RECORD NOS. 08-5223(L), 09-5342

ORAL ARGUMENT HAS BEEN SCHEDULED FOR JANUARY 27, 2010

In The

United States Court of Appeals

For The District of Columbia Circuit

SPEECHNOW.ORG; DAVID KEATING; FRED M. YOUNG, JR.; EDWARD H. CRANE, III; BRAD RUSSO; SCOTT BURKHARDT,

Plaintiffs - Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant - Appellee.

ON CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CASE NO. 08-CV-00248 (JR)

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

*Authorities upon which we chiefly rely are marked with asterisks.

CONSTITUTIONAL PROVISION

STATUTES

REGULATION

GLOSSARY

BCRA	Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.)
FEC	Federal Election Commission
PAC	Political Action Committee, a political committee as defined by 2 U.S.C. § 431(4)(A)

STATUTES AND REGULATIONS

Except for the following, all applicable statutes, etc., are contained in the statutory addendum submitted in conjunction with the Plaintiffs-Appellants' Brief on November 16, 2009.

2 U.S.C. § 441e(a)(2)

11 C.F.R. § 114.10

These statutes and regulations are contained in an addendum to this brief.

SUMMARY OF ARGUMENT

Plaintiffs' position in this case follows from fundamental First Amendment principles, most notably that independent expenditures are core political speech that may not be limited and that individuals may associate with one another to do collectively what they have a right to do individually. Thus, Plaintiffs are constitutionally entitled to raise and spend unlimited funds on independent expenditures collectively because, as the FEC admits, each of them may do so individually. They will disclose under 2 U.S.C. § 434(c), the disclosure provision Congress created for those who make independent expenditures, and the FEC can therefore demonstrate no constitutionally adequate reason to require them to become a political committee.

The FEC's entire case applies statutory terms out of context and in complete disregard of constitutional principle. The FEC thus ignores that the Supreme Court has only upheld the application of campaign-finance limits to individuals and groups with a sufficient connection to candidates. SpeechNow.org, however, is independent of candidates and therefore nothing like the groups that work closely with and make contributions to candidates, to which contribution limits have been constitutionally applied. Likewise, in arguing that SpeechNow.org must become a political committee, the FEC ignores the fact that Plaintiffs are not challenging disclosure as such, but only the application of political-committee requirements the Supreme Court has found significantly burdensome. In short, the FEC simply cannot show a constitutionally adequate reason to justify imposing either contribution limits or political-committee status on Plaintiffs.

ARGUMENT

I. As Applied to Plaintiffs, the Contribution Limits Are Unconstitutional.

Plaintiffs' position in this case can be understood, in essence, as the right of association applied to the principle that independent expenditures are core political speech and may not be limited. In other words, if one person may spend unlimited amounts on independent expenditures, a group of persons must be permitted to do the same thing. As Plaintiffs stated in their opening brief, this conclusion follows from several fundamental First Amendment principles that this Court summarized

in *EMILY's List*. *See* Brief of Appellants at 22, *Keating v. FEC*, No. 09-5342 (D.C. Cir. Nov. 16, 2009) (hereinafter "Appellants' Merits Brief").

These are not new-fangled constitutional principles. The Supreme Court announced or relied on all of them in *Buckley v. Valeo* and has restated them many times since. *See* Appellants' Merits Brief at 30-31. Thus, as Plaintiffs stated in their opening brief, the FEC can prevail in this case only by destroying core First Amendment principles, most notably the right of association and the principle of independence. *See id*. at 28-32.

The FEC has now made clear that this is precisely its approach to this case. In its entire brief, the FEC nowhere even acknowledges that a right of association exists, much less explains how contribution limits can be applied to SpeechNow.org without violating that right. Nor does the FEC explain why it is entitled to limit Plaintiffs' expenditures for speech simply because they are spending that money collectively through SpeechNow.org, when the FEC is not entitled to limit Plaintiffs' spending made entirely on their own.

The FEC's only response is that the money Plaintiffs want to spend is called a "contribution" when it is spent through SpeechNow.org, but an "expenditure" when spent individually. *See* Brief for the Federal Election Commission at 9-12, *Keating v. FEC*, No. 09-5342 (D.C. Cir. Dec. 15, 2009) (hereinafter "FEC Merits Brief"). But, as Plaintiffs have shown, First Amendment rights do not turn on

labels. *See* Appellants' Merits Brief at 34; Brief of Appellants at 29, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Aug. 24, 2009) (hereinafter "Appellants' P.I. Brief"). The Supreme Court has repeatedly analyzed campaign-finance limits, not on the basis of the labels "contribution" and "expenditure," but according to whether the money has a sufficient connection to the possible corruption of candidates. *See* Appellants' P.I. Brief at 33. Having admitted that the individual Plaintiffs may spend as much as they want alone, the FEC cannot claim that the exact same spending creates concerns about corruption when it is made through SpeechNow.org. *See FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 468 (2007) (declining to allow "the bizarre result that identical ads aired at the same time could be protected speech for one speaker, while leading to criminal penalties for another"). In short, the FEC hopes to do exactly what the Supreme Court said governments may not do in *Citizens Against Rent Control v. City of Berkeley*—impose a limit on citizens acting together that it could not impose on them acting alone. 454 U.S. 290, 295-96 (1981).

The only way around this is to attack the very idea of independence, which the FEC also does. The FEC spends over ten pages in its brief purporting to show that independent expenditures and even expenditures for issue advocacy lead to corruption. *See* FEC Merits Brief at 12-23. The FEC obviously wants this Court to reject the Supreme Court's contrary conclusion in *Buckley*. As Plaintiffs

demonstrate below, there is much wrong with the FEC's alleged "evidence," not least that the district court rejected all of it and it does not show what the FEC claims. *See infra* part I.B. But even were this evidence reliable and even were the Supreme Court poised to overturn *Buckley*, the FEC would still be barking up the wrong tree. If the FEC wishes to lobby Congress to change the definition of "independent expenditure" from one that turns on coordination to one that turns on "gratitude" by candidates, it may do so.[1] But the FEC is not entitled to decide that the existing laws governing independence—the laws on which David Keating relied in creating SpeechNow.org—do not apply in this case. *See* Appellants' Merits Brief at 28, 32; Appellants' P.I. Brief at 38-39.

