UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. No. 08-248 (JR)
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF RESPONSE TO PLAINTIFFS' PROPOSED FINDINGS OF FACT

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INTRODUCTION

On October 28, 2008, plaintiffs SpeechNow.org ("SpeechNow"), David Keating, Edward Crane, Fred Young, Brad Russo and Scott Burkhardt (collectively "plaintiffs") filed their proposed findings of fact, which purport to demonstrate that contribution limits and reporting requirements foreclose the development of new groups devoted to independent candidate advocacy and that unlimited contributions to such groups do not pose a danger of corruption or its appearance. Plaintiffs' evidence, however, fails to establish any of these points and the Court should not enter most of the facts proposed by plaintiffs because they are unsupported by competent evidence, irrelevant, or contradicted by overwhelming evidence presented by defendant Federal Election Commission ("Commission" or "FEC"). As demonstrated below, as well as in the Commission's more specific paragraph-by-paragraph Response to Plaintiffs' Proposed Findings of Fact ("FEC Resp. to Pls'. Facts"), unlimited contributions to groups like SpeechNow pose a danger of corruption or its appearance and groups like SpeechNow are capable of raising significant sums while complying with the contribution limits and reporting requirements of the Federal Election Campaign Act ("FECA" or the "Act"), 2 U.S.C. §§ 431-55.

I. Plaintiffs' Description of SpeechNow Omits the Critical Fact that It Was Created to Serve as a Test Case.

Plaintiffs' proposed facts and evidentiary submissions regarding SpeechNow are deficient in one critical aspect – they fail to note that SpeechNow was established to create a "test case." This missing fact casts doubt on a number of plaintiffs' proposed facts, including their claims that SpeechNow cannot start operations, not even fundraising, without contributions slightly exceeding the Act's $5,000 individual annual contribution limit and the $108,200 biennial limit on contributions by individuals.

The only statement in plaintiffs' facts even alluding to the "test case" aspect of this litigation is a single statement that David Keating "recognized that it might be necessary to challenge the application of these provisions to SpeechNow.org in court." (SN Facts ¶ 46 (citing Keating Decl. (Doc. 44-39) ¶ 38).) However, as demonstrated in the Commission's facts and as already recognized by this Court in its July 2008 decision (Order (Doc. 32) at 2), SpeechNow was created specifically to provide a vehicle for a new challenge to longstanding provisions of the Act that have already been generally upheld by the courts. (*See* FEC Facts ¶¶ 20-40.)

Evidence of SpeechNow's creation as a test case abounds. David Keating created SpeechNow to serve as part of a "joint project" with two legal advocacy groups that are not charging SpeechNow for legal representation. FEC Facts ¶¶ 24-26, 31-32, 40.) David Keating's initial telephone call to Fred Young, the plaintiff who allegedly wishes to donate $110,000 (an amount chosen by the attorneys (FEC Facts ¶ 64), was followed up by emails and a later lunch meeting with Sean Parnell, president of one of the legal advocacy groups. Their email messages explicitly confirm the "test case" nature of this suit. (*See* FEC Facts ¶ 33.) In addition, attorneys with the other legal advocacy group recruited Brad Russo, another plaintiff in this suit. (FEC Facts ¶ 38.) In another email message, a SpeechNow board member queried Fred Young, "[should the group] prepare an actual radio ad to lend credence to this initiative?" (FEC Facts ¶ 36.) The earliest documentary evidence of activity by SpeechNow may in fact be the creation of a SpeechNow email account at gmail.com by one of SpeechNow's attorneys. (Email from Paul Sherman to David Keating, June 23, 2007, SNK0327, FEC Exh. 146.)

Mr. Keating has conceded that he personally can "handle" the purportedly unconstitutional registration and reporting provisions and fundraising limits at issue here. Mr.

Keating went to the trouble of creating a test case, however, to allow others to take advantage of the ruling: "There are a lot of other people out there that don't understand all this stuff about PACs." (Partial Transcript of Policy Forum "Freeing SpeechNow: Free Speech and Association vs. Campaign Finance Regulation" (Mar. 5, 2008) at 3; Sadio Decl. ¶¶ 1-9, FEC Exh. 142.) Thus, he hopes "other groups of people will copy our method of operating" (email from Keating to Samples, Mar. 4, 2008, SNK0518, FEC Exh. 146), and he thought of others when creating the organization: He "wanted to create an organizational structure that would be simple and easy for people to copy . . . ," (email from Keating to Sims, Mar. 9, 2008, SNK0197, FEC Exh. 146.) Mr. Keating's selection of the target of SpeechNow's advertisements — the group's claimed raison d'etre — was somewhat haphazard, with the targeted candidate changing at the last minute because of the timing of the group's advisory opinion request and with Mr. Keating never even ascertaining the views on campaign finance of Senator Landrieu's opponent. (*See* FEC Facts ¶¶ 55-57.)

