies that it is improper. But the FEC's own rules expressly recognize that this happens and make clear that it is entirely appropriate. The rules provide a "safe harbor" for communications made on the basis of "publicly available information" about a federal candidate's campaign. *See* Fed. Election Comm'n, *Campaign Guide for Nonconnected Committees* 34 (May 2008) ("The conduct standards for substantial discussion, material involvement, use of a common vendor and involvement of a former employee/contractor are not satisfied if the information used in creating or distributing the communication was obtained from a publicly available source.").

The FEC is free to rewrite its rules or to ask Congress to change the definition of independent expenditure, but it is not free to ignore its rules and all of the information it produces on which the public relies. The claims in this subsection are all based on actions that are entirely legal, and, as a result, they are entirely irrelevant to the issues in this case.

122. Denied. This paragraph is merely a summary and is irrelevant for the reasons mentioned above.

123. This paragraph is irrelevant and misunderstands the concept of coordination, which does not depend on whether an independent expenditure helps a candidate win. Plaintiffs admit that many activists work for both campaigns and organizations during their careers and that FEC disclosure reports and the internet make it relatively easy for individuals to find out what campaigns are doing and on what they are spending their money, but those activities are entirely legal and do not make independent expenditures suspect in any way.

124. Professor Wilcox cites only four examples in his report in support of this claim. Wilcox Rep. at 17-18. All of those examples relies on inadmissible hearsay evidence, and the FEC offers no evidence to support the claim that the alleged collaboration claimed in this paragraph "helps assure that groups use their money in an optimal way to help elect candidates." That said, Plaintiffs admit that some groups share information with others and meet and discuss their strategies. Doing so is perfectly legal and is an important means of exercising both rights to free speech and rights to association.

125. Denied. This paragraph is inadmissible hearsay. Moreover, the cited testimony was given in support of a new federal law that regulates certain 527s and independent expenditures differently than they are currently regulated. Once again, this demonstrates that the FEC wishes the law were different and wants to introduce evidence to try to achieve what Congress has not done.

126. This paragraph is based largely on inadmissible hearsay. Beyond that, assuming the hearsay evidence on which this paragraph is based is true, it simply demonstrates that information about campaigns is publicly available, which Plaintiffs do not deny. The argument in this paragraph, and in this entire section, amounts to saying that a group made an independent expenditure and that it relied on publicly available information, which is entirely legal, and then

simply stating that it was not necessary for the group to engage in illegal coordination for its independent expenditure to be valuable to a candidate or campaign. This is rather like saying that it is not necessary for college professors to commit technical plagiarism for their articles to get published; or that it is not necessary for a litigant to actually make things up for its arguments to sound persuasive. Both of these things are true, but they prove nothing other than that argument by innuendo is easy.

127. Denied. This is hearsay.

128. Denied. This paragraph is based entirely on hearsay.

129. Denied. This paragraph is based on hearsay.

130. Denied. Mr. Johnson's statement is a baseless assertion that does not demonstrate any "clear pattern." It also conflicts with the FEC's rules.

131. Denied. This paragraph relies on baseless assertions without any evidence.

"IV.B. Independent Expenditures Lead to Gratitude, Indebtedness, and Access, Pose a Danger of Quid Pro Quo Arrangements, and Create the Appearance of Corruption." (¶¶ 132-184)

1. General Objections

As Plaintiffs demonstrated in Part I.A., all of the proposed findings of fact in this section are irrelevant because they purport to demonstrate that decades-old precedent, statutes, and rules are wrong and should be ignored. In addition, many of the proposed findings of fact in this section amount to legal conclusions, and incorrect legal conclusions at that, to the extent they argue in favor of a version of "corruption" that does not exist under current law. As stated in Part I.A., the possibility of "gratitude," "indebtedness," and "access" do not amount to corruption as that term has been defined by the Supreme Court. As the Court stated in *NCPAC*,

> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of

> corruption is the financial *quid pro quo*: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate.

470 U.S. at 497. While the Court has noted the hypothetical possibility that expenditures on behalf of a candidate could lead to gratitude and thus special favors to those who make the expenditures, it has held that *independent* expenditures raise no such concerns because of their "lack of prearrangement and coordination." *See id*. at 498. *See also Buckley*, 424 U.S. at 46-47. As stated in Part I.A., as a matter of law, "coordination" has nothing to do with the possibility of "gratitude" and "access." Moreover, contrary to the FEC's contention in subsection IV.B.5., it is not legally possible for an independent expenditure to be considered an "indirect contribution" to a candidate, because independent expenditures are by definition not coordinated and thus not considered in-kind or "indirect" contributions to a candidate. *See* 11 C.F.R. § 109.21(b)(1), (3). Thus, the FEC's proposed findings of fact in subsection IV.B.5. are irrelevant and incorrect legal conclusions in that they purport to "prove" the existence of something that is does not exist under governing law.

Moreover, this section of the FEC's proposed findings of fact relies heavily on the report of their expert, Clyde Wilcox. Yet, as Plaintiffs' expert Jeffrey Milyo demonstrated in his rebuttal to Professor Wilcox's report, Wilcox's report is riddled with errors. *See* Milyo Rebuttal Decl. at ¶ 50. Wilcox never defines what he means by "corruption," "undue influence," "access," or "influence, *see id.* at ¶¶ 11, 15;" he relies on no empirical evidence that support his claims that independent expenditures lead to corruption or that contribution limits would have any effect on corruption even if such evidence did exist, *see id*. at ¶¶ 14, 16, 19, 21, 22, 42-46; he ignores, entirely, the benefits of independent expenditures to free speech or even that there are any such benefits, *see id.* at ¶¶ 6, 15; he makes no effort to define or measure the likelihood of corruption or the other concerns he claims will occur if unlimited contributions are permitted for

groups like SpeechNow.org, *see id*. at ¶¶ 16, 19, 21; he ignores the fact that his arguments apply equally to all sorts of legal activities that benefit candidates, *see id*. at ¶¶ 7-10; he uses slippery terms throughout his report, *see id*. at ¶¶ 13-20; and he fails to acknowledge studies that detract from his broad claims, *see id*. at ¶¶ 11, 12, 22, 23, 26-40.

As Professor Milyo states, "I find it disconcerting that in discussing the effects of campaign spending and contribution limits on the appearance of corruption, Wilcox fails to mention any of the studies cited in [my declaration]. Nor does Wilcox even raise a single caveat regarding his unsupported claim that large contributions exacerbate the appearance of corruption." *Id*. at ¶ 41. Indeed, as Plaintiffs demonstrated in Part I.B., above, several of the articles on which Wilcox himself relies cut against his broad claims. And, as Professor Milyo pointed out, even Wilcox's own articles are in conflict with some of his claims. *See* Milyo Rebuttal Decl. at ¶ 12.

This section of the FEC's Proposed Facts also relies heavily on what amounts to character or propensity evidence, only in this case, the FEC is relying on the alleged character of one group of donors to independent groups to try to prove how the entire class of donors to such groups will act. The FEC's basic argument in this section, and others that follow, is that some donors in the past have attempted to gain access and influence to candidates by making contributions to various entities. As a result, donors to SpeechNow.org and other groups like it will do the same. As stated earlier, this claim contradicts evidence from Professor Wilcox's own research. But even if it did not, the FEC's evidence would be inadmissible to prove that some or all donors have a propensity to curry favors or attempt to gain influence and access to candidates simply because it claims others have done so. Under Federal Rule of Evidence 404, evidence of

a person's character is never admissible in a civil action to prove that they have a propensity to act in a certain way. *See* F.R.E. 404; 2006 Amend. Advisory Comm. Notes.

Under rule 404, the FEC would not even be able to use evidence of only one donor's prior actions to show that he, himself, had a propensity toward corruption, access, or influence. Thus, even in actions against the specific individuals the FEC claims engaged in corruption or sought access or influence, it would not be able to admit evidence of that behavior to prove that they had acted or likely would act the same way again. Here, however, the FEC is taking the argument one step further. It is arguing that a handful of examples of alleged corruption prove that all donors to SpeechNow.org or other groups like it will act in the same manner. This evidence is not admissible, and the FEC may not claim that the actions of some prove the actions of all. *See id*. *Cf. United States v. Brown*, 381 U.S. 437, 455-56 (1965) (refusing to allow Congress to prevent communists from serving in unions unless it could show "a demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate;" even where some members of a class demonstrate evil behavior "it cannot automatically be inferred that all members shar[e] their evil purposes or participat[e] in their illegal conduct").

Finally, the facts in this section are cumulative and redundant under Federal Rule of Evidence 403. Even assuming that some evidence in this section is relevant, the FEC's nearly 17 pages and 52 separate proposed findings of fact is vast overkill.

2. Specific Responses to Proposed Findings of Fact in Section IV.B.

"1. Large Direct Contributions Raise the Danger of Quid Pro Quo Arrangements, Undue Influence, and the Appearance of Corruption"

132. Denied. This paragraph is irrelevant for the reasons stated in Part I. A. and because this case does not involve direct contributions to candidates. Moreover, the claims made

are unsupported, and, in any event, hotly debated in the political science and general academic community. *See* Milyo Rebuttal Decl. at 22-30.

133. Denied. As Professor Milyo has demonstrated, there is a great deal of debate about this topic and much conflicting evidence. *See* Milyo Rebuttal Decl. at 22-30. Moreover, both Warren articles cited here are theoretical pieces, not empirical studies. And in the Warren 2004 article, the author recognizes that there are many institutions in place, such as the competitive political process, that can ameliorate the corruption he claims exists, and he states, "in these ways, the corruption of speech that is unavoidable in politics might be limited in its harms to democracy." *See* Simpson Decl., Ex. 45, Mark Warren, *What Does Corruption Mean in a Democracy?*, 48 American Journal of Political Science 328 (2004). at 338. The chapter in the 1995 book by Thompson is also theoretical and does not focus on *all* contributions, as this paragraph implies, but only on those that are ideologically incongruent with the legislators' positions. *See* Simpson Decl., Ex. 46,Dennis Thompson, Ethics in Congress: From Individual to Institutional Corruption (1995) at 113. Moreover, this article does not address corruption in the legal sense at all, which Professor Wilcox admitted during his deposition. *See* FEC Ex. 18, Wilcox Dep. at 95:3-7 ("Q. So, as I understand it, you said that Thompson doesn't really discuss corruption in the context of the legal definition, is that right? A. Yeah. He's a political theorist."). The statements in this paragraph are also hearsay.

134. Denied. The statements in this paragraph are hearsay, and the cited work makes clear that direct contributions are irrelevant to independent expenditures. As Malbin states,

> Even if we grant the questionable empirical claim that equates independent spending with contributions from the quasi-bribery perspective, the equivalency idea [between independent expenditures and contributions] fails to address the quasi-extortion side of the issue. From this perspective, the contribution is a unique form of transaction because office-holders ask directly for help [and it is]

> the office-holder's ability to ask for help directly [that] creates the potential for shakedowns.

Simpson Decl., Ex.42, Malbin (2008) at 3-4. Thus, Malbin himself recognizes that the extortion claim does not apply to independent expenditures.

135. This is a legal conclusion, and thus irrelevant. But as far as it applies to contribution limits on direct contributions to candidates, it is an accurate statement of the law.

136. Denied. This is a baseless and self-serving statement by Professor Wilcox that could not possibly be proved true in any event. As stated above, there is a great deal of debate in the academic community over the meaning of and extent of corruption in general, let alone as that concept applies to independent expenditures. Even some of the articles on which Professor Wilcox relies make that clear. This claim is also entirely irrelevant to this case.

"2. Donors Are Also Willing to Make Large Indirect Contributions to Secure Access and Influence Policymaking." (¶¶ 137-139)

137. This is an accurate summary of some facts from Professor Wilcox's own research, but it is a half-truth, because neither Professor Wilcox nor the FEC point out that donors who give for ideological reasons are the largest class of donors. Professor Wilcox admitted this in his deposition. *See* FEC Ex. 18, Wilcox Dep. at 225:19-226:3. *See also* Simpson Decl., Ex. 22.

138. Denied. Much of the information in this paragraph flatly contradicts Professor Wilcox's own research, which shows that even so-called "investor" donors often give for ideological and political reasons. See [financiers]. The rest are vague statements without any support.

139. Denied. This is irrelevant and a baseless assertion. It is also a tautology, because, as far as Plaintiffs understand Professor Wilcox's argument, in his view all donors who "seek to gain access" necessarily care, by definition, only about their contribution being noticed and

appreciated. (In short, the sentence in this paragraph can be roughly translated as "access-seeking donors seek access.")

"3. The History of Soft Money Contributions to Party Soft Money Committees Illustrates that Donors Are Willing to Invest Their Contributions Indirectly and Officeholders Seek Such Contributions." (¶¶ 140-149).

The proposed findings of fact in this subsection (IV.B.3.) are entirely irrelevant because they deal with soft money donations to political party committees. The difference between outside organizations like SpeechNow.org and political party committees is a difference in kind, not a difference of degree. Political party committees work with and are comprised of federal candidates and officeholders. For instance, the current Chairman of the Democratic Senatorial Campaign Committee, a national political party committee, is Sen. Charles Schumer (D-N.Y); his counterpart at the National Republican Senatorial Committee is Sen. John Ensign (R-NV). The leader of the Republican National Committee is President George W. Bush, and the leader of the Democratic National Committee is President Elect Barack Obama. SpeechNow.org, however, is not comprised of officeholders, was not established by officeholders, and will not be financed, maintained or controlled by officeholders, candidates, or their agents. SpeechNow.org will have no dealings with political party committees and will not coordinate with them. *See* Plaintiffs' Proposed Findings of Fact at ¶¶ 5-7.

In upholding the national political party committee soft money ban, the Supreme Court in *McConnell* noted that contributions to national party committees and "[f]ederal candidates and officeholders enjoy a special relationship and unity of interest. This close affiliation has placed national party committees in a unique position . . . to serve as 'agents for spending on behalf of those who seek to produce obligated officeholders.'" *McConnell v. FEC*, 540 U.S. 93, 145 (2003) (citation omitted). The record in that case was "replete" with "examples of national party

committees peddling access to federal candidates and officeholders in exchange for soft money donations" *id.* at 150, which led the Court to state that "it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence" that Congress sought to correct with BCRA. *McConnell, supra*, at 153-154 (emphasis in original).

But none of these concerns apply to the activities of SpeechNow.org, nor could they because SpeechNow.org is independent of candidates and officeholders and cannot coordinate with, let alone sell access to, them. Indeed, as an article that Professor Wilcox co-authored concluded after an analysis of 527 giving patterns after BCRA, "[i]t follows that the considerations that stimulated soft money giving [to national political party committees] do not automatically transfer to 527 committees." *See* FEC Ex. 55, Boatright, Malbin, Rozell, and Wilcox, *Interest Groups and Advocacy Organizations After BCRA* at 120. One of the reasons, according to the article, is that "officeholders do not ask for the contributions to 527s, so the potential reward is no longer so direct." *Id.* Accordingly, the activities of donors in connection soft money donations to party committees are irrelevant to the issues in this case.

140. Denied. The information in this paragraph is simply a string of baseless assertions that are not supported by any evidence cited in the Wilcox Report.

141. Plaintiffs admit that, in general, soft money (i.e., money not subject to contribution limits) is easier to raise than hard money (i.e., money subject to contribution limits). The remaining claims in this paragraph are baseless and irrelevant for the reasons stated above.

142. Plaintiffs do not dispute the dollar amounts stated in this paragraph, however the information is irrelevant.

143. Denied. The assertions are baseless other than the claims about Gerald Greenwalt, but those are hearsay.

144. Plaintiffs do not dispute the specific dollar amounts cited, but deny the remaining claims as baseless. The information in this paragraph is also irrelevant.

145. Denied. The information in this paragraph is baseless, and where Professor Wilcox has provided a cite in his report, he cites to a newspaper article, which is hearsay.

146. While the information in this paragraph is general enough to not really be subject to a denial or admission, it is all hearsay.

147. Denied. The information in this paragraph is all hearsay.

148. Denied. Professor Wilcox offers no evidence to support this paragraph.

149. Denied. Professor Wilcox offers no evidence to support this paragraph.

"4. Donors Seeking Access and Influence Give to Non-Party Organizations As Well." (¶¶ 150-162)

150. Denied. The information in this paragraph is all hearsay and is irrelevant and inadmissible propensity or character evidence.

151. Denied. The information in this paragraph is irrelevant and inadmissible for the reasons stated in the previous paragraph. It is also all hearsay.

152. Denied. The information in this paragraph is irrelevant and inadmissible for the same reasons. It is also all hearsay.

153. Denied. The information in this paragraph is irrelevant and inadmissible for the same reasons. It is also all based on hearsay.

154. Denied. The information in this paragraph is irrelevant and inadmissible for the same reasons. Moreover, the first sentence is baseless and the second is hearsay.

155. The information in this paragraph is irrelevant and inadmissible for the same reasons. Plaintiffs do not dispute that these statements were made in news reports, but they are all hearsay. As a general matter, Plaintiffs do not deny that 527s played a significant role in the 2004 election, that they raised a lot of money and spent it on particular races, and that they likely hired people to help them operate.