Plaintiffs have addressed the FEC's attack on the principle of independence and the right of association in detail in their previous briefs in this appeal. *See, e.g.*, Appellants' Merits Brief at 28-32; Appellants' P.I. Brief at 35-41; Reply Brief of Appellants at 3-6, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Oct. 15, 2009) (hereinafter "Appellants' P.I. Reply Brief"). The FEC has ignored these points entirely, in favor of three arguments that are either wrong or irrelevant: that

[1] The fact that the laws concerning independent expenditures have not been changed makes this a far stronger case for the right to raise unlimited amounts of money to fund independent expenditures than *EMILY's List*. *EMILY's List* at least involved new rules passed by the FEC on the heels of *McConnell* that governed the allocation of funds by committees like EMILY's List. *See EMILY's List v. FEC*, 581 F.3d 1, 4-5 (D.C. Cir. 2009). Those allocation rules do not apply to SpeechNow.org because it is not a multicandidate committee that makes both contributions to candidates and independent expenditures.

SpeechNow.org is no different from groups that contribute to or work closely with candidates; that the government's interest in regulating speech increases as that speech becomes more effective; and that only David Keating is speaking in this case. Plaintiffs address each of these arguments below.

A. Contribution limits can be constitutional only as they apply to entities with a sufficient connection to candidates.

"[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008) (citation omitted). As the Supreme Court has stated, "Corruption is a subversion of the political process" the hallmark of which is "the financial *quid pro quo*: dollars for political favors." *FEC v. Nat'l Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 497 (1985).

The Supreme Court has found the prospect of corruption compelling enough to justify limits on campaign financing in only three types of cases: (1) those involving direct contributions to candidates (or coordinated expenditures on their behalf), *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 23-26 (1976); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382-83 (2000); (2) those involving direct contributions to groups that themselves make direct contributions to candidates, *see, e.g.*, *Cal. Med. Ass'n v. FEC* (*CalMed*), 453 U.S. 182, 184-86 (1981); and (3) those involving contributions to political-party committees that work directly with and

are often composed of candidates, *see, e.g.*, *McConnell v. FEC*, 540 U.S. 93, 145 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 437 (2001). Only in those circumstances has the Court concluded that the money used for political activities was sufficiently connected to candidates, and thus the potential for corruption sufficiently compelling, to justify limits.[2] *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291-93 (4th Cir. 2008). The FEC has not cited one case that varies from this framework. Because SpeechNow.org fits into none of these categories, the FEC's case cannot stand.

The FEC attempts to evade this by arguing, essentially, that Plaintiffs must justify their right to speak and associate free of contribution limits. Relying on *Buckley*, the FEC claims that the Supreme Court has "generally" upheld contribution limits because they impose a lesser burden on speech than expenditure limits. *See* FEC Merits Brief at 9-10, 25. It then claims that only David Keating's speech is at issue and that the limits therefore do not impose any significant burden on any of Plaintiffs' First Amendment rights. *See id*. at 9-12. According to the FEC, contributors to SpeechNow.org are simply engaging in "speech by proxy," which the government may limit as it sees fit. *See id*.

[2] The only exception to this is so-called "corporate-form" corruption, which has no application to this case because SpeechNow.org is not a corporation. *See SpeechNow.org v. FEC*, 567 F. Supp. 2d 70, 81 n.10 (D.D.C. 2008); *see also Citizens United v. FEC*, 129 S. Ct. 2893 (2009) (ordering reargument on whether *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), should be overruled).

But this entire argument ignores the fact that the government bears the burden of showing that limits prevent corruption. *See WRTL II*, 551 U.S. at 464-65; *Shrink*, 528 U.S. at 392 ("We have never accepted mere conjecture as adequate to carry a First Amendment burden . . . ."). Indeed, in *Buckley*, the Supreme Court made clear that serving the "weighty interests" of eliminating corruption was absolutely essential to the constitutionality of the contribution limits. *See* 424 U.S. at 29. Those limits, according to the Court, focus "precisely on the problem of large campaign contributions[,] the narrow aspect of political association where the actuality and potential for corruption have been identified[,] while leaving persons free to engage in independent political expression." *Id*. at 28. Outside this "narrow aspect of political association"—that is, large contributions to candidates, and, after *McConnell*, soft-money contributions to political-party committees—the Court's corruption rationale no longer applies. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 261-62 (2006) (striking down low limits on direct contributions to candidates); *Buckley*, 424 U.S. at 51 (striking down limits on independent expenditures). SpeechNow.org is far outside this category—indeed, it will engage in precisely the sort of "independent political expression" the Court in *Buckley* refused to limit. As a result, whether money donated to it is considered a "contribution" and whether only David Keating is speaking, SpeechNow.org is still outside the scope of allowable restrictions on amounts it receives from donors.

In short, neither *Buckley* nor any other case allows the government to limit contributions to any group simply because the government does not believe the limits are burdensome or the donors' interests are important. *See, e.g.*, *WRTL II*, 551 U.S. at 476-81 (refusing to impose PAC burdens, including contribution limits, because no showing of corruption). To limit the right to associate and pool resources for speech, the government must first demonstrate that the restriction serves a sufficiently compelling interest. *See Citizens Against Rent Control*, 454 U.S. at 296-99; *Democratic Party v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 124-26 (1981); *Buckley*, 424 U.S. at 24-26; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958).[3] The FEC cannot do so here because Plaintiffs raise no concerns about corruption. In arguing to the contrary, the FEC relies primarily on *CalMed* and *McConnell*. But that reliance is misplaced.