SpeechNow's alleged inability to raise sufficient funds in legal amounts also is suspect, given the "test case" nature of this suit. Indeed, despite the many advantages that SpeechNow has as a result of its experienced and well-connected founding members and the great success that SpeechNow has already achieved in publicizing its efforts and creating a contributor list (*see* FEC Facts ¶¶ 392, 426), SpeechNow has not made a serious effort to develop into a functioning organization. Instead, it has refused to accept any contributions in legal amounts, even amounts as low as $100 offered by plaintiffs Burkhardt and Russo, which would pay for the out-of-pocket costs incurred to date but not trigger political committee status. (*See* FEC Facts ¶ 50.) SpeechNow already has the ability to raise the money it needs within the legal limit, but has chosen not to. (*See* FEC Facts ¶¶ 51-52, 395-401; email from [redacted] to Keating, Apr. 17,

2008 SNK0287, FEC Exh. 146 (subject line of "I'd like to donate $10k to SpeechNow.org".) At the same time, SpeechNow was representing in court that it was being harmed irreparably by its inability to run two advertisements, for which it did not even attempt to raise funds within the contribution limits during the pendency of the case. From the outset, as Keating conveyed to a prospective board member, "we don't plan any activity of substance until we get approval from the government to proceed." (Email from Keating to redacted recipient, Sept. 27, 2007, SNK0159, FEC Exh. 20.)

The facts proposed by the Commission regarding SpeechNow as a "test case" should be included in the certified record. SpeechNow's litigation purpose helps confirm that the particular conduct (or lack thereof) of SpeechNow is not probative of whether there is a danger of corruption from allowing the kind of unlimited contributions it seeks. In the past, other groups have accepted contributions from individuals in amounts as high as $20 million and have used the funds to affect elections dramatically. *(*See, *e.g.*, FEC Facts ¶ 160).

II. The Individual Plaintiffs Have the Ability to Express Themselves Independently.

Although their contributions to SpeechNow are limited to $5,000 per calendar year, the individual plaintiffs are free to spend any additional money on their own in support of any messages they hope to spread. As the Supreme Court explained, one of the "overall effect(s)" of dollar limits on contributions is "to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Buckley*, 424 U.S. at 21. The individual plaintiffs contend, however, that they are unable to pay for such "direct political expression" because they lack the time, resources, and/or experience to produce television advertisements. (SN Facts ¶¶ 34-39.) Plaintiffs are of course free to express themselves in any manner, including conventional means such as yard signs or pamphlets. Plaintiffs have the

ability to create websites or post material on websites, thus expressing themselves and making their messages be cheaply and readily available to viewers all over the world.

Moreover, even assuming arguendo that plaintiffs must purchase television advertisements, technology has made purchasing advertisements easier and cheaper than ever. People such as the individual plaintiffs can now quickly and easily finance advertisements for very modest amounts, as low as a few hundred dollars. Several websites now facilitate the broadcast of political advertisements by nonprofessionals. SaysMe.tv allows citizens to place their own television advertisements on cable television for as little as $50. (Says Me, "FAQ," http://www.saysme.tv/static/faq, FEC Exh. 147.) Another website, VoterVoter.com, allows citizens to finance advertisements for as little as $1,000.[1] (VoterVoter.com, "Press," http://www.votervoter.com/wot-tvad/page/press, FEC Exh. 149.) Plaintiffs should be aware of this new technology, since one of the counsel for SpeechNow and the individual plaintiffs also represents one of the venders providing this low-cost political advertising. (FEC Facts ¶ 437.)

On the VoterVoter website, for example, users can choose an advertisement from those available on the site, upload their own advertisement, or request that VoterVoter create an individual, personalized ad for them. (VoterVoter.com, "How to Sponsor An Ad, http://www.votervoter.com/wot-tvad/page/sponsor, FEC Exh. 148.) At the click of a mouse, users can then select their target audience, including by geographic location, age, gender, and ethnicity. Once users specify their budget, VoterVoter's media buyers develop the advertisement schedule that meets the user's needs. (VoterVoter.com, "FAQ," http://www.votervoter.com/wot-tvad/page/faq (visited Nov. 20, 2008, FEC Exh. 150.) Users can pay for their advertisements

[1] The Commission's Proposed Findings of Fact may have been incorrect in listing the minimum ad purchase as $500 (FEC Facts ¶ 437), or the information may have changed on VoterVoter.com's website.

using major credit cards. (*Id.*) SaysMe.tv operates in a similar manner to VoterVoter. (SaysMe.tv, "FAQ," http://www.saysme.tv/static/faq, FEC Exh. 147.)