156. Denied. The information in this paragraph is irrelevant and inadmissible for the reasons stated above. It is also baseless and not supported by any evidence in the Wilcox Report.

157. The information in this paragraph is irrelevant and inadmissible for the same reasons. The first sentence is baseless and not supported by the cited works. Plaintiffs do not dispute the statistics and dollar amounts cited. However, neither the FEC nor Professor Wilcox notes that Weissman and Hassan point out the large role that ideological donors played in contributing to 527s. Moreover, as stated in paragraph 150, the article cited that Professor Wilcox co-authored contains statements that directly conflict with the claims made in this paragraph and this entire section. *See* FEC Ex. 55, Boatright, Malbin, Rozell, and Wilcox, *Interest Groups and Advocacy Organizations After BCRA* at 120.

158. Although the data show that some donors give more to 527s than they can under contribution limits and it is likely that many did so to influence election outcomes, there is nothing improper about this. Indeed, as discussed in Weissman and Hassan, many donors to 527s do so for ideological reasons, and, as Professor Wilcox's own article shows, comparisons to soft money giving are unwarranted.

159. Plaintiffs do not dispute the accuracy of the statistics cited in this paragraph, but the last sentence is a half-truth. Stating that individuals associated with the business community gave more to 527s than they had to soft money is seriously misleading in light of the statements

in the article Professor Wilcox co-authored on the subject. In fact, early in that article the authors state that they have misgivings about even describing donors as "individuals associated with the "business community": "While we have significant reservations about treating an individual employee's contributions as if they reflect the same concerns as an employer's, we nevertheless find the grouping useful because of the question we are trying to answer." FEC Ex. 55 at 114. Moreover, as that article concluded after an analysis of 527 giving patterns after BCRA, "[t]herefore, it follows that the considerations that stimulated soft money giving do not automatically transfer to 527 committees." *Id*. at 120. One of the reasons, according to the article, is that "officeholders do not ask for the contributions to 527s, so the potential reward is no longer so direct." *Id*. The article also states that "the net affect of the abolition of soft money, therefore, was not to reduce the role of all individuals who had earned their wealth in a business but to substantially displace the role of large, publicly owned corporations" with donors associated with smaller businesses who "are much freer, and more able financially, to pursue a personal political agenda." *Id*.

160. Admitted.

161. Plaintiffs do not dispute the dollar amounts and statistics stated in this paragraph, but they deny the claim in the last sentence that donors' contributions to 527s "served to supplement hard money contributions and allowed them to contribute beyond the legal hard money limit." This is an unsupported claim about the intentions of donors. It is irrelevant to this case and it conflicts with other evidence that demonstrates that many groups and people make independent expenditures but do not make direct contributions to candidates in the same election cycle. *See, e.g.*, Plaintiffs Proposed Findings of Fact at ¶ 130. Moreover, this statement, and the other quotes in this paragraph, are hearsay.

162. The information in this paragraph is irrelevant for the purposes for which the FEC offers it in that it demonstrates nothing about any connection between independent expenditures and corruption. Indeed, the FEC found no evidence that these groups coordinated their expenditures with campaigns or candidates. These groups were found to have met the definition of "political committee" and to have violated laws against corporate contributions to political committees. That said, Plaintiffs do not dispute that the listed groups entered into conciliation agreements with the FEC that concluded the groups had violated the law.

"5. Contributions to Groups that Make Independent Expenditures Can Lead to Corruption in the Same Way as Direct and Other Kinds of Indirect Contributions." (¶¶163-167)

163. Denied. The statement in this paragraph is a baseless assertion from the Wilcox Report that directly contradicts governing case law holding that independent expenditures do not have a "similar potential for corruption as large direct contributions to candidates." *See, e.g.*, *NCPAC*, 470 U.S. at 497-498; *Buckley*, 424 U.S. at 46-47.

164. Denied. The statements in this paragraph are baseless and legally incorrect for the reasons stated in the preceding paragraph.

165. Denied. This paragraph directly contradicts governing case law, as stated in ¶ 163. The Supreme Court has held that it does matter "who cashes the check" for purposes of determining whether there are concerns about corruption or its appearance. Accordingly, this paragraph sets forth a legally irrelevant argument about corruption. Moreover, the statements made are simply baseless assertions.

166. Denied. This is a baseless statement by Professor Wilcox with no support. It also contradicts Supreme Court cases holding that independent expenditures do not have the same potential for "evoking special favors" and "gratitude" is irrelevant to whether independent

expenditures can be limited. Moreover, this statement is too vague and general to constitute a finding of fact.

167. Denied. The statement in this paragraph is irrelevant and it is hearsay. Congress did not enact the bill for which this testimony was given and the points made have nothing to do with the question of whether independent expenditures cause corruption or can be limited. Moreover, as stated above, Mr. Malbin has described the claim that independent spending are comparable to direct contributions as a "questionable empirical claim," so the FEC's use of another of his quotes is unreliable. *See supra* ¶ 134.

"6. Unregulated Contributions to Groups that Make Independent Expenditures in California Illustrate the Potential for Corruption and Circumvention." (¶¶ 168-180)

The FEC's proposed facts in this subsection (IV.B.5., ¶¶ 168-180) are largely based on the declaration of Ross Johnson, which Plaintiffs have moved to strike in a separate motion. The proposed findings of fact in this subsection are also irrelevant to the issue for which the FEC offers them, because the FEC's argument is based on an incorrect and legally-irrelevant notion of corruption. Indeed, in this subsection the FEC is attempting to introduce facts that show that contribution limits should be imposed on groups that make independent expenditures because that will limit the amount of independent expenditures that those groups can make. This directly contradicts not only the Supreme Court's holding that *independent* expenditures may not be limited, but the Court's holding that expenditures of any type may not be limited. *See Buckley*, 424 U.S. at 46-51 (stating that "[t]he First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.").

Thus, the argument and proposed facts in this section also amount to an admission of a point on which Plaintiffs included a number of proposed findings of fact in their opening brief—

namely, that contribution limits imposed on groups that make only independent expenditures necessarily limit those expenditures and that the FEC, among others, intends them to do just that. *See* Plaintiffs' Proposed Findings of Fact at 27-32. Plaintiffs proposed to include these findings so they can argue, under *Citizens Against Rent Control v. City of Berkeley*, that contribution limits imposed on a group like SpeechNow.org are unconstitutional, among other reasons, because they limit SpeechNow.org's expenditures. *See* 454 U.S. 290, 299-300 (1981). As the Court explained in *Citizens Against Rent Control*, if a law allows an individual to make unlimited expenditures but prevents the same individual to "contribute beyond [that] limit when joining with others to advocate common views" that law "automatically affects expenditures" and therefore "operate[s] as a direct restraint on freedom of expression." *Id*. *See also id*. ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."). Plaintiffs wish to argue that the contribution limits that apply to them have the same affect on SpeechNow.org's ability to make expenditures and thus to show that when groups are free of limits, they will raise money in larger amounts. This also goes to the burden that contribution limits place on a group like SpeechNow.org.

FEC's Reliance on the FPPC "Gorilla" Report

The paragraphs in this subsection also rely heavily on a misleading and inherently unreliable report by the California Fair Campaign Practices Commission—*Independent Expenditures: The Giant Gorilla in Campaign Finance* (FEC Ex. 47) [the "Gorilla Report"]. The FEC relies on the Gorilla Report to try to demonstrate a causal relationship between the imposition of limits on direct contributions to candidates and an increase in spending by independent expenditure committees in California. In other words, the FEC is contending that the money that previously went to candidates via direct contributions in California simply shifted

and went to independent expenditure committees after direct contribution limits were imposed. The FEC thus contends that the donors who gave money to the independent expenditure committees did so to avoid the limits on direct contributions to candidates. But the Gorilla Report shows nothing of the kind. Even assuming the data in the report are accurate (which is a generous assumption), the report shows only the amounts that some individuals and groups donated to independent expenditure committees, the amounts that some of them spent in certain elections, and the fact that candidates who were supported by large amounts of independent expenditures generally lost. *See supra* at ¶ 114.

To demonstrate that the imposition of contribution limits on candidates *caused* independent expenditures to increase thereafter would, at the least, require a comparison not only of independent spending before and after candidate contribution limits were imposed, but also a comparison of the overall spending on direct contributions both before and after candidate contributions were imposed. Only then could one conclude that any increase in independent spending might have some relationship with the amounts previously spent on direct contributions to candidates. In other words, without knowing that overall direct contributions to candidates went down after the imposition of contribution limits, one could not reasonably conclude that the money being spent on independent expenditures after the imposition of limits was redirected from direct contributions to independent expenditures. Yet the Gorilla Report does not examine the overall amount of money that was spent on direct contributions to candidates prior to the imposition of contribution limits at all. And while it purports to have looked at the amount of money spent on independent expenditures prior to the passage of direct contribution limits, the amounts it finds simply defy common sense.

The Gorilla Report states that "in 2000, when there were no contribution limits, 'independent expenditure' spending for legislative candidates totaled $376,000." It then states that that spending increased to $23.48 million for all legislative candidates by 2006, when contribution limits were in place. *See* FEC Ex. 47 at 9. It then examines statewide races and finds that in 2002, when there were still no limits on direct contributions to candidates, "the total amount of 'independent expenditures' benefitting all statewide candidates was $526,000." The report then states that that spending increased to $29.47 million by 2006. *Id.*

Yet the amounts that the Gorilla Report claims were spent on all independent expenditures prior to the imposition of contribution limits simply cannot be true. California is the most populous state in the Union. It has over 17 million registered voters[23] and is one of the most expensive media markets in the country.[24] Yet the Gorilla Report claims that the total independent expenditures in the entire state for all legislative elections was $ 376,000 in 2000, and the total amount for all statewide races was $ 526,000. The report offers no context for those numbers—for instance, by showing the amounts spent in direct contributions to candidates in those years—and it provides no evidence of independent spending for other years prior to the imposition of contribution limits. Indeed, the report does not even list the amounts it claims were spent in the races in 2000 and 2002 in the tables that list the independent spending totals. Those amounts appear only in bullet-point summaries. *See* Gorilla Rep. at 9. In the chart that lists total independent spending—the chart on which the Report's claims are based—the amounts

[23] October 20, 2008 Report of Registration, California Secretary of State, available at http://www.sos.ca.gov/elections/ror_102008.htm.

[24] Indeed, according to an article in the Weekly Standard "Brian Brown, executive director of the National Organization for Marriage, the fledgling organization leading the fight for this fall's marriage amendment in California, estimates that their campaign will need at least $10 million to succeed in a state with some of the most expensive media markets in the country." John McCormack, *California's Gift to McCain?*, THE WEEKLY STANDARD, May 26, 2008.

for legislative races in 2000 and for statewide races in 2002 are not provided. *See id*. at 10 (Chart#1).

At least a little information on independent spending is available prior to 2000, however. Ross Johnson, the Chairman of the FPPC and also a witness for the FEC, ran for election in 1995. *See* Johnson Decl. at ¶ 3. In that race, an independent expenditure was made on his behalf totaling $75,000. Johnson Dep. at 88:20-22. Thus, independent expenditures in Ross Johnson's one race only on his behalf amounted to roughly 1/5th of all independent spending that the Gorilla Report claims occurred in the entire State of California on behalf of all candidates for all legislative races in 2000; likewise, the independent expenditures on behalf of Johnson were roughly 1/8th of all independent spending in the entire State on behalf of all candidates for all statewide races in 2002.[25] For the record, Johnson testified that *he* was not unduly influenced by that $75,000 independent expenditure. *See* Johnson Dep. at 93-95.

Perhaps one explanation for the oddly low independent spending in the election cycles immediately preceding the imposition of candidate contribution limits is the fact that the law apparently was in flux at the time. According to Mr. Johnson, ballot propositions that "sought to limit the size of contributions to candidates" were passed in 1988 and again in 1996 and then were tied up in litigation for a few years thereafter. *See* Johnson Decl. at ¶ 4. During these court battles, according to Johnson, "there were several election cycles without any limits on direct contributions to candidates." *Id*. Thus, it is not at all clear from the Johnson declaration exactly what limits were in place at what time and what, exactly, those limits affected. The only thing that is clear from this is that campaign finance laws in California changed several times and were tied up in litigation from 1988 until 2000. It is entirely possible that the law was simply unclear

[25] Similarly, $397,000 was spent in independent expenditures in the 2005-06 election for Secretary of State, and $460,000 in independent expenditures was spent in that same year in the Board of Equalization election. *See* Gorilla Rep. at 10.

while the 1996 proposition was tied up in litigation, or reporting obligations were not clear, or records were not being kept accurately. But whatever was happening, neither the Johnson declaration nor the Gorilla Report provide enough information to assess the validity of its claims about the alleged "explosive" growth of independent expenditures.

Indeed, Susie Swatt, who wrote the report for the FPPC, testified that all she examined in producing it were "the numbers, which is all this report sought to do. You could also look at other factors in terms of a campaign, which I didn't put in here . . . This was purely a report that was done based upon the independent expenditure dollars that were spent." Swatt Dep. at 83-84. *See also id*. at 73-75, 79-80 (listing other factors not considered in Gorilla Report that could impact a campaign). As stated above, there are other problems with the Gorilla Report, not least that its claims about the "significant" impact of independent expenditures are contradicted by the report itself. See *supra* ¶ 114. And although Professor Wilcox relied solely on the Gorilla Report for an entire section of his expert report (Wilcox Rep. at 12 and n.11; Wilcox Dep. at 240), he never saw fit to examine any of the claims that the report makes or verify any of the information it contains. *Id*. at 243. He has never studied campaign finance issues in California or attitudes about corruption there, and he is not aware of any studies that would shed light on attitudes about corruption in California. *Id*. at 236-37. Nor would Wilcox typically rely on Common Cause for information for his studies or scholarly works, unlike the author of the Gorilla Report. *Id*. at 244. *See* Gorilla Rep. at 5, 8 (quote of Derek Cressman of Common Cause). *Cf*. Johnson Decl. ¶ 9.

Wilcox did agree with the Plaintiffs on one point about the Gorilla Report: "It does set you back a bit" that the report "depicts a giant gorilla throwing money off of the state capitol

building." Wilcox Dep. at 245. "Clearly these people have an agenda that's different than mine." *Id*.

168-178. Denied. As stated above, the Gorilla Report on which these paragraphs rely is propaganda, not evidence. In light of the many problems and overblown claims in the Gorilla Report, it and its data are inherently unreliable. It is also hearsay and its claims lack foundation and are irrelevant to the issues in this case. It and the paragraphs in this subsection are full of supposition and argument by innuendo. For instance, paragraph 174 simply asserts that individuals are "avoiding contribution limits" by legally making contributions to independent expenditure committees. Similarly, paragraph 175 complains that "some of the biggest contributions" to independent expenditure groups in California have come from individuals. In fact, according to the Gorilla Report, all but three of the largest contributors to the 25 "largest independent expenditure committees" were PACs; and out of the 25 contributors who contributed the most money to all independent expenditure committees, all but two were PACs. *See* FEC Ex. 47 at 11-20, 22.

179. Denied. John Coupal has not "contended that a form of quid pro quo corruption has occurred as a result of individuals being able to circumvent contribution limits via independent expenditures in California." The focus of the article the FEC cites is not independent expenditures; it is the manner in which increased spending—in the form of increased salaries of city workers—was harming taxpayers in Los Angeles. Mr. Coupal noted in the article that the reason for the increase is the symbiotic relationship between elected officials and unions. Mr. Coupal does not allege the independent expenditures are the source of the problem; rather, the problem is the symbiotic relationship that he believes wastes taxpayer money. As Mr. Coupal has explained:

> In essence, the unions are using taxpayer dollars, which the government gives them the power to take through payroll withholdings, to obtain more taxpayer dollars. In California, there is a prohibition against government funds being used in political campaigns. I think that is good because taxpayers should not have to fund political speech with which they disagree. I believe that this principle should be extended to the use of union dues for electoral purposes.

Decl. of Jon Coupal ¶ 7. In his article, Mr. Coupal stated that city workers engage in independent expenditures so they can spend money in excess of contribution limits. But he did not say that independent expenditures were the source of what troubled him—i.e., the symbiotic relationship, described above, that he believes wastes taxpayers' money. As Mr. Coupal acknowledges, "that problem would exist even if there were no such thing as independent expenditures." *Id.* at ¶ 8. Furthermore, "the idea that this specific problem has anything to do with whether independent expenditures, per se, cause corruption is absurd. Reaching that conclusion from my article requires a huge stretch that is unsupported by what is actually in the article." *Id.*

180. Denied. Once again, the FEC takes Mr. Coupal's words out of context in an article he wrote focusing on the relationship between unions and city governments, described above. Mr. Coupal did not state that independent expenditures are the source of corruption or what the FEC calls "undue influence," and he did not advocate that independent expenditures should be restricted. The FEC mischaracterizes a quote from Mr. Coupal in a newspaper article as showing that he has "recognized that independent expenditures would allow individuals to circumvent campaign finance restrictions, public financing for example." However, what Mr. Coupal said was that the public financing of elections would cause more spending on independent expenditures; he said nothing about the circumvention of campaign finance laws and restrictions such as contribution limits. "Circumvention" implies that there is something

illegal or corrupt about making independent expenditures. While the FEC may wish that were so, it is not.