1. *CalMed* does not support the FEC's position.

At most, *CalMed* stands for the proposition that contribution limits are constitutional as they apply to multicandidate political committees that make contributions to candidates. That is the point on which the plurality and Justice Blackmun's concurrence agreed. *See* 453 U.S. at 201-04 (Blackmun, J., concurring). While it is true that the committee in *CalMed* also wanted to make

[3] Plaintiffs believe that strict scrutiny applies to their claims. *See* Appellants' P.I. Brief at 25-32; s*ee also FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 251-52 (1986) (plurality opinion). But the FEC must show corruption regardless of what level of scrutiny applies. *See Shrink*, 528 U.S. at 392.

independent expenditures, that fact was irrelevant to the decision, because, as both the plurality and Justice Blackmun agreed, the committee might be used to circumvent limits on direct contributions to candidates if limits did not apply to the committee itself. *See id.* at 197-99 (plurality opinion); *id.* at 203 (Blackmun, J., concurring).

CalMed does not support the application of contribution limits to SpeechNow.org, because SpeechNow.org does not do the one thing that was central to the agreement between the plurality and Justice Blackmun: it does not make contributions to candidates. Thus, contrary to the FEC's claim, *Marks v. United States*, 430 U.S. 188 (1977), is not difficult to apply to *CalMed* on this point. *See* FEC Merits Brief at 26-27. Justice Blackmun made absolutely clear that he joined the plurality only to the extent that its decision applied to a committee that made direct contributions to candidates. *See CalMed*, 453 U.S. at 202-03 (Blackmun, J., concurring). Plaintiffs relied on *CalMed* in their opening brief only to make the point that the case does not support the FEC's position, which it does not. Indeed, the case fits squarely within the general rule, discussed above, that contribution limits are constitutional only when applied to groups with a sufficient connection to candidates.

The FEC relies on Judge Brown's concurrence in *EMILY's List* for the claim that *CalMed* held that contribution limits can be applied to funds devoted to independent expenditures. *See* FEC Merits Brief at 28. But the FEC ignores the context in which that statement was made. EMILY's List is a multicandidate committee that makes contributions to candidates; SpeechNow.org is not. Thus, *CalMed* cannot even arguably support the application of contribution limits to SpeechNow.org. Plaintiffs agree with the majority in *EMILY's List*, but their disagreement with Judge Brown on this point is immaterial for the simple reason that SpeechNow.org does not make contributions to candidates, and is thus completely unlike EMILY's List.

The FEC also relies on footnote 48 of *McConnell*, effectively arguing that it rewrote *CalMed* and treated Justice Blackmun's concurrence as just another vote for the plurality. *See* FEC Merits Brief at 29-32. But the point of footnote 48 was that *CalMed* supports the application of contribution limits to groups, like the political-party committees at issue in *McConnell*, with a sufficient connection to candidates. As Plaintiffs stated in their opening brief, the footnote cannot be understood to have decided an issue not before the Supreme Court, thus foreclosing as-applied challenges like this one, especially when the Supreme Court held soon after *McConnell* that the Court did not foreclose as-applied challenges

even to the very law at issue in *McConnell*. *See* Appellants' Merits Brief at 40. The FEC ignores this point entirely.

2. *McConnell* does not support the FEC's position.

In *McConnell*, the Supreme Court upheld limits on soft-money donations to political-party committees due to the unique nature of those committees. As the Court found, "'[t]here is no meaningful distinction between the national party committees and the public officials who control them.'" 540 U.S. at 155 (internal citations omitted). The Court upheld these limits despite the fact that they would restrict funds used for independent campaign activity, not because independent spending by anyone causes concerns about corruption, but because *political-party committees* cause concerns about corruption. As the Court stated, "*Given this close connection and alignment of interests*, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, *regardless of how those funds are ultimately used*." *Id*. (emphasis added).

The FEC ignores this factual context and attempts to do with *McConnell* what it tried to do with *Buckley* and *CalMed*—apply the holding as though the Supreme Court was issuing a series of directives as some sort of super-legislature. But the Court in *McConnell* recognized it was doing no such thing. *See* 540 U.S. at 192 ("We have long rigidly adhered to the tenet never to formulate a rule of

constitutional law broader than is required by the precise facts to which it is to be applied, for the nature of judicial review constrains us to consider the case that is actually before us." (internal quotation marks and citation omitted)). To contend, as the FEC does, that SpeechNow.org is indistinguishable from the political-party committees at issue in *McConnell* requires one to ignore that both Congress in passing BCRA, and the Court in upholding it, relied on an extensive record that pertained to the unique role of political-party committees and their connections to candidates. *See id*. at 145-54.

The FEC also contends that the Court in *McConnell* recognized that nonprofits can create concerns about corruption. *See* FEC Merits Brief at 37-40. But the Court's comments pertained to BCRA's ban on candidates soliciting donations for nonprofits. *See McConnell*, 540 U.S. at 174-76. Those comments do not apply to SpeechNow.org, a group that is entirely independent of candidates and thus raises a question the Supreme Court has not directly addressed. The Court did not find that nonprofits as such were corrupting; it found that candidate solicitation for nonprofits raised the specter of corruption, again making clear that it is the connection to candidates that causes concerns about corruption. *Id.*

In any event, with the solicitation ban in place, candidates cannot solicit funds for SpeechNow.org or any other nonprofit, and the problem Congress sought to address is solved. Nonprofits are now even more independent of candidates

than they were before. The fact that the Court upheld the solicitation ban cannot be the basis for upholding further restrictions on nonprofits for whom candidates are now *not soliciting funds*. The FEC's argument is precisely the sort of "prophylaxis-on-prophylaxis" approach that the Supreme Court rejected in *WRTL II*. *See* 551 U.S. at 479.