Technology has made direct expression in the media more readily available and affordable than ever, and the Court should not find that the individual plaintiffs with more than $5,000 available per year are unable to use such funds to express themselves.

III. Contribution Limits Do Not Prevent Groups From Raising Significant Sums.

Plaintiffs ask the Court to find that contribution limits restrict the amount of funds available to them and make it impossible for groups like SpeechNow to develop. (*See* SN Facts § IV.) The historical record of fundraising within contribution limits, however, belies these purported facts and is consistent with the Supreme Court's holding that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons . . . ." *Buckley*, 424 U.S. at 21-22. Because plaintiffs' primary proposed facts in support of these propositions are unsupported, the Court should not find that groups cannot get started by relying on a wide range of donors or that contribution limits cap the amount of money that groups can raise.

A. Plaintiffs' Proposed Facts on the Effects of Contribution Limits Are At Odds With The History of Federal Contribution Limits.

Nonconnected PACs — political committees that have no connected organizations such as a labor union or corporation — have proliferated since 1990, and the national political party committees have raised significant sums within the federal contribution limits. (*See* FEC Facts ¶¶ 376–84.) From the 1990 election cycle to the 2006 election cycle, the number of nonconnected committees rose from 1,321 to 1,797, while their total receipts ballooned from $72 million to more than $350 million. (*See* FEC Facts ¶¶ 376-79, 383.) The increase in the number of nonconnected committees confirms that small groups do not, as plaintiffs contend, "usually

start at a loss and remain there until they go into debt and/or cease to exist" (SN Facts ¶ 82), and that large donations are not "necessary" for groups to "get off the ground." (SN Facts ¶ 90.)

Similarly, the national political parties raised significant sums of money by recruiting millions of new donors after the Bipartisan Campaign Reform Act of 2002 prohibited them from receiving unlimited nonfederal or "soft money" donations. (*See* FEC Facts ¶¶ 385-91; Anthony Corrado, *Party Finance in the Wake of BCRA: An Overview*, in *The Election After Reform, Money, Politics, and the Bipartisan Campaign Reform Act* 28 (Michael J. Malbin ed., 2006), FEC Exh. 151.) For example, the Democratic National Committee increased the number of its direct mail donors from 400,000 in 2000 to 2.7 million in the 2004 election cycle and had 4 million donors contribute via the Internet during the 2004 election cycle. (*Id.*) Similarly, the Republican National Committee brought in more than 1 million new donors in 2003 alone. (*Id.*) The two parties' congressional campaign committees likewise brought in hundreds of thousands of new donors in the 2004 election cycle, including 700,000 for the Republican committees and 230,000 for the Democratic Congressional Campaign Committee. (*Id.*)

Due in large part to their recruitment of new donors, the national party committees raised at least 90 percent as much in hard money in the 2004 and 2006 election cycles as they had raised in both hard and soft money *combined* in the 2000 and 2002 election cycles, the last two election cycles before Congress enacted BCRA. (*See* FEC Facts ¶¶ 387-90.) Indeed, "(i)n the first two elections conducted under BCRA (2004 and 2006), the national parties committees raised $2 billion, an amount roughly equivalent to the $2.1 billion in hard and soft money raised in the two election cycles prior to BCRA (2000 to 2002)." (Corrado and Varney, Party Money in the 2006 Elections: The Role of National Party Committees in Financing Congressional Campaigns ("Corrado & Varney"), FEC Exh. 135 at 21.) Much of the parties' increase in hard

money receipts came as a result of contributions of less than $200 per calendar year from individuals. The amount of those contributions to the national parties approximately doubled from 2000 to 2004 (from $222 million to $442 million), and increased by over $100 million from 2002 to 2006, from $219 million $309 million. (*Id.* at 6-7.)