"7. People Have Established Independent Groups Devoted to Electing or Defeating a Single Candidate." (¶¶ 181-184)

181. Denied. This is just an assertion in the Wilcox report with no support. It is also irrelevant whether or not groups have been formed for specific races.

182. Denied. Mr. Johnson provides no support for these claims, and the Gorilla Report does not support them. *See* FEC Ex. 47. This paragraph is also irrelevant.

183. Denied. This paragraph purports to be based on an entire section that appears elsewhere in the FEC's facts. It is thus cumulative of other facts and irrelevant for the reasons stated above.

184. Denied. There is no evidence that these groups existed "solely to advocate for the election or defeat" of Bush or Kerry. The FEC ultimately concluded that these groups had engaged in express advocacy and the groups chose to enter into conciliation agreements, but they did not admit that they were formed for the purpose of advocating for or against these candidates.

"IV.C. Candidates Are Usually Aware of the Identity of Individuals Making Large Contributions to Fund Independent Expenditures." (¶¶ 185-202)

1. General Objections

The claims in this section are irrelevant for the reasons stated with respect to the previous section. It is not coordination for those who make independent expenditures to tell candidates about them. *See* 11 C.F.R. § 109.21(d). Indeed, it is not coordination to contact a candidate even before making an independent expenditure as long as the purpose is to inquire about legislative or policy issues and not to discuss campaign plans, projects, activities or needs. *See id*. § 109.21(d), (f) (safe harbor for responses to inquiries about legislative or policy issues).

Greg Scott, the assistant staff director of the FEC's information division,[26] made this clear in his deposition in this case. He was asked, "If someone were to call the help line and ask is it coordination if I tell a candidate about an independent expenditure ad I ran after the ad has run, what would you answer? What would you say to those people?" Scott Dep. at 162:5-9. Mr. Scott answered, "I would say that based on our reading of the regulations[,] [p]ost-communication discussions would not jeopardize the independence of that expenditure." *Id*. at 162:20-163:2.

2. Specific Responses to Proposed Findings of Fact in Section IV.C.

185. Denied. This is simply a baseless assertion.

186. There is no evidence for the claim that candidates usually know who is funding independent expenditures. That they are able to discover such information is obvious given that campaign finance laws make disclosure of this information mandatory.

187. The statement in this paragraph is a general and unsupported assertion. That some candidates will be aware of donors to groups that make independent expenditures is obvious, but irrelevant. Moreover, Plaintiffs have made a separate motion to strike the Rozen declaration.

188. The statements in this paragraph are arguments, not facts. They also directly conflict with governing law to the extent that Mr. Johnson claims that corruption results from independent expenditures. Under Supreme Court precedent, statutes, and FEC rules, that is not so.

189. Admitted.

190. Denied. This is a baseless assertion from the Wilcox report.

[26] The information division publishes and provides information about the campaign finance laws for the public and answers questions. *See* FEC Ex. 14, Scott Dep. at 10-14.

191. Denied. The statements in the Wilcox report that allegedly support these claims are newspaper articles. Thus, this is simply an effort to launder hearsay through the Wilcox report.

192. Denied. This is another example of laundered hearsay.

193. Plaintiffs do not dispute that "donors have the capacity" to notify candidates of whatever they want to notify them of. The remaining claims are baseless and are denied.

194. Denied. This is based entirely on the Gorilla Report, which is hearsay and inherently unreliable.

195. Denied. The central claim in this paragraph is simply a tautology and it is irrelevant in any event. The FEC admits in this paragraph that BCRA prohibits candidates from soliciting money for outside groups, yet it then claims that donors for the groups are nonetheless solicited "'by a network of partisan activists, consultants, and lobbyists' who have 'directed them to the most effective committees.'" But anyone who operates a group that wants to speak out about politics can be considered a "partisan activist," and "consultants and lobbyists" is a description that likely covers the vast majority of people employed in Washington, D.C. and every state capital in the Union. As a result, this statement says nothing more than that donors are solicited by the groups that want them to contribute to those groups. Indeed, the admission in this paragraph that BCRA outlawed candidate solicitation of donations for outside groups makes perfectly clear that the statement by Robert Hickmott is no longer true and is thus irrelevant to this case. So why does the FEC include a statement about an activity that it admits is no longer legal and is not being done by the Plaintiffs? To argue, by innuendo, that what is perfectly legal—making independent expenditures that may or may not be known to a candidates—is somehow illicit. In any event, the statements in this paragraph are hearsay.

196. Denied. This is a baseless and almost meaningless statement from the Wilcox report. Neither the FEC nor Professor Wilcox provides evidence that "access-seeking donors" will donate money to independent groups. Beyond that, the statement simply states a truism. Obviously, *someone* has to solicit donors for funds to pay for the independent expenditures that groups make. And donors will typically want to spend their money on things that are "effective" rather than "ineffective."

197. Denied. The FEC has provided no evidence of any "dense web of relations between independent expenditure groups and candidates and parties." The anecdotes it has provided simply show (leaving aside that they are inadmissible for a host of reasons) that groups that speak out about political issues tend to employ those with the knowledge and experience necessary to do so, and that those individuals pay attention to publicly available information and often conduct research in order to make their public commentary more effective in conveying the information they want to convey. Moreover, this paragraph simply repeats claims made previously that rely on the notion that even if independent expenditures are not coordinated, there is still something illicit about them. It is entirely irrelevant.

198-200. Denied. These paragraphs are based on newspaper articles and are thus hearsay. Moreover, they directly contradict the FEC's own conclusion in its investigation of the Swift Boat Vets that there was no evidence of coordination. *See* Simpson Dec., Ex. 10, Swift Boat Vet conciliation agreement (dated 12/13/06).[27] Thus, not having found any coordination, the FEC now wants to fall back on smear tactics and innuendo based on statements made in newspaper articles that were published *before* it completed its investigation of the Swift Boat Vets. These paragraphs are both cumulative and irrelevant.

[27] *See* In re: Swift Boat Veterans and POWs for Truth, MURs 5511 & 5525, available at, http://eqs.nictusa.com/eqsdocs/000058FA.pdf.

201. This is a particularly outrageous example of argument by innuendo. The FEC found no evidence of coordination in its investigation of these groups, yet it implies that the violations they were found to have committed had something to do with their "close ties" with the parties.[28] *See* Simpson Decl., Exs. 8, 9. It then cites a chart from an article by Weismann & Hassan that simply groups all of the 527s mentioned under the general descriptions "Republican Oriented" and "Democratic Oriented." *See* FEC Ex. 55 at 104-05.

202. Denied. This paragraph is based entirely on hearsay and innuendo, and it is irrelevant.

"IV.D. Candidates Feel Indebted, Grateful, or Are Inappropriately Disposed to Favor Individuals Who Paid for Such Ads or Independent Expenditures." (¶¶ 203-247)

1. General Objections

This section is based largely on the declarations of Robert Rozen, which only makes broad, conclusory claims about candidates and independent groups, and several declarations from the *McConnell* case, all of which the Plaintiffs have separately moved to strike. Moreover, virtually every paragraph in this subsection simply duplicates claims that the FEC has already made previously in their proposed findings, often relying on the very same evidence. This section, like the previous sections, relies on a legally incorrect view of "corruption" and ignores the principles of independence and coordination. It relies heavily on broad claims about donor motives, which cannot be used to prove the conduct, much less motives, of others, and is irrelevant to the question of whether speech is protected in any event. *See FEC v. Wis. Right to Life, Inc.* 127 S. Ct. 2652, 2665 (2007).

[28] *See* In re: The Media Fund, MUR 5440, available at http://eqs.nictusa.com/eqsdocs/0000668B.pdf; In Re: Progress for America Voter Fund, MUR 5546, available at http://eqs.nictusa.com/eqsdocs/00005AC1.pdf.

2. Specific Responses to Proposed Findings of Fact in Section IV.D.

203. Denied. This statement from the Wilcox report is conclusory and lacks any evidentiary support. Mere gratitude is not evidence of corruption.

204. Denied. This paragraph relies on the declaration of Robert Rozen which, as noted above, is inadmissible. Furthermore, the proposed fact mischaracterizes the relevant portion of the Rozen declaration, which does not contain any discussion of "similar detrimental effects." In addition, Defendant's expert Clyde Wilcox has previously said that "the considerations that stimulated soft money giving do not automatically transfer to" independent groups. FEC Ex. 55, Wilcox et al., *Interest Groups and Advocacy Organizations After BCRA* at 120. One reason for the difference, according to Wilcox, is that "officeholders do not ask for the contributions to 527s, so the potential reward is no longer so direct." *Id*. Furthermore, both the proposed fact and the underlying statement from the Rozen declaration are conclusions that are not supported by any evidence on the record. And, again, mere gratitude cannot be evidence of corruption.

205. Denied. This paragraph, relying solely on the inadmissible Rozen declaration, is irrelevant. Its sole topic, the issue of soft money contributions to political parties, is not an issue in this litigation, which is about independent expenditures, not contributions to candidates or political parties. Furthermore, the quotation from Robert Rozen that the FEC puts forward contains only conclusions and opinions, not substantive facts.

206. Denied. This paragraph, relying solely on the inadmissible Rozen declaration, is actually an expert opinion that – in addition to being inadmissible as expert testimony not properly disclosed – lacks any evidentiary support. Also, it is not clear what Rozen means by "independent group." Is he talking about a group that makes contributions to candidates, a group that makes issue ads, or a group, like SpeechNow.org, that will make only independent expenditures? Rozen's discussion of gratitude is irrelevant.

207. Denied. This paragraph is actually a smattering of opinions and assertions by Mr. Rozen, none of which he supports with actual evidence. Plaintiffs would furthermore note that almost all individuals who gave more than $250,000 to 527 committees in the 2004 election cycle previously made soft-money contributions to a single political party. FEC Ex. 55. Stephen R. Weissman & Ruth Hassan, *BCRA and the 527 Groups, in* The Election After Reform 79, 94-96 (Michael J. Malbin ed., 2006), Table 5.2. Donors interested in "access" would presumably give to candidates in either party. In addition, Mr. Rozen's discussion of possible donor motives, gratitude, and the influential nature of donor speech is irrelevant and inadmissible.

208. Denied. This paragraph is inadmissible hearsay. Simply quoting Professor Magleby's broad assertions—based on no actual facts—in Professor Wilcox's report does not remove the hearsay problem or transform those opinions into facts. And, once again, evidence of gratitude is irrelevant.

209. Denied. This paragraph, based on a declaration from Democratic consultant Terry Beckett in the *McConnell* case, is inadmissible hearsay, irrelevant, and lacking foundation. Furthermore, the proposed fact mischaracterizes Ms. Beckett's testimony, which discusses issue advocacy rather than independent expenditures. There is no foundation for the broad assertion Ms. Beckett makes about candidates "often" appreciating help from interest groups: her declaration includes only one specific example of a single race for a Congressional seat in 2000.

210. Denied. This paragraph, based on a declaration from Democratic consultant Joe Lamson in the *McConnell* case, is inadmissible hearsay, irrelevant, and an opinion lacking evidentiary foundation. The discussion of sham issue ads and gratitude is irrelevant.

211. Denied. This paragraph, based on a declaration from former Senator Dale Bumpers in the *McConnell* case, is inadmissible hearsay, irrelevant, and an opinion lacking foundation. The discussion of sham issue ads and gratitude is irrelevant.

212. Denied. This paragraph, based on a declaration from Senator Alan Simpson in the *McConnell* case, is inadmissible hearsay, irrelevant, and an opinion lacking foundation. The discussion of sham issue ads and gratitude is irrelevant. Senator Simpson also predicts possible future actions by others without any evidentiary support. Testimony of this sort is inadmissible under Federal Rule of Evidence 404.

213. Denied. Like the quotes from the other *McConnell* declarations, the quote from Republican consultant Rocky Pennington—about issue ads and gratitude—is inadmissible hearsay, irrelevant, and opinion lacking foundation. Also, the FEC does not quote the immediately preceding statement by Mr. Pennington, which is that "[o]f course, occasionally the approach these groups take is off base, and in those cases the ads may not be that helpful." FEC Ex. 33, Pennington Decl. at ¶ 11.

214. Denied. This is yet more testimony from *McConnell* that is inadmissible hearsay, irrelevant, and lacking foundation. The Congresswoman's "appreciat[ion]" of the issue ads is irrelevant. Notably, the Congresswoman does not state that she did anything improper as a result of her appreciation.

215. Denied. The quote from the *McConnell* declaration of former Representative Pat Williams is inadmissible hearsay, irrelevant, and lacking foundation. Further, there is no such thing as the "functional equivalent of a campaign contribution" under the law. Professor Wilcox, in the first sentence of the proposed fact, asserts that "candidates see these independent ads as equivalent of contributions – very large contributions." His sole support for that statement is

Representative Williams' statement. Notably, although Representative Williams is talking about issue ads, Professor Wilcox's use of "these" in the report of the page cited by the FEC actually refers to independent expenditures.

216. Denied. The statements that Mr. Johnson puts forward in this proposed fact are solely assertions that he supports with no evidence. Not only does it lack foundation, but Mr. Johnson is clearly offering expert testimony even though the FEC failed to designate him as an expert witness and obtain from him an expert report. Thus, his testimony must be disregarded.

217. Denied. This paragraph mostly consists of two quotes from Congresswoman Linda Chapin's declaration in *McConnell*; her testimony is inadmissible hearsay, irrelevant, and lacking foundation. The Congresswoman's appreciation of issue ads has nothing to do with the independent expenditures SpeechNow.org wishes to make. Moreover, it is notable that the Congresswoman does not say that her appreciation of the ads in her race changed her behavior in any way.

218. Denied. This paragraph is inadmissible hearsay; it is also irrelevant and lacks foundation. Professor Wilcox is relating, for the truth of the matter asserted, a report from a newspaper article. Furthermore, in the cited portion of his report, Professor Wilcox qualifies his statement in his report by saying that the NFIB "reportedly" spent $100,000 and that Forbes "reportedly" called Jack Farris; the FEC removes that qualification. It is not clear whether the NFIB spent its money in the form of an issue ad, express advocacy, or through some other means, such as a get-out-the-vote effort. Whether Congressman Forbes felt gratitude for the NFIB's assistance is irrelevant.

219. The proposed fact, which relays statements made in an academic article by persons not testifying in this litigation, amounts to hearsay. In addition, the proposed fact fails to

mention how some regarded Democracy Alliance as a failure that acted as an impediment to fundraising. Simpson Decl. Ex. 47, David Magleby and Kelly D. Patterson, *War Games: Issues and Resources in the Battle for Control of Congress*, in Center for the Study of Elections and Democracy Report 22-23 (2007). Finally, it is not corrupt, as a matter of law, for donors to receive information about the effectiveness of a group from activists. If there is no coordination, there can be no corruption.

220. Denied. This proposed fact is simply speculation with no factual support. As noted earlier, donors who give for ideological reasons are the largest class of donors. And "gratitude" and "obligation" are not, as a matter of law, sufficient to cause corruption. If they were, then every politician who appreciated the support he receives—i.e., all politicians—would be corrupt. If value to a candidate – rather than coordination and independence – opens the door to corruption, then things like favorable media coverage, editorial endorsements, and celebrity endorsements become corrupting.

"1. Unlimited Contributions to Independent Expenditure Groups Are More Likely to Lead to Corruption than Direct Candidate Contributions Under the Legal Limits" (¶¶ 221-225)

221. Denied. The statement put forward by the FEC is not a fact in any sense, but just a summary of other proposed facts that the FEC later puts forward. Even this summary, though, mischaracterizes the nature of the proposed facts that follow.

222. Denied. Both of the statements in this paragraph are conclusory. Both make assertions about what "always" or "almost always" is the case, but neither is supported with any evidence whatsoever. In addition, the second sentence of the proposed fact consists solely of a hearsay statement.

223. Plaintiffs admit that, if there were no contribution limits applicable to groups like SpeechNow.org, individuals could give more money to such groups, and the groups would

therefore be able to spend more money. This paragraph constitutes an admission of a point that Plaintiffs made in their proposed findings of fact.

224. Denied. All of the statements by Mr. Johnson in this paragraph are conclusory opinions and assertions without support. Only the last sentence in the quote from Mr. Johnson is about independent expenditures, and in that sentence, Mr. Johnson seems to be asserting that there is no such thing as independence, which simply denies a legal reality.

225. Denied. This paragraph simply repeats a proposed fact already stated in paragraph 176. This proposed fact is nothing more than the conclusory opinion of Mr. Johnson. Again, because the FEC has not put forward Mr. Johnson as an expert, his testimony should be disregarded.