B. Effective speech is not corrupting.

The FEC devotes over ten pages of its brief to anecdotes and opinions based on multiple levels of hearsay, vague claims by alleged "experts," equivocal research about the alleged impact of independent expenditures, and examples of politicians and others who have violated the law. The purpose of this alleged "evidence" is to show that the Supreme Court's consistent conclusion that independent expenditures do not cause concerns about corruption is wrong. *See* FEC Merits Brief at 13-25. Plaintiffs have rebutted each of these claims, showing them to be overblown half-truths at best;[4] completely unreliable and often outright

[4] *See* Plaintiffs' Brief in Response to the FEC's Proposed Findings of Fact at 12-15, *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) (No. 08-248, Dkt. # 54) (hereinafter "Plaintiffs' Response Brief on Facts"); *see also id*. at 33-40 (citing problems with FEC's expert's opinions); *id*. at 74-75 (noting FEC's failure to distinguish between political parties and independent groups); *id*. at 36-37, 58-64 (discussing FEC's misleading claims about 527s); *id*. at 38-39, 81-86 (revealing FEC's misstatements about academic and other research); *id*. at 73 (revealing FEC's misleading statements about those who make campaign contributions).

wrong at worst.[5] *See* Appellants' P.I. Reply Brief at 24-28. Plaintiffs also raised hundreds of evidentiary objections and violations of procedural rules with respect to this evidence. *See* Plaintiffs' First Motion in Limine, *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) (No. 08-248, Dkt. # 51). The district court rejected all of this evidence, concluding that the only relevant facts in this as-applied challenge were those pertaining to SpeechNow.org. J.A. 1261.

Now the FEC asks this Court either to accept all of its rejected and disputed facts as "legislative facts" or to remand the case and require the district court to spend another year trying to sort through hundreds of evidentiary and factual disputes concerning the actions of every group and individual imaginable other than Plaintiffs. *See* FEC Merits Brief at 58-61. Neither approach makes any sense. The FEC's alleged facts are not proper "legislative facts" of which this Court can effectively take judicial notice. *Cf. United States v. Shannon*, 110 F.3d 382, 387-88 (7th Cir. 1997) (taking notice of basic historical and biological facts motivating statutory-rape laws). They are disputed questions involving the statements, opinions, and motives of third parties and the views of various scholars on the current state of research concerning spending for political speech. *See*, *e.g.*,

[5] *See*, *e.g.*, Plaintiffs' Response Brief on Facts at 13 (noting blatant misrepresentation of statements by Stephen Moore, former president of the Club for Growth); *see also infra* note 8.

Appellants' P.I. Reply Brief at 24-28; Plaintiffs' Response Brief on Facts at 9-11. The FEC offers these "facts" not to support the statutes and rules governing independence versus coordination, but to contradict them. *See* Appellants' Merits Brief at 28-32. But there can be no legislative facts that pertain to a new definition of independence until Congress actually legislates on that issue. *See* Plaintiffs' Reply Memorandum in Support of Their First and Second Motions in Limine at 3-4, *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) (No. 08-248, Dkt. #67).

Ultimately, the FEC wants to prove something that is wrong as a matter of constitutional law—that the more effective the speech, the more it must be restricted. The FEC's argument boils down to the claim that if Plaintiffs are left free of contribution limits, they will be able to spend more money on speech that more effectively communicates their message. *See* FEC Merits Brief at 42-43; *see also* Appellants' P.I. Reply Brief at 28. That is, of course, true. As Plaintiffs have shown, contribution limits severely burden their ability to speak effectively. *See* Appellants' Merits Brief at 12, 13 n.2;

Appellants' P.I. Brief at 23-24.[6] But speaking effectively is Plaintiffs' right under the First Amendment. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 774 (1978); *Buckley*, 424 U.S. at 19-20. Plaintiffs have the right to associate to amplify their voices as well. *See, e.g., Ripon Soc'y v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (holding that the First Amendment protects "a right not only to form political associations but to organize and direct them in the way that will make them most effective"). And they are entitled to choose the most effective means of speaking out as well as the message. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988).

None of the FEC's alleged evidence shows that independent expenditures are inherently corrupting. At most, the FEC's evidence shows that sometimes independent expenditures are useful to candidates and sometimes they are not. *See* Appellants' P.I. Reply Brief at 26-27. It also shows that some politicians have

[6] Even while it claims that contribution limits will prevent SpeechNow.org from spending the amounts it wishes, the FEC claims that the limits are not burdensome. *See* FEC Merits Brief at 44-46. But the FEC obviously recognizes the significant impact of contribution limits on speech; it relies on that impact in complaining about the amounts 527s were able to raise and spend for issue advocacy outside of contribution limits during the 2004 election cycle. *See* FEC Merits Brief at 18; *see also* Appellants' P.I. Reply Brief at 28; Declaration of Jeffrey Milyo, Ph.D., in Support of Plaintiffs' Proposed Findings of Fact at 21-31, *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) (No. 08-248, Dkt. #44-54). Moreover, the FEC's reference to aggregate amounts that nonconnected committees raised after BCRA, *see* FEC Merits Brief at 44, is meaningless, because those committees can make small direct contributions to candidates if they wish. SpeechNow.org, by contrast, must raise large sums to fund even one advertisement. *See* J.A. 786-87.

violated the law. *See id*. at 27-28. And it shows that the FEC can find people who believe that independent spending in elections, whether for express advocacy or issue advocacy, is problematic. *See id*. at 28; *see also* FEC Merits Brief at 17-20.