Plaintiffs rely in part on the expert report of a former political fundraiser, Rodney Smith, who asserts that contribution limits make the cost of fundraising prohibitive. (*See, e.g.*, SN Facts ¶¶ 80-82.) Smith's own experience successfully raising significant sums within the Act's contribution limits, however, contradicts his claims. While the Finance Director for the National Republican Congressional Committee in 1995 and 1996, Smith raised approximately $100 million, the vast majority of which (80%) was hard money raised within the contribution limits. (Smith Decl. Exh. A at 16; Smith Dep. at 39-40, FEC Exh. 15.) At the time, the Act limited contributions to national party committees to $20,000 per year from individuals, and $15,000 per year from political committees. (*Id.*; 2 U.S.C. § 441a(a)(1995).) In 1987-88, Smith recruited approximately 90,000 new donors and raised over $18 million at a cost of slightly less than 40% of the total sum raised for the Jack Kemp for President Campaign, even though the candidate never exceeded 6% in a national poll. (Smith Decl. Exh. A at 16.) Similarly, while the Treasurer and Finance Director for the National Republican Senatorial Committee in 1985 and 1986, Smith raised $96 million at a cost of less than 40% of the total sum raised. (Smith Decl. Exh. A at 16; Smith Dep. at 56-58, FEC Exh. 15.) Again, the vast majority of the funds he raised for the Committee – at least 90% – were hard dollars raised under the Act's limits on contributions to national party committees. At that time the limits were the same as they were in the 1985-86 election cycle, $20,000 per year from individuals, and $15,000 per year from political committees. (Smith Decl. Exh. A at 16; Smith Dep. at 58, FEC Exh. 15; 2 U.S.C.

441a(a) (1986).) Smith attempts to reconcile the incongruence of his opinion that acquiring new donors does not raise new funds with his own success finding new donors and raising additional money within contribution limits by claiming that he's "the exception to the rule." (Smith Dep. at 84.) The expansion of nonconnected committees over the last two decades and the success of the political parties after BCRA, however, demonstrate that Mr. Smith is no exception.

To rebut the history of hard money fundraising, plaintiffs principally rely on Rodney Smith's report to support their conclusions about fundraising, including his opinion that "(b)ecause the cost of acquiring new donors is often greater than the amount received from a new donor, small groups usually start at a loss and remain there until they go into debt and/or cease to exist." (SN Facts ¶ 82.) The Court should decline to enter the proposed facts relying on Smith's testimony regarding fundraising costs, however, because Smith's opinion is entirely unsupported. He does not rely on any empirical data or even anecdotal evidence in support of his claim that contribution limits make fundraising so costly that it dooms most groups. Instead, the report includes two matrices (Smith Dep. Exh. 1, at 8, 10; Smith Decl. ¶¶ 33, 38) that purport to illustrate the costs of fundraising but, in fact, were just invented by Smith and not intended to actually mirror reality. One matrix purports to demonstrate that fundraising costs exceed revenue when large numbers of donors are secured. (Smith Dep. Exh. 1, at 10.) Smith testified, however, that he "wasn't trying to reflect reality as it has been [his] experience," and "there was no attempt on [his] part to make it reflect reality, either today or yesterday." (Smith Dep. at 111-13.) Instead, "[i]t was just a number [he] arbitrarily picked up to make a point of how volume changes form and results." (Smith Dep. at 113.) Another matrix purports to illustrate that "the higher the average contribution, the lower fundraising costs will be as a percentage of gross receipts." (Smith Dep. Exh. 1 at 8.) That matrix is also not based on historical data.

(Smith Dep. at 81-88.) "I'm just using very simplistic numbers," he explained; "(i)t was the principle I was trying to show, not the facts of what it really cost to generate a gift." (*Id*. at 87.)

Smith's inaccurate forecasts regarding the ability of the political parties to locate new supporters are another reason that his opinion should not serve as the foundation for the Court's findings of fact. He made forceful predictions at the time the national parties were no longer permitted to have accounts that were not subject to contribution limits. In an amicus brief to the Supreme Court, he wrote that

> it [is] crystal clear that it is a practical impossibility for either party to recruit enough new donors to make up for the loss of "soft" dollars. Both political parties would literally have to double their existing donor bases. Absent the occurrence of some cataclysmic event, doubling the size of either party's donor base is simply impossible. . . . Over time, both parties are likely to shrink in size and influence — and shrink significantly.

(Br. of Rodney A. Smith as Amicus Curiae, *McConnell v. FEC*, No. 02-1674, Smith Dep. Exh. 5, FEC Exh. 158.) The "simply impossible" has happened. Although Smith nevertheless continues to offer his opinion about donor acquisition, the Court need not adopt it as fact.

The Court thus should not find that the costs of donor acquisition outweigh revenue generated and force most groups to go out of business. Smith's matrices are admittedly not designed to reflect reality and in actuality do not reflect reality, as evidenced by the history of nonconnected committees, political party committees, and Smith's own fundraising success. Although it may be true that raising funds through unlimited contributions is easier than raising funds within contribution limits, plaintiffs have not established that contribution limits foreclose the establishment of viable new groups.