"2. Ad Campaigns Run By Interest Groups Allow Candidates to Conserve Resources and Keep Their Hands Clean" *(¶¶ 226-240)*

226. This proposed finding is merely an assertion by Professor Wilcox. On the cited page of his report, Professor Wilcox actually makes two separate assertions that the FEC combines into one. The first assertion is that ads run by interest groups are generally more valuable than direct contributions to a campaign. For this assertion, he offers no support other than the second assertion, which is that "independent groups can make attacks on opposing candidates that would backfire if directly associated with the candidate." Professor Wilcox says that this assertion, stated as fact, is "widely understood." However, he cites only to *two* sources for his claim. The FEC quotes from those sources. One is a quote from Terry Dolan, who was the director of the National Conservative Political Action Committee (NCPAC) in 1980. The other is a quote from a book about issue—not express—advocacy in the 2002 election.

227. Denied. Professor Wilcox cites to a 1980 quote from Terry Dolan that a group like NCPAC "could lie through its teeth, and the candidate it helps stays clean." This is another

example of argument by innuendo. The FEC simply states a truism and then claims that it must have happened. The statements is also inadmissible hearsay—actually double hearsay, as it appears that Professor Wilcox obtained the quote from a source he did not cite. Of course, because independent expenditures are not controlled by candidates, all candidates are "clean" by virtue of the fact they had nothing to do with the expenditure. Thus, the quote is meaningless.

228. Denied. This proposed finding is a quote from Professor Wilcox's report, which is taken directly from a book that, as noted above, is about issue advocacy. Thus, it is inadmissible hearsay and irrelevant. Even more importantly, the quote is an opinion supported by no facts. (Neither the book nor an excerpt is included by the FEC as an exhibit.) Simply quoting that opinion in an expert's report does not transform it into a fact.

229. Denied. This paragraph is not a fact, but rather a summary of the paragraphs that follow. The FEC's argument in this and the next several paragraphs is that a candidate's silence or discouragement of independent expenditures is always evidence that she tacitly approves them, which makes no sense.

230. Denied. The proposed finding is a quote from Rocky Pennington's declaration from the *McConnell* case; it is inadmissible hearsay, irrelevant, and lacks foundation. (Although Professor Wilcox's report is cited, it just cites to the declaration.) The FEC says that Mr. Pennington is talking about "independent ads." The effect of this characterization is to make it seem that Mr. Pennington is talking about ads run by independent expenditure groups like SpeechNow.org. But the FEC omits the beginning of the quote, in which Mr. Pennington makes clear he is talking about "*party* and interest group attack ads." Further, he is clearly talking about issue advocacy by corporations that was banned by Congress, not independent expenditures. Also, Mr. Pennington says that he thinks that "in virtually every campaign,"

candidates disavow negative ads, but secretly like them. In support of this sweeping statement, he offers no factual support. Lastly, the FEC does not mention that in this same paragraph Mr. Pennington states "[o]f course, occasionally the approach these groups take is off base, and in those cases the ads may not be that helpful." FEC Ex. 33, Pennington Decl. at ¶ 11.

231. This paragraph is based on hearsay and it is irrelevant. Even if the quote were not hearsay, it would not show that candidates give a "wink and a nod."

232. Denied. This paragraph is based on double hearsay; it is a quote of an article's quote of Professor David Magleby. It is also simply a baseless assertion.

233. Denied. This paragraph is not a statement of fact, but rather a summary of the following paragraphs that mischaracterizes those paragraphs.

234. Denied. The newspaper articles that the FEC seeks to introduce are hearsay. The FEC further mischaracterizes the contents of the articles, both in this particular proposed fact and in their summary. The Chabot article states that McCain dropped his opposition not because he grew in favor of the independent ads, but due to the difficulty and time it took to denounce them. FEC Ex. 69 at 1-2. Likewise, the Rutenburg and Luo article contains no statement saying that McCain stopped opposing the advertisements out of a desire that the number of ads increase, which the FEC implies in Proposed Fact 233. FEC Ex. 70 at 1.

235. Denied. Again, the FEC attempts to put forward a proposed finding supported solely by two pieces of hearsay evidence. And, as before, the FEC further mischaracterizes its evidence to support their contentions. Despite the FEC's claims, there is nothing in either article that implies the Obama campaign sent "encouraging signals" to independent groups (unless one denotes silence alone as an encouraging signal). And neither does either article discuss how Democrat-leaning independent groups were "flush with new donations."

236. Denied. This paragraph consists of three separate quotes from three different articles. All of the articles are inadmissible hearsay – two levels at least, and in some places three. Speculation that candidates may "privately hope" that groups run ads is not evidence of corruption; neither is hope, standing alone, coordination, which is needed for there to be a possibility of corruption.

237. Denied. The FEC's statement puts forward contains one unsupported fact and one bare assertion, also unsupported by any facts. The FEC says that there was but a day's delay between the Willie Horton and Bush-Quayle ads, but does not provide any evidentiary support for the assertion. In addition, Professor Wilcox's opinion about how one ad was able to play off the other's imagery is conclusory and without support in the record. Furthermore, the fact that an ad by a candidate's campaign on a topic runs after an ad by an independent group on a topic is simply irrelevant.

238. Denied. The statement by Professor Wilcox is a conclusion for which he provides no evidentiary support.

239. Denied. This paragraph is hearsay. Moreover, Plaintiffs' counsel have been unable to find most of the quotation attributed to Mr. Moore in the cited exhibit. Beginning with "The rule of thumb," it appears, as far as Plaintiffs' counsel can tell, that the last *five* sentences are not in the exhibit. Thus, despite brackets that indicate this statement is a quotation, it is completely unreliable. Furthermore, Defendant quotes Mr. Moore as saying, "It's much better to allow the candidates themselves to do positive ads about themselves and an outside group to do *a negative ad*." (emphasis added). But the actual quotation in the proffered evidence said "issue ads that attack the congressman's voting record," not "negative ad."

240. Denied. This paragraph repeats previous proposed findings, and the statement by Professor Wilcox is a series of surmises. In discussing the value of various contributions, Wilcox provides absolutely no evidence or standard by which one could independently verify that the value of a contribution to an independent group is less than an equivalently size contribution to a candidate, or that it is more valuable than a direct contribution that is at or below the contribution limits. In any event, whether an independent expenditure is more or less valuable to a candidate than a direct contribution is irrelevant, under the law, to the issue of corruption.

"3. The Likelihood of Candidate Indebtedness Increases When the Amounts of Independent Expenditures Are High Relative to Candidate Spending" (¶¶ 241-247)

241. Denied. This paragraph is not a fact; it is a summary of the paragraphs that follow, and it draws a conclusion that is both nonsensical and that the paragraphs simply cannot support.

242. Denied. The paragraph consists of nothing but the opinion of Professor Wilcox, with no supporting evidence. Furthermore, in reaching his opinion, Professor Wilcox makes numerous assumptions, both about the marginal value of additional spending in a political campaign and the relative productivity of various types of spending in a political campaign, to the point that all that is left is a generalized irrelevancy. Lastly, Professor Wilcox did not disclose this opinion, or the factual bases that underlie it, in his report. Instead, it was the product of questioning by Counsel for Defendants and clearly amounted to rebuttal expert testimony by an expert who provided no rebuttal report. Because the opinion is beyond the scope of Professor Wilcox's report, it should not be considered by the Court.

243. The paragraph is simply an assertion about the quality of the evidence in the paragraphs that follow it. But the Defendant's attempt to cherry-pick various races to bolster its

opinion does not make that opinion true. In any event, as Plaintiffs discuss below, the Defendant's evidence does not amount to proof sufficient to support this conclusion.

244. Defendant's proposed finding of fact is most interesting for what it fails to note. On the face of the report, it does indicate that seven candidates in 2006 had individuals and groups spend more than $ 1,000,000 in independent expenditures on their behalf. But those candidates, far from crushing their electoral opponents, won in barely over half of their races (four out of seven general elections). And the total amounts spent in the various races cited varied greatly, so focusing on $ 1,000,000 is completely arbitrary. This proposed finding of fact proves nothing more than that seven candidates in 2006 had individuals and groups spend more than $ 1,000,000 in independent expenditures on their behalf.

245-46. Denied. This is nothing more than a conclusion by Clyde Wilcox that is based solely on the California FPPC "Gorilla" Report and is as unreliable as the report itself. See *supra* text preceding ¶ 168. Moreover, even assuming the data are reliable, the report itself only shows that there were "12 legislative and statewide races from January 1, 2001 through December 31, 2006, in which 'independent expenditures' accounted for more than 50% of the total campaign spending." *See* FEC Ex. 47 at 23-24. This does not amount to "many" as Professor Wilcox claims.

"IV.E. Large Donations Are a Tool Used By Donors Seeking Access and Influence Over Candidates." (¶¶ 248-266)

1. General Objections

This section is largely a rehash of claims that the FEC has already made earlier in its proposed findings of fact and evidence on which it has already relied. As a result, this section is cumulative and irrelevant. It is also irrelevant because it ignores holdings, statutes, and rules that make clear that independent expenditures do not cause corruption and may not be limited.

2. Specific Responses to Remaining Proposed Findings of Fact in Section IV.E.

248. Denied. This paragraph is a series of baseless assertions by Professor Wilcox, and it does not consist of facts, but merely summarizes other paragraphs in the FEC's proposed findings.

249. Denied. The first sentence of this paragraph is a baseless assertion by Professor Wilcox; the second is inadmissible hearsay. The last sentence is true but irrelevant.

250. Denied. This paragraph is a baseless assertion and laundered hearsay.

251. Denied. This paragraph is hearsay and it is irrelevant to the issues in this case. The fact that groups may or may not work with and communicate with each other has nothing to do with whether a group like SpeechNow.org raises concerns about corruption.

252. Denied. This paragraph consist of baseless assertions by Professor Wilcox, all of which are irrelevant.

253. Denied. This paragraph is simply hearsay and is irrelevant.

254. Denied. This paragraph is baseless, repetitive, and irrelevant.

255. Denied. This paragraph relies on hearsay and is irrelevant.

256. Denied. This paragraph relies on hearsay and is irrelevant.

257. Denied. This paragraph is simply a set of baseless assertions by Professor Wilcox, and it is hearsay.

258. Denied. This paragraph is hearsay both because the FEC is directly quoting Professor Wilcox's unsworn report, and because Professor Wilcox is simply summarizing an article written by Weissman and Hassan.

259. Denied. This paragraph is hearsay both because the FEC is directly quoting Professor Wilcox's unsworn report, and because Professor Wilcox is directly quoting an article written by Weissman and Hassan.

260. Denied. This paragraph is based on hearsay

261. Denied. This paragraph is hearsay and it is baseless.

262. Denied. This paragraph is hearsay, it is irrelevant, and the source does not support the FEC's claims. Attempting to exert influence over American policy is not corruption, it is the essence of democracy. *See NCPAC*, 470 U.S. at 498.

263. Denied. This paragraph consists entirely of hearsay.

264. Denied. This paragraph is a baseless assertion from the Wilcox Report.

265. Denied. This is a baseless assertion from the Wilcox Report.

266. Denied. This paragraph consists of hearsay and is irrelevant in any event. This is another example of argument by innuendo. The FEC simply cites something that a donor did—gave a check destined for a political party to someone who later became a candidate—and claims that it is evidence of corruption as applied to an entirely different context—that is, to individuals who make donations only to independent groups.

"IV.F. If Contributions to Groups Making Independent Expenditures Were No Longer Limited, Influence-Seeking Donors Would Quickly Give Massive Amounts." (¶¶ 267-274)

1. General Objections

This section is largely a rehash of claims that the FEC has already made earlier in its proposed findings of fact and evidence on which it has already relied. As a result, this section is cumulative and irrelevant. It is also irrelevant because it ignores holdings, statutes, and rules that make clear that independent expenditures do not cause corruption and may not be limited.

2. Specific Responses to Remaining Proposed Findings of Fact in Section IV.F.

267. Denied. This is a baseless assertion and merely a summary of other paragraphs in the FEC's proposed findings of fact.

268. This paragraph is based on the Rozen declaration, which Plaintiffs have moved to strike. Moreover, it is simply a broad statement that, because it has been stated broadly enough, is almost impossible to deny. It is therefore completely meaningless and irrelevant.

269. Admitted. But this paragraph is irrelevant.

270. Admit that the basic statement of facts, without the hyperbole, is true. But this paragraph is irrelevant.

271. Denied. This is a baseless assertion from the Wilcox report.

272. The first sentence is based on hearsay and is denied. It is true that David Keating has many responsibilities within the Club for Growth. The remaining sentences in this paragraph are hearsay.

273. Denied. "Adapting to changes in the regulatory environment" could mean anything from committing crimes to taking sensible steps to comply with new regulations. It is therefore a meaningless statement and is denied. David Keating's testimony in his deposition speaks for itself. The FEC has repeatedly mischaracterized his testimony in this case and simply cannot be relied upon to quote accurately.

274. Many donors currently prefer to give to groups that expressly advocate the election or defeat of candidates, and the FEC has not offered any evidence to determine what donors have what preferences. This is therefore a broad and vague statement that might or might not be true. It is also baseless.

"IV.G. Financers of Independent Expenditures Are Given Preferential Access to, and Have Undue Influence Over, Officeholders." (¶¶ 275-286)

1. General Objections

This section is largely a rehash of claims that the FEC has already made earlier in its proposed findings of fact and evidence on which it has already relied. As a result, this section is cumulative and irrelevant. It is also irrelevant because it ignores holdings, statutes, and rules that make clear that independent expenditures do not cause corruption and may not be limited.

2. Specific Responses to Remaining Proposed Findings of Fact in Section IV.G.

275. Denied. Senator Bumpers' statement is from his McConnell declaration which, for the reasons described in Plaintiffs' memorandum of law in support of Plaintiffs' First Motion in Limine, is inadmissible hearsay. Furthermore, Senator Bumpers is referring to issue advocacy, not independent expenditures, and is thus irrelevant. Further, he is merely speculating about how Members of Congress will behave. Notably, Senator Bumpers' declaration does not contain a statement that he was "favorably disposed" to donors to a group that ran issue ads.

276. Denied. Mr. Pennington's statement is from his McConnell declaration which, for the reasons described in Plaintiffs' memorandum of law in support of Plaintiffs' First Motion in Limine, is inadmissible hearsay. Second, the "these groups" Mr. Pennington is talking about in the cited paragraph of his declaration are "interest groups" that can, in addition to running ads, "can raise funds from their members, and in federal races this may take the form of raising federal funds ("hard money") and bundling the checks, then delivering them all together." SpeechNow.org will not give any money to candidates, so this paragraph is irrelevant.

277. Denied. No fact in this paragraph provides an example of how people who gave money to the Swift Boat Vets "apparently received favors from or access to the President."

Also, the word "apparently" renders meaningless the assertion in the last sentence; it signals that the FEC has no evidence upon which to base that assertion. Finally, having a "significant impact" on elections is not corruption; rather, it is the essence of what political speech is supposed to do.

278. Denied. This paragraph is built upon two things: inadmissible hearsay from a sampling of newspaper articles and press releases and argument by innuendo. The FEC is suggesting that Mr. Pickens had dinner with Queen Elizabeth II ,got a post office named after him in his hometown and got the President to deliver the commencement speech at Oklahoma State University because he gave money to the Swift Boat Veterans. Of course, suggest is all it can do because it has no evidence—just its *post hoc ergo propter* hoc reasoning. Of course, one could just as easily suggest, without evidence, that he had dinner with the Queen because he is regularly invited to state dinners, that the post office was named after him because he is hometown's most famous person, and that George Bush gave the speech at Oklahoma State because he wanted to go somewhere close to Texas. But innuendo is not evidence; neither is this paragraph. Finally, the cited newspaper article is not in the table of contents of the FEC's exhibits.

279. Denied, again the FEC resorts to argument by innuendo. According to the FEC, Mr. Fox was nominated to an ambassadorship, so that must have been because of the money he gave to the Swift Boat Vets because, well, that just has to be the case. The FEC cites a White House press release as evidence that Mr. Fox had no foreign policy experience, but the release does not establish that; it does not purport to provide extensive biographies of any of the nominees it lists. The newspaper article cited at the end of the paragraph is inadmissible hearsay; furthermore, the reason the story gives for the withdrawal of Mr. Fox's nomination is

because Senate Democrats, particularly Senator Kerry, resented his contribution to the Swift Boat Vets—not because he was unqualified for the post. The quote in the last sentence about "big-money contributors" being rewarded with ambassadorships highlights that Mr. Fox was a fundraiser who contributed money to the Republican Party and President Bush's campaign. Of course, SpeechNow.org will not give money to parties or candidates.

280. Denied. This paragraph relies wholly on inadmissible hearsay from a series of newspaper articles. All of those articles make clear, by the way, that the reason Senator Kerry and other Democrats opposed the nomination was because they resented his role as a donor to the Swift Boat Veterans. The fact that Senator Kerry—the target of the Swift Boat Veterans' ads –condemned the recess appointment is unsurprising. Even if this paragraph were not inadmissible hearsay, the fact that Senator Kerry alleged that Mr. Fox was being rewarded would not be evidence of anything other than that he made an allegation. The same is true in regard to Senator Edwards.