Plaintiffs offered similar opinions on the other side and could mine news stories and academic articles, as the FEC did, to offer many more such views. *See, e.g.*, Declaration of Jeffrey Milyo, Ph.D., in Support of Plaintiffs' Response to Defendant's Proposed Findings of Fact, *SpeechNow.org v. FEC*, 2009 U.S. Dist. LEXIS 89011 (D.D.C. Sept. 28, 2009) (No. 08-248, Dkt. #53-3). But that would be pointless, because the FEC's point is simply that many individuals and groups want to spend large amounts of money on speech that is designed to influence the outcome of elections. *See* Appellants' P.I. Brief at 22; FEC Merits Brief at 13-15. As the Court in *EMILY's List* recognized, that is their right, and the FEC may not attempt to restrict funding in order to limit spending for effective speech. *See* 581 F.3d at 18-19.

The same applies to the FEC's argument that groups with large contributors are corrupting while groups with small contributors are not. *See* FEC Merits Brief at 32. The Supreme Court has never held that this is true, and the notion makes no sense. If having large contributors makes independent expenditures corrupting, then large independent expenditures by individuals would have to be corrupting as well. After all, an individual's own money will always constitute 100% of the

independent expenditures he is making, and that individual will be able to dictate precisely how those independent expenditures are made.[7]

C. The FEC's argument that only David Keating is speaking is both wrong and irrelevant.

The same essential point applies to the FEC's argument that only David Keating's speech is at issue in this case. *See* FEC Merits Brief at 11-12. This claim is wrong for the reasons Plaintiffs have already stated in other briefs. *See* Appellants' Merits Brief at 24-27. But even if it were true, it would prove nothing. In effect, David Keating would be speaking using other people's money freely given to finance independent expenditures that are not corrupting. So where is the problem? George Soros may spend $1 million of his own money on independent expenditures, but according to the FEC, if David Keating spends any amount of his own money and another $100,000 or so provided by others who agree with him, suddenly there is corruption.

In short, if there is no reason to limit David Keating's independent speech in the first place, then there can be no reason to prevent him from spending other people's money on that same speech. *See EMILY's List*, 581 F.3d at 10-11; *Leake*,

[7] SpeechNow.org cannot accept earmarked donations, so large donors cannot control what SpeechNow.org does. *See* J.A. 1270, 1279. Even so, in a classic heads-I-win-tails-you-lose move, the FEC both complains that large donors may control SpeechNow.org's independent expenditures at the same time that it complains that not allowing earmarked donations means that the speech at issue is only David Keating's. *Compare* FEC Merits Brief at 32 *with id*. at 11-12.

525 F.3d at 295; *see also* FEC Merits Brief at 56 (admitting that Fred Young can spend his entire contribution to SpeechNow.org on his own independent expenditures). As the Supreme Court made clear in *NCPAC*, the fact that a group may spend more than an individual is not corruption. *See* 470 U.S. at 497-98.

In any event, the Supreme Court has never applied the so-called "proxy speech" argument outside of the context of direct contributions to candidates, which involve "weighty" concerns about corruption and are far less likely than contributions to SpeechNow.org to support a particular viewpoint. *See Buckley*, 424 U.S. at 29. Indeed, in *NCPAC* the Court rejected precisely the argument the FEC is making here, stating that 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." 470 U.S. at 495.

If the FEC's argument were correct, there would be no such thing as associational speech, for in every group, some individual must actually put pen to paper or use his voice as the "proxy" for the group's members. The fact that not every contributor gets to decide on the group's precise message does not diminish the importance of his First Amendment rights, because, as the Supreme Court has recognized, individuals "will surely cease contributing when the message those organizations deliver ceases to please them." *See id.* at 499.

II. The Political-Committee Regulations Are Unconstitutional As Applied to Plaintiffs.

The FEC insists that it must be allowed to impose political-committee burdens on SpeechNow.org. However, its insistence is largely based on an argument—that disclosure is important—that is not in dispute. As Plaintiffs have repeatedly made clear, the disclosure and disclaimer provisions for those who make independent expenditures will apply to them. Thus, the parties' dispute is not whether SpeechNow.org will disclose, but how it will disclose and whether the information disclosed will satisfy the government's interests.

SpeechNow.org will disclose every contribution above $200 that goes to fund its independent expenditures under 2 U.S.C. § 434(c), the mechanism Congress provided for individuals and groups that are not political committees. Appellants' Merits Brief at 44-46. Because SpeechNow.org does not accept earmarked contributions, this means that, contrary to the FEC's claim, it will end up disclosing every contribution above $200. *See* J.A. 1279; J.A. 790; Deposition Transcript of David Keating, taken Sept. 25, 2008, at 184:10-13 ("[M]y plan is that if we are allowed to do independent expenditures, we're going to disclose all our donors over whatever the threshold is, $200 a year or whatever it is.") (No. 08-248,

Dkt. #45-1, Ex. 11).[8] This will provide the public with all the information necessary to discover where the "money comes from and how it is spent . . . ." *Buckley*, 424 U.S. at 66; s*ee also FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 262 (1986) (holding that § 434(c) provides "precisely the information necessary to monitor MCFL's independent spending and its receipt of contributions," so the "state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations" that accompany political-committee status).

In contending that SpeechNow.org must be subjected to all the burdensome requirements that apply to political committees, the FEC takes the same approach it does with respect to contribution limits. It ignores its burden in constitutional challenges and resorts to a rote application of the statutes. SpeechNow.org meets the definition of political committee and has a "major purpose" of influencing elections; that, according the FEC, should be the end of the discussion. *See* FEC Merits Brief at 33-35.

While the FEC makes a half-hearted attempt to show that political-committee status will yield important information that would not otherwise be disclosed under § 434(c), *see* FEC Merits Brief at 53-54, its claims are imaginary.

[8] The FEC's claim that David Keating "has given conflicting testimony" on this point, FEC Merits Brief at 53 n.14, is wrong. *See* Plaintiffs' Response Brief on Facts at 14 n.4.

First, as noted above, the FEC's supposed concern about the disclosure of million-dollar contributions for administrative expenses is a non-issue, because SpeechNow.org cannot accept earmarked contributions, and it makes only independent expenditures. Thus, no contributor can hide behind a request to fund only administrative expenses. Second, the FEC's claim that political-committee requirements are necessary to ensure that SpeechNow.org will not accept contributions from foreign nationals, corporations, and unions is nonsensical. It would be illegal for SpeechNow.org to accept such contributions whether it were a political committee or not, and SpeechNow.org's bylaws forbid it from accepting such donations in any event. 2 U.S.C. § 441e(a)(2); 11 C.F.R. § 114.10; J.A. 831. But even if David Keating decided to accept such contributions in violation of the law, he would still have to disclose them under § 434(c).

Here, again, the FEC is fighting both the statute and the Constitution. Congress created § 434(c) as the appropriate disclosure mechanism for groups that are not political committees, and that mechanism has received the Supreme Court's imprimatur. *See Buckley*, 424 U.S. at 79-82; *MCFL*, 479 U.S. at 262. The FEC must accept § 434(c) as it exists, not as it wants it to be. *See Ala. Power Co. v. EPA*, 40 F.3d 450, 456 (D.C. Cir. 1994) (holding that, where Congress has "indicated by plain language a preference to pursue its stated goals by what [an agency] asserts are less than optimal means . . . neither this court nor the agency is

free to ignore the plain meaning of the statute and to substitute its policy judgment for that of Congress").

At bottom, the FEC can offer nothing more than rhetoric to justify imposing the significant burdens of political-committee status on Plaintiffs. Thus, as demonstrated below, the political-committee regulations are unconstitutional as applied to Plaintiffs regardless of what level of scrutiny applies.

A. The political-committee regulations are unconstitutional as applied to Plaintiffs under any level of scrutiny.

As Plaintiffs demonstrated in their opening brief, strict scrutiny applies to their challenge to the political-committee regulations. *See* Appellants' Merits Brief at 46-47, 53. The Supreme Court has long recognized the significant burdens political-committee status imposes on groups like SpeechNow.org and has thus applied strict scrutiny to those burdens. *See WRTL II*, 551 U.S. at 464, 477-78 & n.9 (stating that "PACs impose well-documented and onerous burdens, particularly on small nonprofits" and applying strict scrutiny); *MCFL*, 479 U.S. at 256 (plurality opinion) (stating that the "practical effect [of political-committee status] on MCFL in this case is to make engaging in protected speech a severely demanding task"); *id.* at 256 (majority opinion) (applying strict scrutiny).

In arguing that intermediate scrutiny applies, the FEC relies on *Buckley* and *McConnell* but ignores that in neither case were the disclosure laws at issue anywhere near as burdensome as the regulations that apply to political committees.

Indeed, *Buckley*'s discussion of disclosure applied to the very type of independent-expenditure disclosures Plaintiffs are arguing should apply to them. 424 U.S. at 74-82. *McConnell*'s discussion of disclosure applied to whether the identities of those making electioneering communications would be disclosed, which is information SpeechNow.org will disclose under § 434(c). 540 U.S. at 194-202. In short, the FEC confuses the scrutiny that applies to challenges to simple disclosure requirements like § 434(c)—which Plaintiffs are not challenging—with the scrutiny that applies to far more burdensome regulations such as the political-committee regulations. The latter clearly get strict scrutiny. *See MCFL*, 479 U.S. at 256; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (noting that "severe burdens" on political parties' associational rights are reviewed with strict scrutiny, while "lesser burdens … trigger less exacting review ….").

But even if strict scrutiny did not apply, the FEC still could not prevail. Intermediate scrutiny does not permit the FEC to apply the broadest regulatory regime possible in order to obtain disclosure; it must still demonstrate that imposing the administrative, organizational, and continuous reporting requirements that apply to political committees is a narrowly tailored means of obtaining disclosure. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (recognizing that the government must demonstrate narrow tailoring under intermediate scrutiny). But the FEC cannot do so because SpeechNow.org will

satisfy the government's legitimate interests by disclosing pursuant to § 434(c). *See Buckley*, 424 U.S. at 80-81.

Davis v. FEC is instructive on this point. In *Davis*, the Supreme Court struck down the so-called "Millionaires' Amendment," which subjected candidates who financed their own campaigns to asymmetrical contribution limits. 128 S. Ct. at 2772. Considering the government's argument that the amendment's disclosure provisions should nonetheless remain in place, the Court applied exacting scrutiny to the disclosure provisions. Relying on *Buckley*, the Court made clear that this scrutiny was a two-step analysis. First, there must be "a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* at 2775 (citing *Buckley*, 424 U.S. at 64). Second, "the governmental interest 'must survive exacting scrutiny.'" *Id*. In all events, "a mere showing of some legitimate governmental interest" does not satisfy this scrutiny. *Id*.

The FEC made the same basic argument in *Davis* that it makes here. It argued that the additional disclosure requirements that applied to candidates subject to the Millionaire's Amendment would give the public additional important information about those candidates. Brief of Appellee at 48, *Davis v. FEC*, 128 S. Ct. 2759 (2008) (No. 07-320), 2008 WL 742921. The Court rejected this argument, finding that the additional disclosure requirements could not survive the

elimination of the Millionaire's Amendment. *Davis*, 128 S. Ct. at 2775. If the FEC's argument that disclosure requires no narrow tailoring were correct, the government's argument would have easily prevailed in *Davis*, because more information can virtually always be said to advance the government's interest in disclosure.