281. Denied. The first sentence implies, without evidence, that the only reason Mr. Fox was appointed was because of his donation to the Swift Boat Veterans. The rest of the paragraph is, again, argument by innuendo. The FEC says the quote in the last sentence is from "one observer" instead of simply disclosing that the quote is from a representative of a group called the Center for Governmental Studies, a group that, according to its website (www.cgs.org), favors the public financing of campaigns. In any event, his quote is double, and inadmissible, hearsay.

282. The first sentence is another example of argument by innuendo. The Club for Growth has run independent expenditure ads in the past and it sometimes holds conferences in which its members can meet with candidates. Put them both together in one sentence, add the

word “access”, and the FEC has an instant argument. But the FEC’s suggestion that the Club’s independent expenditures had anything to do with the conferences it describes in this paragraph is a baseless assertion. Moreover, the fact that Club for Growth hosts conference at which Members of Congress brief Club members about events in Congress is not evidence of corruption. Nor is it evidence of “access” to that are attended by its members and Members of Congress is irrelevant. This paragraph is irrelevant to the issues in this case.

283. This paragraph uses the term “support” in a way that could mean either financial support or political support. It is not clear from Mr. Young’s testimony whether he meant the candidates asked for financial support or just for votes. That said, Plaintiffs admit the facts in this paragraph.

284. Admitted.

285. Admitted.

286. Most of the facts in this paragraph are true, but one is not. Stating that David Keating “believed that the persons who donated the most to Club for Growth received an invitation” implies that only those donors who gave the most receive an invitation. But here is what Mr. Keating said:

> Q. What's the range of people that the conference calls -- the smallest to the largest?
> A I'm not sure what the smallest, because I haven't done the data selections lately. It may go down to as low as $100. I wouldn't want to be quoted on the amount, because I don't know the exact amount. And the largest -- I would imagine the person, whoever that is, that's given the most amount of money got an invitation. Whether they joined the call, I wouldn't be able to recall that.

Keating Dep. at 106:14-107:1.

"IV. H. Large Contributions for Independent Expenditures Can Influence Legislative Votes or Other Official Actions, and Thereby Pose a Danger of Actual Quid Pro Quo Arrangements." (¶¶ 287-314)

1. General Objections.

This section is based on the false premise that if independent expenditures influence legislative votes, that is *quid pro quo* corruption. But the Supreme Court has made clear the fact that legislators may alter or reaffirm their positions as a result of independent expenditures "can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view." *NCPAC*, 470 U.S. at 498. Furthermore, as the Supreme Court held in both *NCPAC* and *Buckley*, there is no *quid pro quo* corruption unless there is coordination; thus, as a matter of law, the independence of an expenditure prevents it from being corrupting. *See NCPAC*, 470 U.S. at 498 ("[T]he absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."); *Buckley*, 424 U.S. at 46 (same).

Moreover, the FEC's alleged "evidence" of corruption involves examples, not of independent expenditures, but of coordinated expenditures and related illegal activity. Conveniently, it often omits facts that demonstrate the existence of coordination or simply fails to note that the events it describes plainly amount to coordination. Demonstrating that some people have violated the coordination rules does not demonstrate that others who make independent expenditures will engage in coordination. There is legal conduct and there is illegal conduct. We do not ban the former because the latter exists. If we did, jaywalking would be a justification for not allowing anyone to cross the street. And the fact that some have used speech to incite violence would justify banning all public demonstrations. Here again, the FEC is

simply blurring the distinction between independence and coordination, and engaging in more argument by innuendo. This section, like many of the previous sections, amounts to inadmissible character or propensity evidence and should be disregarded. *See supra* § E.1.

Finally, Plaintiffs have moved to strike the declaration of Kevin Yowell, and if the Court grants that motion, the proposed facts that are based on that declaration should be disregarded as well.

2. Findings of Fact to Which Plaintiffs Do Not Object In Section IV. H.

Without admitting to their relevancy or adopting the FEC's characterizations of the facts, Plaintiffs admit that the facts contained in the following paragraphs are true: 304 and 305.

3. Specific Responses to Remaining Proposed Findings of Fact in Section IV. H.

"1. A Group with an Interest in Gaming Issues Attempted to Bribe Former Congressman Snowbarger by Signaling That They Would Conduct an Independent Spending Campaign on His Behalf" (¶¶ 287-297)

287. Denied. This paragraph is not a statement of facts, nor even a summary of the facts that appear in the subsequent paragraphs in this section. Instead, it is merely an unsupported inference that the FEC draws from its descriptions of situations that have nothing to do with the lawful independent expenditures that Plaintiffs wish to make. As such, it is not a fact, it lacks foundation, and (like all the paragraphs below) is irrelevant.

288. Denied. This paragraph is based on a declaration from Kevin Yowell and a news article from Ingrams Magazine. The latter is clearly inadmissible hearsay. Yowell's assertions about the statements made by representatives of the tribe are also inadmissible hearsay. Further, while Plaintiffs do not dispute that the Wyandotte Tribe tried to get Congressman Snowbarger to change his vote, there is no foundation for the claim that this attempt is an "example of

independent expenditures providing a vehicle for groups to try to make *quid pro quo* arrangements with elected officials." Any expenditure made by the Tribe would have been a *coordinated*, not independent, expenditure pursuant to 2 U.S.C. § 441(a)(7)(B) and 11 C.F.R. § 109.21. Furthermore, the Wyandotte Tribe's offer to buy the Congressman's vote was certainly illegal. *See* 18 U.S.C. § 203 ("Whoever . . . knowingly gives, promises, or offers any compensation for any . . . representational services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was . . . a Member [of Congress] . . . shall be subject to the penalties set forth in section 216 of this title."). Had the Congressman accepted the offer, he would have been in violation of 2 U.S.C. § 441i(3), which prohibits a federal candidate's direction of funds unless those funds (treated as contributions because they are coordinated) are subject to contribution limits. This case is not about coordinated expenditures; nor is it about breaking criminal law. If SpeechNow.org coordinates its expenditures with a candidate, it will have to abide by the contribution limits. If it attempts to bribe a Member of Congress, it will be breaking the law. But SpeechNow.org proposes to do neither of these things, nor does the FEC even allege that it will. Thus, all of the paragraphs regarding the Snowbarger incident (paragraphs 288-297) are irrelevant.

289. Denied. This paragraph relies on the Yowell declaration and inadmissible hearsay.

290. Denied. This paragraph relies on the Yowell declaration and inadmissible hearsay evidence regarding the truth of matters set forth in a newspaper article in the Kansas City Star.

291. Denied. This paragraph relies on the Yowell declaration and inadmissible hearsay contained in the Ingrams Magazine article. Moreover, the Yowell declaration states that

Congressman Snowbarger opposed the bill in question for specific reasons, but the stated reasons are hearsay.

292. Denied. Defendants' reliance on several newspaper articles—all of which constitute inadmissible hearsay—should be disallowed. Plaintiffs object to the characterization of the direct mail and phone campaign the tribe proposed to conduct in support of Congressman Snowbarger's reelection as "independent" spending. Although the Yowell declaration characterizes the fax sent by the tribe as proposing an "independent spending" campaign, the fax itself (which is attached to the Yowell declaration as an exhibit) does not characterize the campaign as independent. Indeed, the fact that the fax was directed to a Congressman supports the opposite inference: that the proposed spending would be coordinated. Moreover, had the Congressman assented to the campaign, both FECA and the FEC's regulations make clear that any expenditures would have been coordinated as a matter of law. Accordingly, expenditures by the tribe would have been in-kind contributions to the Congressman's campaign and thus subject to contribution limits. Indeed, Counsel for Congressman Snowbarger's election committee, in a letter to the FEC attached to Yowell's declaration, clearly recognized that the expenditures proposed by the tribe *would not* be independent. *See* Exhibit 6 of Yowell Declaration ("This proposed 'independent expenditure' *cannot reasonably be seen to be independent* of the Committee, where both the Committee and the candidate know of its purported existence prior to its initiation.") (emphasis added). And he was clearly concerned that the tribe's polling expenses would be treated as a contribution to the Congressman. *See id*.

Furthermore, the Yowell declaration summarizes the contents of the poll and memo put together by a pollster, but does not include either. In any event, Yowell's representation of the contents of the poll, the memo, and the letter from C.J. Zane are inadmissible hearsay. The only

takeaway from this paragraph is that the tribe proposed a coordinated direct mail and phone campaign if the Congressman supported a bill that would get the tribe a casino, and that the proposal, if executed, would have been coordination.

293. Denied. Mr. Yowell's declaration quotes two statements from documents that were included within the fax sent to the campaign, but it does not actually include those documents as exhibits to Mr. Yowell's declaration. Those statements are also inadmissible hearsay. Furthermore, the first quote makes it clear that the tribe was proposing a coordinated expenditure campaign, not an independent one: "*Should the Congressman end up supporting this proposal . . . .*" (emphasis added by FEC). Although Mr. Yowell characterizes the proposed spending by the tribe as independent, he is not a lawyer, he obviously knows nothing about independent expenditures, and he offers nothing to support that characterization. In any event, as noted above, whether an expenditure is independent or coordinated is determined as a matter of law, not by the unsupported characterization of a witness who may not understand what he is talking about.

294. Denied. This paragraph is based on the Yowell declaration, and the FEC relies on newspaper articles that contain inadmissible hearsay. Mr. Yowell's summary of Congressman Snowbarger's remarks is also inadmissible hearsay.

295. Denied. This paragraph is based on the Yowell declaration, and the FEC once again relies on the Ingrams Magazine article, the contents of which are inadmissible hearsay.

296. Denied. Mr. Yowell's characterization of the tribe's offer as one to make an independent expenditure is, for the reasons stated above, without foundation and is contradicted by the statement of the counsel for Congressman Snowbarger's reelection committee (an actual lawyer). Mr. Yowell's assertion that a corrupt Congressman would not risk accepting a bribe of

only $5,000 or $6,000 is pure speculation and not grounded in personal experience. It is also irrelevant. Also irrelevant is the fact that independent expenditures can be greater than $5,000 or $6,000.

297. Denied. Mr. Yowell's opinion that Congressman Snowbarger's public rejection of the tribe's illegal offer cost him reelection is just that—an opinion, not a fact supported by any evidence. Furthermore, it is irrelevant. Mr. Yowell's statement that the campaign proposed by the tribe "might have made the difference in the race had it gone forward" is also an opinion (and a qualified one, at that) based on pure speculation. Furthermore, that a coordinated expenditure campaign could have helped Congressman Snowbarger is irrelevant to the issue of whether unlimited contributions to groups that only make independent expenditures cause *quid pro quo* corruption. Bribing voters would no doubt have helped the Congressman get elected as well, but that would be just as irrelevant to this case as the information in Mr. Yowell's declaration.

"2. Former Wisconsin Senate Majority Leader Chvala Extorted Funds In Return For Legislative Action, Including Funds for Purportedly Independent Campaign Spending." (¶¶ 298-308).

In this subsection, the FEC continues its pattern of characterizing as a fact a conclusion that it wishes to draw from those facts, and it continues its pattern of using the actions of those who have done something wrong to smear the intentions of those who have not. It is the FEC's opinion, not a fact, that the actions of former Wisconsin State Senator Charles Chvala—an admitted criminal—demonstrate that large contributions to groups doing purportedly independent campaign work pose a danger of *quid pro quo* arrangements for legislative actions." In fact, as demonstrated below, the alleged "independent" expenditures that Chvala made were actually coordinated and thus violated the law. The FEC obviously recognizes this, which is the reason it uses the word "purportedly" to describe those "independent" expenditures. This makes the FEC's reliance on the Chvala example not only irrelevant, but comical. Who "purported"

that the expenditures were "independent"? Chvala, of course. The FEC thus hopes to use as evidence the fact that a criminal described his expenditures as "independent" when they were not independent, to prove that those who are not criminals are only describing their expenditures as "independent" when, in fact, they are not independent. From this, the FEC concludes that independent expenditures might cause corruption. The FEC's position is like saying that because President Nixon famously proclaimed, "I am not a crook" we should be concerned that all Presidents might commit crimes.

In any event, as described below, the FEC conveniently omits facts that conclusively demonstrate that the expenditures were coordinated, and that Chvala's actions were illegal. Chvala was charged with "extortion, misconduct in office and violations of various campaign finance laws." *State v. Chvala*, 2004 WI App. 53, P5 (Wis. Ct. App. 2004). Accordingly, the actions of Chvala are irrelevant to this case because they do not demonstrate that large contributions to independent expenditure groups that do nothing wrong pose a danger of *quid pro quo* corruption. Indeed, if Chvala, himself, were brought up on new charges of extortion tomorrow, the prosecution in the case could not introduce evidence of his past crimes in order to prove that his actions conform to his alleged "character" as an extortionist. *See* Fed. R. Evid. 404(b). Yet the FEC wants to use Chvala's example to prove that *other* individuals who have done nothing wrong have the "character" of lawbreakers and will likely act consistently with an alleged propensity toward corruption. The information in the paragraphs below concerning Chvala (paragraphs 298 through 308) is entirely irrelevant to this case. In addition, these paragraphs rely on the declaration of Michael Bright, which Plaintiffs have separately moved to strike.

298. Denied. This paragraph contains no facts; it only summarizes other irrelevant paragraphs.

299. The information in this paragraph is irrelevant and relies on newspaper accounts, which are hearsay. However, Plaintiffs do not dispute the statements about Chvala's career and the corruption charges filed against him that are not hearsay.

300. Denied. Plaintiffs object to the language in this paragraph that refers to the groups to which Chvala encouraged people to give money as "independent" or making "independent" expenditures. As the criminal complaint filed against Chvala makes clear, Chvala controlled groups such as Independent Citizens for Democracy (PAC) ("ICD-PAC") and Independent Citizens for Democracy-Issues ("ICD-Issues"). *See, e.g.*, FEC Ex. 90, Criminal Complaint, ¶¶ 130-132, 137, 141-81, 210, 238. The complaint also makes clear that Chavala coordinated the activities of those (and other) groups with the campaigns of his legislative allies. *See, e.g., id.* at ¶¶ 130-40, 237, 241. But strangely, in this and other paragraphs where it summarizes portions of the criminal complaint, the FEC never mentions either of these crucial facts, which demonstrate unequivocally that there was absolutely nothing independent about the groups to which Chvala steered money or their expenditures.

At best, these omissions are oversights; at worst, they are a disingenuous attempt by the FEC to brush away facts that clearly demonstrate the irrelevance of Chvala's situation to this case. The notion that SpeechNow.org must not be allowed to accept unlimited contributions to make independent expenditures because others, acting criminally, have made coordinated expenditures and engaged in *quid pro quo* corruption is absurd. One might as well argue that no one should be allowed to become Majority Leader because some majority leaders might, like Chvala, abuse their power.

Plaintiffs do not object to the description of Senator Chvala's criminal activity in the complaint filed against him. However, they do object to characterizations, contradicted by facts, about the "independence" of groups he controlled and their spending.

301. Denied. This paragraph contains inadmissible hearsay about statements made by Chvala, and it relies on the declaration of Michael Bright.

302. Denied. The FEC's use of inadmissible hearsay in the form of newspaper articles continues in this paragraph, as does its incorrect assertion that the groups to which Chvala directed funds were "independent." The only actual fact is that Chvala wielded tremendous power in the Wisconsin State Legislature and that that power allowed him to extort money from individuals with interest in legislation pending before that body.

303. Denied. The FEC's omissions of significant facts continue in this paragraph. First, as noted above, it is clear that ICD-PAC was controlled by Chvala and thus not an independent group. Second, it is clear that Chvala coordinated the activities of that group with the reelection campaign of Senator Meyer. FEC Ex. 90, Criminal Complaint at ¶¶ 130-140. Thus, as a matter of both fact and law, the expenditures that it made were not independent. The FEC, citing the criminal complaint filed against Chvala, states that a notarized oath by the treasurer of the group stated that the group would not act in concert, cooperation, or consultation with candidates. It appears that the FEC, based on that sentence, wants to create an inference that the group was actually independent. Any such inference is false: the FEC neglects to cite the portion of the complaint stating that the oath was false, and that ICD-PAC did indeed act in concert, coordination, or consultation with Senator Meyer's campaign. *See id.* at ¶ 149. The only fact to be derived from this paragraph is that ICD-PAC spent more than $100,000 in

coordinated expenditures and that it received the funding to do so from Chvala's illegal extortion scheme.

306. Plaintiffs do not object to the statement of facts in this paragraph (despite the use of inadmissible hearsay from a newspaper article), except that the expenditures at issue were not "independent." They were clearly coordinated.

307. Denied. Independent Citizens for Democracy-Issues, Inc. ("ICD-Issues") was, as the title suggests, a group that purportedly made issues advertisements, not advertisements with express advocacy. Thus, the discussion of the group is even more irrelevant than the rest of the Chvala saga to the issue of whether independent expenditures can cause corruption. Further, any "appearance of corruption and *quid pro quo* arrangements" was not the result of independent expenditures. (As noted above in the general objections, the FEC's use of the concepts of corruption and its appearance is untethered from their actual legal meanings.) Plaintiffs admit to the truth of the remaining facts, minus the FEC's characterization of them.