Davis was entirely consistent with the Court's approach in *Buckley*. Notably, in *Buckley*, the Court relied on *Pollard v. Roberts*, which involved a prosecutor's attempt to subpoena contributor records of the Republican Party of Arkansas. *See* 424 U.S. at 64 (citing 283 F. Supp. 248, 257 (E.D. Ark. 1968), *aff'd*, 393 U.S. 14 (1968) (per curiam)). While recognizing the prosecutor's legitimate power to subpoena information necessary to a criminal investigation, the court nonetheless enjoined enforcement of the subpoenas because they were broader than necessary to further the government's legitimate interests. *Pollard*, 283 F. Supp. at 257-59. Just as the subpoenas could not survive narrow tailoring, neither can the FEC's attempt to impose political-committee requirements on SpeechNow.org.[9]

[9] The FEC's claim that David Keating "can handle" political-committee requirements, FEC Merits Brief at 55-57, is irrelevant even if it is true. *MCFL*, 479 U.S. at 263 ("While the burden on MCFL's speech is not insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification."); *WRTL II*, 551 U.S. at 477 n.9 (rejecting argument by dissent that WRTL could be required to speak through a political committee because it had shown the ability to operate a PAC).

B. SpeechNow.org's "major purpose" does not make the application of political-committee status to SpeechNow.org constitutional.

The FEC largely ignores Plaintiffs' argument that SpeechNow.org's "major purpose" alone does not make the application of political-committee status to it constitutional. Instead, the FEC perfunctorily argues that *MCFL*'s discussion of "major purpose" is not dicta, but it fails to explain how the discussion of major purpose could have been anything but dicta given that the issue was not before the Court. *See* FEC Merits Brief at 34. The FEC then argues that even if the discussion is dicta, it must be treated as authoritative. *Id*. at 34 n.9. But this Court has noted that Supreme Court dicta, while "forceful," is "not binding." *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 481 (D.C. Cir. 2009) (quoting *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997)). Moreover, the FEC omits an important qualification: that the authority of Supreme Court dicta comes from it having been "carefully considered." *S. Nuclear Operating Co. v. NLRB*, 524 F.3d 1350, 1356 (D.C. Cir. 2008). As discussed in Plaintiffs' opening brief, the Supreme Court in *MCFL* expressed *no opinion* on whether it would be constitutional to apply political-committee requirements to all groups with a major purpose of influencing elections. *See* Appellants' Merits Brief at 54-55. Thus, the Court's dicta hardly represents a "carefully considered" statement of the constitutionality of those requirements.

The FEC next relies on dicta from this Court's vacated decision in *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1997) (en banc), *vacated*, 524 U.S. 11 (1998), for the proposition that political-committee requirements can constitutionally be applied to groups that make only independent expenditures. *See* FEC Merits Brief at 36. But the *Akins* court was never presented with this issue, and thus could not have decided it. The actual issue before the Court was whether a group *without a major purpose* of influencing elections could constitutionally be treated as a political committee because of its *contributions to candidates*. *See* 101 F.3d at 742. Furthermore, *Akins* recognized that *MCFL*'s discussion of "major purpose" was dicta. *See id.* at 741. Thus, *Akins* does not support the FEC's argument.

In sum, SpeechNow.org will disclose all information necessary to satisfy the government's interest in disclosure under the provision Congress provided for those who make independent expenditures. The FEC can provide no constitutionally adequate reason to burden Plaintiffs' First Amendment rights with additional regulations that serve no legitimate purpose.

CONCLUSION

For the foregoing reasons, this Court should rule in Plaintiffs' favor on all certified questions.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,916 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 29th day of December, 2009, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System.

I further certify that on this 29th day of December, 2009, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand delivery, the required number of copies of this Reply Brief of Appellants, and further certify that I served, via UPS Ground, the required number of said Brief to the following:

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*** CURRENT THROUGH PL 111-116, APPROVED 12/16/2009 ***

TITLE 2. THE CONGRESS
CHAPTER 14. FEDERAL ELECTION CAMPAIGNS
DISCLOSURE OF FEDERAL CAMPAIGN FUNDS

Go to the United States Code Service Archive Directory

2 USCS § 441e

§ 441e. Contributions and donations by foreign nationals

(a) Prohibition. It shall be unlawful for--
(1) a foreign national, directly or indirectly, to make--
(A) a contribution or donation of money or other thing of value, or to make an express or implied promise to make a contribution or donation, in connection with a Federal, State, or local election;
(B) a contribution or donation to a committee of a political party; or
(C) an expenditure, independent expenditure, or disbursement for an electioneering communication (within the meaning of section 304(f)(3) [2 USCS § 434(f)(3)]); or
(2) a person to solicit, accept, or receive a contribution or donation described in subparagraph (A) or (B) of paragraph (1) from a foreign national.

(b) "Foreign national" defined. As used in this section, the term "foreign national" means--
(1) a foreign principal, as such term is defined by section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)), except that the term "foreign national" shall not include any individual who is a citizen of the United States; or
(2) an individual who is not a citizen of the United States or a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act [8 USCS § 1101(a)(22)]) and who is not lawfully admitted for permanent residence, as defined by section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)).

TITLE 11 -- FEDERAL ELECTIONS
CHAPTER I -- FEDERAL ELECTION COMMISSION
SUBCHAPTER A -- GENERAL
PART 114 -- CORPORATE AND LABOR ORGANIZATION ACTIVITY

Go to the CFR Archive Directory

11 CFR 114.10

§ 114.10 Nonprofit corporations exempt from the prohibitions on making independent expenditures and electioneering communications.

[PUBLISHER'S NOTE: 67 FR 78679, 78681, Dec. 26, 2002, purported to substitute "109.10" for "109.2" in paragraph (e)(2). However, this could not be implemented, as this language does not exist. It is expected that the agency will issue a correction in the Federal Register.]