308. The FEC leads off this paragraph with a statement that lobbyists whose clients made contributions offered testimony illustrating the potential for *quid pro quo* arrangements via an independent expenditure group. Once again, the FEC mischaracterizes the facts. The criminal complaint upon which it relies clearly recognizes that ICD-Issues was not independent. *See*, *e.g.*, FEC Ex. 90, Criminal Complaint at ¶ 181.

"3. Additional Incidents Further Illustrate the Danger of Large Contributions for Independent Spending Influencing Official Action or Leading to Quid Pro Quo." (¶¶ 309-314)

309. As an initial matter, this paragraph contains five levels of inadmissible hearsay: Professor Wilcox uses, for its truth, a statement allegedly made by Senator Mitch McConnell, in which he allegedly related about what tobacco industry leaders had said about mounting a television campaign. Senator John McCain purportedly heard this statement at a meeting; his

repetition of that statement was reported in a book; and the article's repetition of McCain's repetition of that statement is found in Professor Wilcox's unsworn report. Even if the statement was not inadmissible hearsay, the FEC still does not explain its relevance. Putting aside the fact that the tobacco industry is composed of corporations, which SpeechNow.org is not, the FEC cites no facts about whether the ads actually were independent expenditures, whether they were made by independent expenditure groups and, if so, whether the groups accepted contributions over the relevant contribution limits. There are no facts at all about *quid pro quo* corruption. The quote from the Wilcox report, which is a quote from a Wall Street Journal article that the FEC does not include in its exhibits, is not only inadmissible hearsay by a reporter, but it states nothing about whether there was actually *quid pro quo* corruption.

310. This paragraph is based on a declaration from the *McConnell* case that, for the reasons more fully described in the accompanying First Motion in Limine (primarily that they are inadmissible hearsay), simply cannot be admitted in this case. The statement about what the unnamed interest group offered would be inadmissible hearsay even if the full declaration was admissible. Furthermore, although it is not clear, it appears from the full context of the cited paragraph from the Chapin declaration—omitted by the FEC from its proposed finding—that the support being offered by the unnamed interest group, was actually an offered monetary contribution to a campaign being run by the Florida State Democratic Party—not support in the form of independent expenditures. *See* FEC Ex. 68, Chapin *McConnell* Decl. at ¶ 6, ("The Florida Women's Vote Project of Emily's List provided significant funding for the Democratic coordinated campaign [run by the Florida State Democratic Party] described above. At least one other interest group offered to provide campaign support if I would agree to vote a certain way on their issues.").

311. Denied. This paragraph, based on the declaration of Mr. Yowell about another situation involving Congressman Snowbarger, is no more relevant than the other paragraphs concerning the Congressman. First, Mr. Yowell's statement about what the interest group told him in regard to a change in Congressman Snowbarger's position on term limits is inadmissible hearsay. Congressman Snowbarger's statement about the interest group's offer—that he expressed it would be wrong to accept the group's help—is also inadmissible hearsay. Also, had Mr. Snowbarger assented to an expenditure campaign by the interest group by changing his position, the expenditures would, for the reasons described above, have been coordinated—not independent. Finally, for the same reasons that the offer by the Wyandottes was illegal and that the Congressman would have broken the law had he accepted it, the same is true of the offer by the unnamed interest group. SpeechNow.org will not engage in coordinated expenditures and has no intention of breaking the law, so this paragraph is irrelevant.

312. Denied. This paragraph lacks foundation. In it, the FEC quotes from the declaration of the Chairman of the California Fair Political Practices Commission, Ross Johnson. Mr. Johnson states that California legislator Bonnie Garcia benefitted from a large independent expenditure from the California Peace Officers Association and that, afterwards, she tried to get a bill enacted that would have helped those officers obtain a raise. When asked at his deposition to provide evidence in support of his claim that Ms. Garcia's actions resulted from the independent expenditure made on her behalf, Chairman Johnson conceded that he had none. FEC Ex. 10, Johnson Dep. at 79:1-4 ("Can I unscrew the top off [Garcia's] head and know why she did what she did? No. Can I prove, therefore, that [Garcia] was unduly influenced by a huge independent expenditure? No, I cannot."). Thus, his opinion is based not on facts, but solely

upon speculation based on the logical fallacy of *post hoc ergo propter hoc*. Accordingly, the Chairman's opinion cannot be the foundation of actual evidence in this case.

313. This paragraph, which quotes the opinion of Derek Cressman, the Government Watchdog Director of Common Cause about the effect of "big money independent expenditures," is nothing but inadmissible hearsay. Mr. Cressman is not a witness in this case; he has not supplied a declaration in order to provide testimony under oath. Instead of seeking a declaration from him, the FEC just pulled a quote from a copy of testimony that Mr. Cressman offered at a hearing of the California Fair Political Practices Commission. Furthermore, even if Mr. Cressman's words were not inadmissible hearsay, he appears to be offering an expert opinion based on specialized knowledge rather than a lay opinion. Thus, if the FEC wanted to use his testimony, it should have timely designated him as an expert in this case. Even if the testimony were lay testimony, Mr. Cressman's participation as a witness in this case was not disclosed in the FEC's initial or supplemental disclosures. And even if he were a properly designated expert or lay witness, the FEC offers no factual findings to serve as the basis of Mr. Cressman's statements of opinion. Finally, because he was not designated as a witness, Plaintiffs never had the chance to obtain from him a specific definition of "undue influence" or to ask him about this specific case.

314. This paragraph extensively quotes from the report of Professor Wilcox, which simply offers up conclusory opinions based on situations that, as described above, have nothing to do with independent expenditures or groups that make them. Accordingly, his opinions simply lack foundation and are irrelevant.

"IV.I. Large Contributions for Independent Expenditures Create an Appearance of Corruption." (¶¶ 315-334)

1. General Objections.

The FEC leads off this section with two conclusory opinions about the "appearance of corruption" that have no foundation in actual facts. The FEC then tries unsuccessfully to bolster these opinions with three things: (a) a tale of lapsed judicial ethics in West Virginia; (b) an inadmissible opinion poll; and (c) an argument that current law does not contain an expansive enough definition of coordination. For the reasons discussed below, that attempt is unsuccessful and provides no relevant evidence for this Court.

a. Lapsed judicial ethics in West Virginia: The FEC first argues that independent expenditures made in a 2004 judicial election in West Virginia created an appearance of corruption; the paragraphs in the section are mostly based on a declaration by Justice Larry Starcher of the West Virginia Supreme Court—a declaration that both the Justice and the FEC refused to provide to Plaintiffs until after he had been deposed, despite the fact that the declaration was finalized before that deposition. FEC Ex. 16, Starcher Dep. at 40-44, 60. According to Justice Starcher, independent expenditures funded by the head of Massey Energy Co., which had a case pending before the West Virginia Supreme Court, resulted in the election of Justice Brent Benjamin and resulted in the "appearance of corruption." But, as explained below, the saga Justice Starcher describes is not about campaign finance law; it is instead about how a judge—who, unlike a legislator or governor, is supposed to a neutral arbiter—failed to act ethically by recusing himself from a case.

The FEC and Justice Starcher's declaration use the term "appearance of corruption" in reference to Justice Benjamin, but, in his deposition, Justice Starcher does not use that term.

When he uses the term "corrupt" in reference to Justice Benjamin, he makes it is clear that he is not referring to *quid pro quo* corruption, but rather Justice Benjamin's negative impact on the confidence of people in the justice system—specifically a decline in the belief of the judiciary's fairness and impartiality. FEC Ex. 16, Starcher Dep. at 163:23-164:16. This is significant because Justice Starcher is not talking about the "appearance of corruption" as defined in *Buckley*—i.e., the appearance of *quid pro quo* corruption. Instead, he is talking about a "higher" ethical standard that no legislator or executive branch official has to meet when running for office—the appearance that, on all issues, he will be fair and impartial. FEC Ex. 16, Starcher Dep. at 106:10-17. Legislators and governors, on the other hand, are free to take positions on controversial issues before deciding them. Indeed, they are supposed to do so. *See NCPAC*, 470 U.S. at 498. As Justice Starcher recognized, nothing prevents these officials from being advocates for a position when they are running for office; judges, on the other hand, are not supposed to do so. FEC Ex. 16, Starcher Dep. at 104:1-106:17. As Justice Starcher notes, that is forbidden by a judicial canon that finds no equivalent in the other branches. *Id*.

Furthermore, as Justice Starcher recognizes, the issue of whether Justice Benjamin's failure to recuse himself violates due process is currently before the U.S. Supreme Court. *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008), cert. granted, __ U.S.L.W. __ (U.S. Nov. 14, 2008) (No. 08-22). Indeed, the motion for recusal of Justice Benjamin that the FEC includes as an exhibit argues that an "appearance of unfairness" constitutes a lack of due process. FEC Ex. 104, Motion of Respondent Corporations for Disqualification of Justice Benjamin at 5.

Justice Starcher is absolutely correct that when it comes to fairness and impartiality, judges are held to a "higher" standard than a legislator or governor. (The standard is higher

because it is possible to not have appeared to receive a *quid pro quo* but to still appear to be unfair or partial.). It is this higher standard, and not "the appearance of corruption" to which Justice Starcher is referring when he is speaking for himself, outside the construct of a declaration prepared for him by the FEC that (1) was not prepared on the basis of an interview with him, FEC Ex. 16, Starcher Dep. at 31:6-32:16, and (2) that he hurriedly reviewed and signed, *Id*. at 36: 7-8 ("I said to [my senior law clerk], I said, oh, we don't have time to change [the declaration prepared by the FEC's counsel]."). Comparing the appearance of a judge's ability to be fair and impartial to a politician's avoidance of the appearance of corruption is, as established by Justice Starcher's testimony, an apples-oranges comparison. Given that fact, this section of the FEC's proposed facts is simply irrelevant. It is further rendered irrelevant by the fact that, as Justice Starcher conceded at his deposition, had Justice Benjamin simply recused himself from the Massey matter, that would have "absolutely" removed the appearance of impropriety. FEC Ex. 16, Starcher Dep. at 144:9-20. Thus, according to Justice Starcher, the but-for cause of any appearance of impropriety was not Mr. Blankenship's independent expenditures, but Justice Benjamin's failure to recuse himself from the Massey case in light of those expenditures. This conclusion is reinforced by the fact that, as Justice Starcher noted, Justice Benjamin has voted *against* Mr. Blankenship's company in other cases. FEC Ex. 16, Starcher Dep. at 164:6-7. Justice Starcher makes no allegation that Mr. Blankenship's independent expenditures caused an appearance of impropriety in those cases. The FEC fails to mention any of this in its proposed facts.

Finally, the proposed statement of facts regarding Justice Benjamin relies on a poll that, for the reasons more fully described in the memorandum of law in support of Plaintiffs' First Motion in Limine, is inadmissible hearsay. Even if it were not, as more fully described below, it

is clear that the poll was asking about the appearance of lack of fairness and impartiality, not the appearance of corruption. For these and the other specific objections noted below—e.g., statements based on inadmissible hearsay and lacking foundation—the Court should not adopt this section of the FEC's proposed statement of facts, all of which are irrelevant.

b. Inadmissible poll results: Second, in paragraphs 333 through 336, the FEC relies on a 2008 Zogby poll it paid for to try to demonstrate that independent expenditures create the appearance of corruption. But, for the reasons noted in the Memorandum of Points and Authorities in Support of Plaintiffs' First Motion in Limine, that poll and the declaration through which it is introduced are inadmissible. The remaining statements in the paragraphs about other polls are likewise both inadmissible and irrelevant, as they discuss topics that are simply not at issue in this case.

c. An argument that the definition of "coordination" is not broad enough: In paragraphs 342 through 344, the FEC tries to demonstrate the need for contribution limits "because coordination is inherently very difficult to police and candidate campaigns are often involved with 'independent' spending below the level of involvement that coordinates 'coordination' within the meaning of the law." The FEC continues to try to marshal facts against the concepts of coordination and independence, and to argue that, because some people may illegally coordinate their expenditures, contribution limits must be placed on everyone.

2. Findings of Fact to Which Plaintiffs Do Not Object In Section IV.I.

Without admitting to their relevancy or adopting the FEC's characterizations of the facts, Plaintiffs admit the facts contained in the following paragraphs are true: ¶¶ 318-322, and 324.

3. Specific Responses to Remaining Proposed Findings of Fact in Section IV.I.

315. Denied. This paragraph is based on two quotes from the Wilcox report. For the reasons explained in Plaintiffs' Second Motion in Limine, that report is inadmissible. Furthermore, the first quote is an opinion by Wilcox that "[i]f the public believes that politicians give favors to large donors, then trust in the political system is undermined. The appearance of corruption has a corrosive effect on the public's ability to judge whether their trust in government is warranted." Cited for this statement are an article and a book by philosophers who (1) are not relying on actual data and (2) are not using the legal definition of corruption. *See* FEC Ex. 18, Wilcox Dep. at 95:11-96:21. This conclusory statement is not a fact; it is simply lacking any foundation. The second statement is that allowing unlimited contributions to entities making independent expenditures "will likely contribute to the perception of corruption by the public" is based on two inadmissible opinion polls. Both of them are discussed below. *See infra* ¶¶ 328-341.

316. Denied. This paragraph simply quotes from the deposition of Ross Johnson, Chairman of the California Fair Political Practices Commission. (The paragraph erroneously cites to Mr. Johnson's declaration as the source of the quote.) The quotation is a sweeping opinion that Chairman Johnson offered with absolutely no factual foundation. This opinion is not a fact, or even an opinion that is based on personal experience. As the surrounding context makes clear, the opinion is based on Mr. Johnson's personal belief as to what constitutes "undue influence" and how, as a matter of theory, that relates to contributions to candidates and independent expenditures. This opinion is clearly offered as the opinion of an expert, not an actual fact that is being reported by a lay witness. As discussed more fully in Plaintiffs' First Motion in Limine, Chairman Johnson is an expert witness, but, because the FEC failed to

designate him as one in this matter, his testimony must be excluded. Regardless of whether the opinion is lay or expert, the statement is not rooted in facts or data. Indeed, if this statement is admissible, then Plaintiffs should be allowed to offer as fact the opinion of anyone who wants to make an argument that independent expenditures do not cause the appearance of corruption, regardless of whether any support for that opinion is offered.

"1. A Coal Company Executive's Contributions for Independent Expenditures In a 2004 West Virginia Supreme Court Race Illustrate the Appearance of Corruption. (¶¶ 317-332)

317. Denied. The statement that "independent expenditures in a 2004 judicial election in West Virginia created an appearance of corruption" lacks foundation. Although independent expenditures played a role in the election of Justice Benjamin, the facts, as shown above, demonstrate that Justice Benjamin's refusal to recuse himself from a case was the source of public concern about impropriety. Furthermore, this and the following paragraphs are irrelevant because, as the witness upon whose testimony they are based—West Virginia Supreme Court Justice Larry Starcher—noted, judges have a much different role than members of the other two branches of government, and judicial elections are different than legislative or executive branch elections.

323. Plaintiffs do not object to this statement of fact, except that statements that an ad was "notorious" and that all of the ads that were run were misleading and untruthful lack foundation. These statements are based solely on the opinion of Justice Starcher, who does not offer a factual basis for that opinion. (The pages of the Mot. Of Resp't Corporations for Disqualification of Justice Benjamin, which the FEC cites as additional source material for the paragraph, also does not speak to these statements.)

325. Denied. Plaintiffs agree that Justice Benjamin defeated Justice McGraw in the general election. There is no evidence offered in the form of opinion or exit polls, as to whether

that result was "largely due" – to say the least, an imprecise term – to independent expenditures funded by Mr. Blankenship. Justice Starcher's statements are quite colorful—e.g., "I said publicly that seeing a seat bought makes me want to puke . . . ."—but they are not facts, just his characterization of the outcome of the election. In any event, Plaintiffs are willing to stipulate that the independent expenditures funded by Mr. Blankenship played a role in Justice Benjamin's victory.

326. Plaintiffs agree with the summary of events, although they note that it is partially based on inadmissible hearsay found within a newspaper article on LegalNewsline.com.

327. Denied. This is a summary and mischaracterization of the proposed findings that follow.

328. Denied. The poll results are clearly inadmissible hearsay evidence. In order to submit this or any poll into evidence, the FEC must, as explained in Plaintiffs' First Motion in Limine, do so through an expert witness in this case. But instead of doing that, it simply relies on—in addition to newspaper articles that are clearly inadmissible hearsay—an affidavit by the pollster *from another case* that was attached to a motion—specifically *Caperton v. A.T. Massey Coal Co.*, No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008). For the reasons discussed in Plaintiffs' First Motion in Limine, affidavits from other cases are plainly inadmissible hearsay. Further, the poll does not ask about "corruption," but rather about fairness and impartiality. As noted above, corruption and impartiality, as well as the appearance of each, are completely different things. For that reason, Professor Wilcox's assertion (relying solely on an affidavit by the pollster) that the poll results are "a clear sign of corruption" lacks foundation and is irrelevant.

329. Denied. Plaintiffs agree that people have expressed doubts about Justice Benjamin's ability to be impartial in the *Massey* case. Also, Mr. Blankenship made independent expenditures supporting Justice Benjamin's election. Justice Starcher says that "[t]he pernicious effect of Mr. Blankenship's bestowal of his personal wealth has created a cancer in the affairs of the Supreme Court." If Justice Starcher is attempting, in colorful terms, to say that the public has no confidence in the West Virginia Supreme Court, he offers no evidence to support that assertion. Furthermore, as noted above, Justice Starcher conceded at his deposition that any appearance of impropriety would have "absolutely" been removed by Justice Benjamin's recusal from the case. Thus, any "cancer" on the affairs of the court – whatever that means – was caused by Justice Benjamin's failure to recuse himself.

330. Denied. To the extent the FEC is trying to characterize independent expenditures as contributions to candidates, it is wrong as a matter of law, for the reasons discussed above. *See supra* Part I.A. For the reasons stated in the general objections for paragraphs 317 through 332, there was not an "appearance of corruption" because of unlimited contributions; rather, there was an appearance of impropriety because of Justice Benjamin's failure to recuse himself. Justice Starcher's opinion on this topic is thus lacking in foundation and contradicted by his deposition testimony. Justice Starcher's use of the phrase "getting away with it scot-free" suggests, incorrectly, that Mr. Blankenship's funding of independent expenditures was a criminal activity.

331. The quote that the FEC obtained from former West Virginia Supreme Court Justice Richard Neely is double hearsay, and therefore inadmissible. The FEC obtains the quote from the motion for disqualification against Justice Benjamin in the Massey case; the motion obtains the quote from a newspaper article. Also, in the statement, Justice Neely says that

"[w]hen someone like Don Blankenship offers you $3 million, you can't turn it down." If Don Blankenship had offered $3 million dollars to Justice Benjamin's campaign, that would have constituted a coordinated, not independent, expenditure.

332. Denied. The first sentence is not a fact, but rather an opinion lacking in any foundation. The quoted text in the second sentence demonstrates again the difference between the declaration prepared for Justice Starcher by the FEC and Justice Starcher's own testimony. Although the quote from the declaration says, in part, "I do not see why elections for legislative office are any different [than judicial elections]," FEC Ex. 5, Starcher Decl. at ¶ 15, Justice Starcher, as noted above, spoke at length at his deposition about the significant difference between judicial candidates and candidates for offices in the other branches of government, as well as the different fundraising rules that apply to judges. FEC Ex. 16, Starcher Dep. at 100:19-108:9. Justice Starcher's opinion that there should be limits on contributions given to independent expenditure committees is offered in the form a legal, and thus, expert, opinion, but Justice Starcher has not been designated as an expert in this case. (At his deposition, he stated that had not been retained as an expert. FEC Ex. 16, Starcher Dep. at 100:4-6.). Moreover, given that the saga of the lapsed judicial ethics of Justice Benjamin is simply irrelevant to this case, it is lacking in foundation.

"2. The Public Views Large Election-Related Contributions As Corrupting, Regardless of the Recipient. (¶¶ 333-341)

333. For the reasons more fully described in the memorandum of law attached to Plaintiffs' First Motion in Limine, the referenced poll is inadmissible pursuant to the FEC's disregard of Fed.R.Civ.P. 26(a)(2). It was not introduced through expert testimony, just through a declaration from an individual who was not designated as an expert and did not provide an expert report.

334. Denied because of the poll's inadmissibility as described in the above paragraph. Plaintiffs also note that the survey did not ask respondents about independent expenditures made by lone individuals, only those made by groups receiving contributions from individuals. This means that there is no baseline from which to compare public perception about the independent expenditures of individuals, which cannot be limited, and those of groups, which the FEC says must be limited by contribution limits.

335. Denied because of the reasons stated in the previous two paragraphs.

336. Denied because of the reasons stated in the previous three paragraphs. Furthermore, Professor Wilcox is simply offering his opinion about an inadmissible survey that he did not conduct. In addition, Professor Wilcox did not put forward any opinions concerning the Zogby survey in his report; as such, his deposition testimony on the matter is inadmissible.

337. Denied because of the reasons stated in the previous four paragraphs. Furthermore, as he conceded at this deposition, the public does not have an idea of what constitutes corruption in the legal sense—which is the only sense that matters in this case. FEC Ex. 18, Wilcox Dep. at 46:21-47:3. This undermines any conclusions from the survey regarding the public's perception of actual corruption.

338. Denied because of the reasons stated in the previous five paragraphs. This paragraph is not a fact, but rather a summary of other proposed facts.

339. Denied. This paragraph is irrelevant because this is not a case about "direct contributions to candidates" or "indirect contributions to party soft money committees." It is about independent groups making independent expenditures. In his report, Professor Wilcox uses the language quoted here to contend that "the public is unlikely to believe . . . that large indirect contributions made through interest groups are not corrupting." FEC Ex. 1, Wilcox

Rept. at 23. But notably, when Professor Wilcox asked Robert Shapiro if he would make a statement about "whether unlimited contributions by individuals to independent expenditure groups might be seen as corrupting by the public," Professor Shapiro refused, saying "I would not want to conclude anything about the independent expenditur[e] groups from the data I looked at." Simpson Decl., ' Ex. 48, Email from Clyde Wilcox to Robert Shapiro (Aug. 13, 2008), at 1-2.

340. Denied. As explained more fully in Plaintiffs' First Motion in Limine, this survey testimony from another case, not introduced by the expert who conducted the survey, is not admissible in this case. All that is provided from the survey – which is inadmissible hearsay – are the questions that Professor Wilcox chose to provide in his report; there is no full copy of the survey in the FEC's exhibits, so its credibility cannot be fully evaluated. Furthermore, according to the survey questions from which Professor Wilcox quotes, the survey asked respondents about donors who were "individual[s], issue group[s], corporation[s], or labor union[s]." It is possible, if not likely, that a question focusing solely on a group like SpeechNow.org would have elicited different results.

341. Denied. This statement of opinion, not fact, lacks foundation. In Professor Wilcox's report, the quoted sentence is followed by the following sentence: "Because individuals are not currently allowed to make unlimited contributions to groups to fund explicit candidate advocacy, there is little direct polling on the topic, but existing research is confirmatory." FEC Ex. 1, Wilcox Rept. at 23. But the "research" he cites are two opinion polls, neither of which compared unlimited independent expenditures by individuals to unlimited expenditures by groups, and all of whose defects (admissibility and otherwise) are discussed in Plaintiffs' response to the paragraphs the FEC devotes to each of them. (Another common problem with the

polls is that, as explained above, Professor Wilcox concedes that the public is not aware of the legal definition of corruption.). Furthermore, even though Professor Wilcox cites to Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 Political Research Quarterly 885 (2002) in support of another one of his points, he ignores its statement, on page 889 that "it is rare to find independent expenditures figuring prominently in more rigorous examinations of the role money plays in the political process."

"3. Coordination is Inherently Verty Difficult to Police and Candidate Campaigns are Often Involved With 'Independent' Spending Below the Level of Involvement That Constitutes "Coordination' Within the Meaning of the Law." (¶¶ 342-344)

342. Denied. This is not a statement of fact, but rather a summary of the proposed facts that follow. Furthermore, it is utterly lacking in foundation.

343. Denied. Chairman Johnson talks about what an anonymous candidate told him; that is inadmissible hearsay. Again, under the law, there can be no corruption without coordination. The FEC cannot change the law just because it asserts that the law is difficult to enforce. Furthermore, it makes no sense to say that cooperation between a candidate and a group can occur without coordination. Plaintiffs note that politicians regularly cite the endorsement of certain groups who support them in their campaigns; if that causes corruption—which it does not—then all politicians are corrupt. If the professional association coordinated with the candidate, then its expenditure would not have been independent; thus, the statement would be irrelevant. Finally, given that the anonymous candidate openly spoke to Chairman Johnson, this is not an example of how coordination is "very difficult" to police.

344. Denied. This statement is just a conclusory assertion with no evidence. Chairman Johnson suggests that the mailing patterns obviously signaled coordination. (The FEC quotes him as saying, "[i]f there was no coordination, it was an unbelievable coincidence."). If

that is so, then this is an example of coordination that is very easy to detect. If the FPPC had investigated, then Chairman Johnson might actually have some facts on which to base his conclusory claims and the parties in this case could actually assess his view that coordination is hard to police.

"IV.J. Money Raised Through Associations with Many Protections of the Corporate Form Pose a Danger of 'Corrosive and Distorting Effects of Immense Aggregations of Wealth.'" (¶¶ 345-349)

1. General Objections

This Court has already ruled that the so-called corporate form corruption rationale "is best understood to be limited to th[e] context" of "*corporate* campaign expenditures"—and thus "inapposite to an unincorporated, political organization such as SpeechNow." *SpeechNow.org v. Fed. Election Comm'n*, 567 F. Supp. 2d 70, 81 n.10 (D.D.C. July 9, 2008) (Docket No. 32, Mem. Order, slip op. at 25-26 n.10) (emphasis added). As a result, this section is irrelevant and amounts to another attempt, like most of the FEC's proposed findings of fact, to redraft provisions of law that the FEC would prefer be different. The FEC's argument about the "distorting effects of immense aggregations of wealth" completely ignores the fact that the Supreme Court relied on that justification in cases involving statutes that singled out *corporations* for special limitations. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-60 (1990); *FEC v. Beaumont*, 539 U.S. 146, 152-56 (2003). But Congress has not seen fit to single out unincorporated associations for special treatment under the campaign finance laws, so there is no occasion for this Court to consider whether such treatment might be constitutional on the same basis on which the Supreme Court has upheld limitations on corporations. The FEC is, in essence, asking this Court to pass judgment on a statutory provision that does not exist. Moreover, with the exception of a single sentence in which the FEC accurately quotes an e-mail message from David Keating, *see id.* ¶ 349 (2d sentence), all of the

proposed findings of fact alleged by the FEC are not facts at all, but rather legal conclusions, mischaracterizations, or utter speculation. This Court properly rebuffed the FEC's earlier efforts to inject this irrelevant issue into this case. It should do so again now.

2. Specific Responses to Proposed Findings of Fact in Section IV.J.

345. This is not a fact but a legal conclusion. The District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code §§ 29-971.01 *et seq*., speaks for itself.

346. This statement is unsupported and merely a summary of other proposed facts, which themselves are irrelevant to the issues raised in this case. Additionally, the FEC's assertion is vague and mischaracterizes those other proposed facts since the FEC only points to "[o]ne such example." *See* FEC's Proposed Findings of Fact ¶ 347, *see also id.* ¶ 348.

347. This is not a fact but the FEC's characterization of the issues and ruling in a case decided by the Colorado Court of Appeals. Moreover, not only is the cited decision not binding precedent in the D.C. Circuit, it is also wholly irrelevant to the instant action since the cited decision solely resolves wage claims brought by campaign workers. Indeed, the cited decision does not consider or even discuss the applicability of federal campaign finance laws to unincorporated associations.

348. This is a legal conclusion, not a fact, reached by a state appellate court in the context of a dispute over back wages, thus making it also irrelevant here. Indeed, nowhere in the cited decision did the Colorado Court of Appeals discuss the applicability or constitutionality of federal campaign finance laws to the speech and association of an unincorporated association, which are the issues raised in this case. As a result, the FEC mischaracterizes the legal conclusion it states as a fact here.

349. Denied. The second sentence of this paragraph accurately quotes the contents of an e-mail from David Keating, but the FEC draws the unwarranted assumption that Mr. Keating was using the statement in the email as "an inducement to potential members." Furthermore, whether the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29-971.01 *et seq.*, limits liability to members of SpeechNow.org, and, if so, the level of limited liability it provides, is a legal conclusion, not a fact.

"IV.K. Independent Expenditures Through Groups are Less Transparent to the Public than Independent Expenditures Made by Individuals." (¶¶ 350-360)

350. Admitted.

351. Denied. This is a baseless assertion from Professor Wilcox that is a conclusion, not a fact. Moreover, this simply ignores the right of association, and it indicates that the FEC's position in this case is nonsensical. The FEC apparently has no problem with individuals hiring consultants to do precisely what SpeechNow.org does, but if they wish, as Fred Young stated in his deposition, to "quote/unquote hire SpeechNow.org to do that sort of thing" that apparently creates concerns about corruption. *See* FEC Ex. 19, Young Dep. at 92:11-93:4.

352. Denied. The statements here are baseless assertions and opinions, not facts. First, Plaintiffs note that if the organization were truly comprised of the CEO and other executives, the organization would have to call itself something, and this name is the one that would be used in the disclaimer. Under federal law, however, the CEO's funding for the ad would have been fully disclosed. *See* 2 U.S.C 434(c). Plaintiffs note that there are many organizations, such as qualified non-profit corporations under 11 CFR 114.10, that do not list the names of the donors in the disclaimer, and yet, are not required to register as political committees. *See Massachusetts Citizens for Life, Inc v. FEC*, 479 U.S. 238 (1986).

353. Denied. These are baseless claims from an unreliable report produced by the California FPPC. They are also hearsay, and they conflict with federal law. Currently, any group that makes independent expenditures only discloses its name on its disclaimers and the public must track down contributor information by examining campaign finance reports. All contributions of $200 or more to such groups for independent expenditures are disclosed, *see* 2 U.S.C. § 434(c), and because SpeechNow.org is organized under section 527 of the Internal Revenue Code, all of its receipts will be made publicly available according to 26 U.S.C. § 527j. Keating Decl. ¶¶ 35-36.

354. This statement is true but irrelevant. SpeechNow.org cannot accept donations from groups such as these.

355. Denied. This is a string of baseless assertions, opinion, and hyperbole.

356. This statement is a tautology and therefore meaningless and irrelevant.

357. Denied. These statements are baseless assertions from an unreliable report produced by the California FPPC and they are hearsay.

358. Denied. As stated above, federal law does not permit people "to make statements [independent expenditures] without taking responsibility for them." Even if Republicans for Clean Air—an organization of two brothers that ran advertising attacking 2000 Presidential primary candidate John McCain—were operating today, it would have to disclose all funds paid for independent expenditures to the FEC, and have to disclose its receipts to the Internal Revenue Service. *See* 2 U.S.C. § 434(c); 26 U.S.C. § 527j. No one would be wondering how much the Wyly brothers would be spending for its advertising, just as no one wondered who the Wyly brothers were in 2000 when the press reported thoroughly on their activities. Moreover, the statements in this paragraph are hearsay.

359. Denied. These are baseless statements from the Wilcox Report, and the second is double hearsay.

360. These are statements from a Supreme Court case that involved "sham" issue ads, and thus have no relevance to this case.

O. "IV.L. The Disclosure of All Receipts and Expenditures Ensures that Vital Information About Who is Supporting Candidates is Made Publicly Available." (¶¶ 361-375)

361. Denied. This is a baseless and broad statement by Professor Wilcox. First, the reporting obligations for organizations other than political committees apply to any communication in any medium that expressly advocate the election or defeat of a federal candidate, including communications made over broadcast, cable or satellite; via phone; direct mail; newspaper or magazine; over the internet or in e-mail, and in any fundraising appeal that contains express advocacy. Simpson Decl., Ex. 25, Scott Depo. 103:21. Second, all costs associated with each communication must be disclosed. *Id*. at 101:15. This would include: the cost of airtime, Id. at 102:10; the cost of postage for written communications distributed through mail, *id* at 102:20; the cost of research used to determine the most optimal form of communication, *id.* at 103:3; production costs for radio and television advertising, *id* at 103:7; printing costs for written materials used in communications, *id* at 103:10; fees for the media buyer, *id.* at104: 11; fees for the direct mail vendor, *id*. at 104:13; the cost of internet banner ads, *id.* at 104:15; costs of newspaper ad space for independent expenditures, *id.* at 104: 20; and, production costs and creative fees for the newspaper advertising itself. *Id.* at 105:1.

362. Denied. These are broad, baseless statements by Professor Wilcox that do not apply to SpeechNow.org, which will spend the majority of its funds on express advocacy. Keating Decl. ¶ 2.

363. Denied. These are broad, baseless statements that do not apply to SpeechNow.org. SpeechNow.org will disclose its independent expenditures and all of its donors over the disclosure limits ($200) regardless of what they fund, and SpeechNow.org will accept no earmarked funds. *See* Plaintiffs' Proposed Findings of Fact at ¶ 27; Keating Decl. ¶¶ 35-36.

364. Denied. This is a baseless assertion by Professor Wilcox. Moreover, voters "will be able to see" who is paying for SpeechNow.org's communications. *See* 2 U.S.C. § 434(c); Keating Decl., ¶¶ 35-36.

365. This is hearsay and it is irrelevant to the issues in this case. SpeechNow.org will disclose all of its donors. *See* Plaintiffs' Proposed Findings of Fact ¶ 27.