(a) Scope. This section describes those nonprofit corporations that qualify for an exemption in 11 CFR 114.2. It sets out the procedures for demonstrating qualified nonprofit corporation status, for reporting independent expenditures and electioneering communications, and for disclosing the potential use of donations for political purposes.

(b) Definitions. For the purposes of this section --

(1) The promotion of political ideas includes issue advocacy, election influencing activity, and research, training or educational activity that is expressly tied to the organization's political goals.

(2) A corporation's express purpose includes:

(i) The corporation's purpose as stated in its charter, articles of incorporation, or bylaws, except that a statement such as "any lawful purpose," "any lawful activity," or other comparable statement will not preclude a finding under paragraph (c) of this section that the corporation's only express purpose is the promotion of political ideas;

(ii) The corporation's purpose as publicly stated by the corporation or its agents; and

(iii) Purposes evidenced by activities in which the corporation actually engages.

(3) (i) The term business activities includes but is not limited to:

(A) Any provision of goods or services that results in income to the corporation; and

(B) Advertising or promotional activity which results in income to the corporation, other than in the form of membership dues or donations.

(ii) The term business activities does not include fundraising activities that are expressly described as requests for donations that may be used for political purposes, such as supporting or opposing candidates.

(4) The term shareholder has the same meaning as the term stockholder, as defined in 11 CFR 114.1(h).

(c) Qualified nonprofit corporations. For the purposes of this section, a qualified nonprofit corporation is a corporation that has all the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section:

(1) Its only express purpose is the promotion of political ideas, as defined in paragraph (b)(1) of this section;

(2) It cannot engage in business activities;

(3) It has:

(i) No shareholders or other persons, other than employees and creditors with no ownership interest, affiliated in any way that could allow them to make a claim on the organization's assets or earnings; and

(ii) No persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of the corporation's position on a political issue. Such benefits include but are not limited to:

(A) Credit cards, insurance policies or savings plans; and

(B) Training, education, or business information, other than that which is necessary to enable recipients to engage in the promotion of the group's political ideas.

(4) It:

(i) Was not established by a business corporation or labor organization;

(ii) Does not directly or indirectly accept donations of anything of value from business corporations, or labor organizations; and

(iii) If unable, for good cause, to demonstrate through accounting records that paragraph (c)(4)(ii) of this section is satisfied, has a written policy against accepting donations from business corporations or labor organizations; and

(5) It is described in 26 U.S.C. 501(c)(4).

(d) Permitted corporate independent expenditures and electioneering communications. (1) A qualified nonprofit corporation may make independent expenditures, as defined in 11 CFR 100.16, without violating the prohibitions against corporate expenditures contained in 11 CFR part 114.

(2) A qualified nonprofit corporation may make electioneering communications, as defined in 11 CFR 100.29, without violating the prohibitions against corporate expenditures contained in 11 CFR part 114.

(3) Except as provided in paragraphs (d)(1) and (d)(2) of this section, qualified nonprofit corporations remain subject to the requirements and limitations of 11 CFR part 114, including those provisions prohibiting corporate contributions, whether monetary or in-kind.

(e) Qualified nonprofit corporations; reporting requirements. -- (1) Procedures for demonstrating qualified nonprofit corporation status. (i) If a corporation makes independent expenditures under paragraph (d)(1) of this section that aggregate in excess of $ 250 in a calendar year, the corporation shall certify, in accordance with paragraph (e)(1)(i)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first independent expenditure report required under paragraph (e)(2)(i) of this section.

(B) This certification may be made either as part of filing FEC Form 5 (independent expenditure form) or, if the corporation is not required to file electronically under 11 CFR 104.18, by submitting a letter in lieu of the form. The letter shall contain the name and address of the corporation and the signature and printed name of the individual filing the qualifying statement. The letter shall also certify that the corporation has the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section. A corporation that does not have all of the characteristics set forth in paragraphs (c)(1) through (c)(5) of this section, but has been deemed entitled to qualified nonprofit corporation status by a court of competent jurisdiction in a case in which the same corporation was a party, may certify that application of the court's ruling to the corporation's activities in a subsequent year entitles the corporation to qualified nonprofit corporation status. Such certification shall be included in the letter submitted in lieu of the FEC form.

(ii) If a corporation makes electioneering communications under paragraph (d)(2) of this section that aggregate in excess of $ 10,000 in a calendar year, the corporation shall certify, in accordance with paragraph (e)(1)(ii)(B) of this section, that it is eligible for an exemption from the prohibitions against corporate expenditures contained in 11 CFR part 114.

(A) This certification is due no later than the due date of the first electioneering communication statement required under paragraph (e)(2)(ii) of this section.

(B) This certification must be made as part of filing FEC Form 9 (electioneering communication form).

(2) Reporting independent expenditures and electioneering communications. (i) Qualified nonprofit corporations that make independent expenditures aggregating in excess of $ 250 in a calendar year shall file reports as required by 11 CFR part 104.

(ii) Qualified nonprofit corporations that make electioneering communications aggregating in excess of $ 10,000 in a calendar year shall file statements as required by 11 CFR 104.14.

(f) Solicitation; disclosure of use of contributions for political purposes. Whenever a qualified nonprofit corporation solicits donations, the solicitation shall inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates.

(g) Non-authorization notice. Qualified nonprofit corporations making independent expenditures or electioneering communications under this section shall comply with the requirements of 11 CFR 110.11.

(h) Segregated bank account. A qualified nonprofit corporation may, but is not required to, establish a segregated bank account into which it deposits only funds donated or otherwise provided by individuals, as described in 11 CFR part 104, from which it makes disbursements for electioneering communications.

(i) Activities prohibited by the Internal Revenue Code. Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, et seq.