366. Denied. These are general statements that have no relevance to this case and they are hearsay. SpeechNow.org will disclose the costs of its independent expenditures under Federal law. Keating Decl. ¶ 2. Moreover, the public's interest also lies in having available the maximum amount of information about politics, which groups like SpeechNow.org will help provide, and having the First Amendment rights of all vigorously protected. The disclosure rules for independent expenditures adequately protect the public's right to information. Indeed, David Keating made clear in his deposition that he is interested in the FEC's guidance on particular disclosure measures he can take in order to ensure appropriate disclosure for SpeechNow.org. *See* Keating Decl. at 184-86. The FEC has not only refused to provide such guidance, it has mischaracterized his statements to make it appear that he is not interested in full disclosure, when he quite clearly is. See FEC's Proposed Findings of Fact ¶¶ 373-376; *see also infra* at ¶¶ 373-376.

367. Denied. This is a broad and baseless statement by Professor Wilcox. The "voters, the media, and civil society groups," if they are at all interested, will each know who is paying for SpeechNow.org's communications by checking FEC disclosure reports.

368. This is a broad statement that is just a summary of other proposed facts.

369. These statistics are likely true but irrelevant. They are aggregate numbers that say nothing about what a group like SpeechNow.org will spend on costs and expenses.

370. These statistics are likely true but irrelevant. They are aggregate numbers, all of which apply to groups that are nothing like SpeechNow.org.

371. This is a legal conclusion. What is stated appears to be true but is not complete.

372. These statements are true but not complete. The forms and instructions speak for themselves.

373. Part of this paragraph makes true statements but the last three sentences are brazen misrepresentations of Mr. Keating's testimony. It is simply false to say that "SpeechNow.org has taken different positions regarding whether it would disclose all of its donors." In fact, Mr. Keating stated in his declaration that SpeechNow.org would disclose all of its donors who contributed above the disclosure threshold. Keating Decl. at ¶ 36. Mr. Keating did not testify to the contrary. Keating Dep. at 184. (FEC Ex. 11). The FEC is ascribing to Mr. Keating a position that the Club for Growth, Mr. Keating's employer, took in a dispute with the FEC last February. The FEC claims in this paragraph that Mr. Keating "agreed with the position taken in a letter to the Commission from the Club for Growth, insisting that disclosure was limited to contributors who had specified that that contribution was for the purpose of furthering an independent expenditure." But there are two things wrong with this. First, even if Mr. Keating had agreed with the Club's position, that position could not be ascribed to

SpeechNow.org, which is a separate organization with no connection to the Club. Second, Mr. Keating clearly stated that SpeechNow.org did not have a position on that issue:

> BY MR. DEELEY:
> Q Does SpeechNow also hold these opinions?
> MR. SIMPSON: Objection. I think that's vague and -- that's good enough.
> THE WITNESS: I -- you know, your question could be interpreted many different ways. I don't know what you're asking.
> BY MR. DEELEY:
> **Q Does SpeechNow disagree in any way with the statements that are made in this letter?**
> MR. SIMPSON: I'm going to object on the grounds that statements made in this letter involve all sorts of legal conclusions and appears to have had the input of lawyers. I'm not sure that this witness can answer a question that would necessarily require him to consult with lawyers. But if he has a view of it, he can answer.
> THE WITNESS: Well, you're going to have to repeat the question for me. Sorry.
> (The record was read by the reporter.)
> MR. SIMPSON: Same objection.
> THE WITNESS: **I don't think SpeechNow has taken a position on this. If you want me to take a position -- we don't go reading every organization's responses to requests and take a position on them.**
> BY MR. DEELEY:
> **Q Right. I understand.**

FEC Ex. 11, Keating Dep. at 84:21-86:3 (emphasis added). Apparently, the FEC did not like Mr. Keating's answer, so it made one up.

374. Denied. This paragraph, too, is based on a brazen misrepresentation of Mr. Keating's testimony. In fact, the position Mr. Keating took at his deposition on whether SpeechNow.org will report receipts and disbursements for expenses such as opposition research and polling was, in essence, tell me what to do and I will do it. This, again, is crystal clear from his deposition:

> **Q If SpeechNow pays for candidate research or public-opinion polling, will it disclose those disbursement on its reports if it's successful in the litigation?**
> A Well, which reports are you talking about?
> Q The independent expenditure reports.
> MR. SIMPSON: Objection.
> **THE WITNESS: I don't know whether – I don't know what would be required, and maybe the commission would provide additional guidance,**

> **either if it decides to drop -- just to concede and write an opinion or something, and then we can work out whatever arrangement you might be happy with.**

FEC Ex. 11, Keating Dep. at 185:18-186:8 (emphasis added). This came on the heels of testimony in which Mr. Keating made clear that he was happy to disclose all donors, whether he has to or not, and that that is what he will do absent further direction from the FEC:

> I don't know if we have to do it that way, but that's how we've decided that we would do it if we're allowed to do this. I was hoping the commission, in the advisory opinion request, would give some clarity about that. But if I don't get clarity from the commission, that's how I plan to do it. Clarity about what the commission would want me to do, or SpeechNow to do, that's how I would plan to do it, because I think that's the -- I think that's a way to disclose all this information to the public. We don't have a problem with that and putting that on our independent expenditure reports. And then you have all the information, and there's no argument about which donors are on there and which ones aren't on there. They're just all on there over the threshold. So there's no argument.

Id. at 185:1-17.

375. Deny. This paragraph is entirely irrelevant because SpeechNow.org is not the Club for Growth. It also capitalizes on the same misrepresentation of Mr. Keating's testimony based on the same Club for Growth dispute with the FEC as paragraph 373.

E. "V. Robust Fundraising Has Occurred Within Federal Contribution Limits and Large Sums Can Be Raised For Independent Expenditures Through the Aggregation of Money From a Number of Donors." (¶¶ 376-437)

1. General Objections

While many of the facts on which the FEC's claims are based in this section are true, this section is irrelevant because the FEC's argument is based on a false premise—that the allegedly "robust fundraising" that has occurred under contribution limits means that the contribution limits do not violate the Plaintiffs' First Amendment rights. But this is an incorrect view of constitutional law. The only legally relevant question is whether contribution limits burden their ability to speak to the extent and in the manner that they wish to speak. *See FEC v. Wisc. Right*

to Life, Inc., 127 S.Ct. 2652, 2664 (2007) ("Because [the statute] burdens political speech, it is subject to strict scrutiny") [hereinafter *WRTL II*]; *Citizens Against Rent Control*, 454 U.S. at 298 ("As we have noted, regulation of First Amendment rights is always subject to exacting judicial scrutiny.")

See also Elrod v. Burns, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (stating that "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed[.]").

Thus it is irrelevant that other groups may have raised significant funds under contribution limits, whether that fundraising is described as "robust" or not. As the Supreme Court made clear in *WRTL II*, the option to become a PAC and raise money under contribution limits, among the other burdens that apply to PACs, is not a viable constitutional alternative for independent groups who wish to speak out about political matters free of those limits. *See* 127 S. Ct. 2679 n. 9. Moreover, as the Court held in *Citizens Against Rent Control*, any limits on the ability of the group to raise or spend its funds necessarily limits its rights both to speech and association. *See* 454 U.S. at 299 ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression.").

It is no answer for the FEC to contend that Plaintiffs have other alternatives to producing and broadcasting the ads they desire. As the Supreme Court made clear in *WRTL II*, cheaper alternatives to broadcast advertising are not reasonable alternatives in terms of "impact and effectiveness." 127 S. Ct. at 2671 n.9. *See also id*. (stating that a "speaker has the autonomy to

choose the content of his own message.'" *Id*. (citation omitted). In short, SpeechNow.org and its supporters have the right to choose their media and their message.

Moreover, SpeechNow.org is unlike the non-connected committees to which the FEC refers in its proposed findings of fact. As a result, the evidence on which the FEC proposes to rely is inapposite. As the FEC recognized, unlike other non-connected committees, SpeechNow.org can accept funds only from individuals, and it will make only independent expenditures. However, the FEC proposes to rely on data that apply to all non-connected committees, which can accept contributions from groups and make direct contributions to candidates. Independent expenditures are very expensive, as contrasted with direct contributions, which can be made to candidates in any amount below the contribution limit.

2. Facts Plaintiffs Admit in Section V.

Without admitting their relevancy or adopting the FEC's characterizations of the facts, Plaintiffs admit that the facts contained paragraphs 376-83 are true.

3. Specific Response to the Remaining Proposed Finding of Fact in Section V.

384. The first sentence of this paragraph is a vague and unsupported statement that cites no evidence, while the second sentence is inadmissible double hearsay since it quotes a *New York Times* article authored by Matthew Mosk that quotes Tom Matzzie. Moreover, "successfully raised funds" has no meaning and appears to be a tautology. That is, it appears simply to mean that groups have raised money.

385. This paragraph states legal conclusions, not facts. The cited Supreme Court decision and federal statutes and regulation speak for themselves.

386. Denied. This paragraph is an unsupported opinion and it is hearsay. It is also irrelevant what amounts political party committees are able to raise. Party committees typically have vast fundraising staffs, donor lists, and they raise funds over the course of many years.

387. Denied. This paragraph is either an unsupported assertion or hearsay since the only evidence cited is the same article published by the Campaign Finance Institute, which itself does not cite the source of the data presented. This paragraph is also irrelevant for the reasons stated above.

388. Plaintiffs cannot verify the statistics cited, but have no reason to dispute them. However, they are aggregate amounts raised by all political party committees and thus irrelevant. This paragraph is either an unsupported assertion or hearsay since the only evidence is the same article published by the Campaign Finance Institute, which itself does not cite the source of the data presented.

389. The information in this paragraph is irrelevant. It is also an unsupported assertion and hearsay. However, Plaintiffs have no reason to doubt the amounts stated.

390. The information in this paragraph is irrelevant. It is also an unsupported assertion and hearsay. However, Plaintiffs have no reason to doubt the amounts stated.

391. This paragraph does not state a fact but merely purports to summarize proposed findings from other paragraphs.

392. This is a legal conclusion.

393. This paragraph states legal conclusions. The statutes and cases speak for themselves.

394. This paragraph states legal conclusions and simply recites irrelevant truisms. Similarly, a speaker who is told he may not speak about a particular topic "remains free" to talk about something else.

395. Denied. This paragraph states no facts but merely summarizes other paragraphs and is argumentative.

396. Admitted.

397. This paragraph is true but irrelevant.

398. Denied. SpeechNow.org has declined to become a PAC, which the Supreme Court has held is a choice protected under the First Amendment for groups that present no concerns about corruption. *See WRTL II*, 127 S. Ct. at 2671 n.9.

399. This is true, but irrelevant. SpeechNow.org has spent less than $1000 to date because if it spends more than that, it will automatically become a PAC. This claim is rather like saying that someone threatened with jail for speaking does not really want to exercise his rights to free speech because he has not spoken yet. All of these points could equally be said about the plaintiff in *WRTL II*.

400. This fact is true, but irrelevant. $22,200 is not nearly enough to finance the production and broadcast of even one advertisement. Yet raising that amount would require SpeechNow.org to register as a PAC, meaning the only actions it could take would be to comply with the regulations for PACs without actually running, or knowing whether it would ever be able to run, any ads.

401. This paragraph is speculative, and highly unlikely in any event. As Plaintiffs' expert Rodney Smith has stated (and as Professor Wilcox's research has shown), most political

donors contribute small amounts of money. Thus, the likelihood of raising enough money from those who have signed up on SpeechNow.org's website is extremely small.

402. This is true, but irrelevant. SpeechNow.org has received that "free publicity" only because it has sued the FEC in this case.

403. These facts are generally true, but irrelevant. Americans' free speech rights do not depend on whether they know some journalists.

404. This is true, but merely a restatement of paragraph 402 and thus cumulative. It is also irrelevant. This point is probably also true of every person who has ever sued to vindicate his or her First Amendment rights, yet the Supreme Court has never held that First Amendment rights expire upon filing a lawsuit to vindicate First Amendment rights.

405-409. The facts in these paragraphs are true, but irrelevant for all of the reasons already stated.

410-412. The facts stated in these paragraphs are generally true, but irrelevant. As a matter of law, contribution limits do not become less burdensome or less a violation of rights because any particular individual may have some experience in complying with them or in fundraising in general.

413-415. The facts stated in these paragraphs appear to be true, but they are irrelevant. The Club is not a party to this case.

416-420. The facts stated in these paragraphs appear to be true, but they are irrelevant. HJTA is not a party to this case.

421. This fact is true but irrelevant. Cato is not a party to this case.

422. Denied. The FEC has mixed up the chronology of these emails. They should be read from the bottom up (the time stamps appear inconsistent with this because Mr. Young lives

in a different time zone (Wisconsin) and it appears that the recipient's time zone appears on each email). Moreover, the facts stated in this paragraph conflict with the fact stated in paragraph 36, in which the FEC described these emails as coming from SpeechNow.org.

423-424. These facts appear true, but they are irrelevant.

425. This is not a fact, it is a summary and a conclusion.

426. Denied. This paragraph does not support the stated claim, it is irrelevant, and it is not a fact, it is a conclusion.

427-428. Denied. David Keating described in his declaration in this case the reasons he did not register SpeechNow.org as a PAC. These paragraphs do not state facts, they state conclusions, and the are irrelevant.

429. Denied. The claim that the "potential donors already identified" could have financed SpeechNow.org's is simply a baseless assertion dressed up with some rudimentary mathematics. Indeed, SpeechNow.org could also finance ads at a cost of $120,000 using donations from 120,000 people giving $1 each, but stating that proves nothing.

430. This paragraph is simply a summary of other paragraphs.

431. This is true, but irrelevant. SpeechNow.org's donors are also able to express themselves by writing letters to the editor or publishing their own newspaper and everything in between. As stated above, the fact that, in America, people have options is not generally used as evidence to restrict their rights.

432. Denied. This simply states a legal conclusion. While it is true that the Supreme Court has held that limits on contributions to candidates do not limit the amount that those candidates can spend. The Supreme Court has also held, however, that placing limits on groups

like SpeechNow.org do limit the amounts they can spend. *See Citizens Against Rent Control*, 454 U.S. at 299.

433. Plaintiffs admit that there are many ways in which individuals can express themselves in this country. None of that is relevant to this case, however.

434. For the reasons already stated, this fact is irrelevant.

435. This is true but irrelevant. The Supreme Court has clearly held repeatedly that individuals have a right to choose their message and the means through which to express it.

436. True but irrelevant.

437. Plaintiffs admit that this is a great country that has spawned a wonderful array of private businesses that are designed to keep speech alive despite the best efforts of the FEC.

F. "VI. Political Committee Reporting Requirements Do Not Threaten The Survival of SpeechNow or Other Campaign Groups."

438. Denied. This is in part a matter of opinion and in part a legal conclusion.

439. Admit.

440. Plaintiffs admit that registration is accomplished by filing FEC Form 1.

441-443. Admit

444. Denied. This is a statement of opinion by Greg Scott, a long-time employee of the FEC whose job is to explain to members of the public how to comply with FEC regulations. In any event, the opinions of any one person as to how burdensome PAC requirements are is irrelevant.

445. Denied. Mr. Hickmott's opinions about the burden of the laws that apply to PACs is irrelevant as well.

446. Denied. Even if the claim about the increase of nonconnected committees is true, it would not "confirm" that reporting requirements have not inhibited anyone from starting a non connected committee.

447. This is simply a conclusory statement, not a fact. It is also vague.

448. Mr. Keating would be the primary person responsible for complying with the reporting and other requirements, but he has stated that he would like to involve others in that if he can.

449. Mr. Keating did not testify that he "developed a successful PAC" and NTU. He testified that he thought it was accurate to say, as an old bio of Mr. Keating's stated, that "[u]nder his guidance, NTU developed a political action committee that had much success in the 1994 elections." FEC Ex. 11, Keating Dep. at 13:8-17. Otherwise, this paragraph is true.

450. Denied. Mr. Keating did not testify that he "directed" the Club's PAC; he testified that he "supervised mailings" and "helped design the website" of the Club's PAC (FEC Ex. 11, Keating Dep. at 49:19-20) and that he did membership recruiting, analysis of legislation, and a number of other things for the current Club for Growth. *See id*. at 20-21. But he did not say, at least in the cited portions of his deposition, that he "directed" the Club's PAC.

451. Mr. Keating qualified his answers considerably more than the FEC lets on. For instance, when asked if he understood how to do PAC reporting, "Generally, I guess. I don't think I've ever prepared a report all by myself, but I may have." Keating Dep. at 180:8-10. When asked if he remembered saying at a Cato forum that he understood how to report as a PAC, Mr. Keating responded "I don't recall that, but if I said it, I said it. I'm sure I could do it. But you know, would I want to do it versus other ways that would be simpler? No, I wouldn't want to." *Id*. at 180:20-181:1.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court certify a short and simple set of facts consisting of only those facts that are admissible and are not substantially disputed.

Dated: November 21, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st Day of November, 2008, a true and correct copy of the PLAINTIFFS' BRIEF IN RESPONSE TO THE FEC'S PROPOSED FINDINGS OF FACT were electronically filed 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