B. Fundraising Costs Have Decreased Over Time.

Plaintiffs' proposed facts are also at odds with the trends in fundraising costs. Thanks to new technology, primarily the Internet, fundraising is easier and less expensive now than at any previous time. "[A]dvances in technology" have "made the act of contributing as easy as the simple task of clicking on a computer mouse." (Corrado & Varney at 21, FEC Exh. 135.) As Professor Wilcox, a leading political scientist on campaign finance issues and the Commission's expert witness, has explained, "[t]he internet has provided a new technology to reach smaller donors — one that is cheaper, allows for a wider range of ideology, and provides a wider range of incentives than existing techniques such as direct mail." (Clyde Wilcox, *Internet Fundraising in 2008: A New Model*, The Forum, at 1-2 (Vol. 6, Art. 6, 2008).) "With a lower threshold to break even, campaigns can seek to build much larger networks of donors. If prospecting is not expensive, then campaigns can spend time to develop complex networks of potential donors, and target them with a mixture of incentives. They can vary the message and the packaging without incurring huge expenses." (*Id.* at 7.)

"Fundraising is the art and science of approaching potential donors with the right appeals at the right time," and the Internet provides better and more inexpensive tools to accomplish such appeals. (Clyde Wilcox, *Internet Fundraising in 2008: A New Model*, The Forum, at 3, 7 (Vol. 6, Art. 6, 2008.) For example, in 2003, Joe Trippi, the manager for Howard Dean's presidential campaign, pioneered a more decentralized approach to fundraising. Trippi explained the very minimal costs associated with Internet fundraising, the success of which centers on the power of the message. "The Internet shines a light on these dark recesses and quickly organizes millions of Americans *cheaply*, without relying on billionaires who want something for their money. Unlike TV ads, which can cost millions, on the internet all you need is a website and working

fingers." (Joe Trippi, *The Revolution Will Not Be Televised* 226 (2004) (emphasis in original).) On a single day in July 2003 the Dean campaign raised "$500,000 from 9,700 donors giving about $50 each." (*Id.*) Using its website, the campaign challenged its supporters to exceed what Vice President Cheney was raising at a $2,000 a plate fundraising dinner. The campaign invited users to watch a streaming webcast of Governor Dean eating a $3 turkey sandwich to draw a contrast with Cheney's fundraiser. (*Id.*)

Governor Dean ultimately set a record by raising $800,000 in a single day, but his record was soon eclipsed by Senator John Kerry on March 4, 2004, when he raised $2.6 million over the internet, more than tripling Governor Dean's record. (*See* Jim VandeHei and Thomas Edsall, *Kerry Capitalizing on Party Resources to Fill Coffers*, Wash. Post, Mar. 19, 2004, at A06., FEC Exh. 159.) Then, in a single 24-hour period in November of 2007, "Ron Paul raised $4.07 million in individual contributions, primarily through the internet." (Clyde Wilcox, *Internet Fundraising in 2008: A New Model*, The Forum (Vol. 6, Art. 6, 2008), FEC Exh.152.)

As a member of Senator Kerry's campaign staff explained, Internet fundraising is more cost-effective than direct mail or major-donor dinner and cocktail events, and cost the Kerry campaign only about 3 cents on the dollar. (Jim VandeHei and Thomas Edsall, *Kerry Capitalizing on Party Resources to Fill Coffers*, Wash. Post, Mar. 19, 2004, at A06, FEC Exh. 159.) Similarly, the national political parties have "successfully used email solicitations as a low-cost means of requesting donations on a national scale" because the Internet has become "commonplace for all manner of financial transactions." (Corrado & Varney at 2, FEC Exh. 135.)

Plaintiffs ask the Court to rely upon Mr. Smith and find that "raising money via the Internet" is "out of reach for the vast majority of non-wealthy candidates and start-up

organizations." (SN Facts ¶ 81.) But Mr. Smith's conclusion rests in part on the assumption that groups will not be able to afford to invest in the technology for Internet fundraising (Smith Decl. ¶ 43) — an erroneous assumption, since the reason for the move to Internet fundraising is that it is inexpensive. (Clyde Wilcox, *Internet Fundraising in 2008: A New Model*, The Forum, at 7 (Vol. 6, Art. 6, 2008), FEC Exh. 152.) Smith's report presents no data which disputes that fundraising is now cheaper than it has ever been due chiefly, although not exclusively, to the salutary effects of the Internet on fundraising costs. Smith concedes that he does not identify in his report any specific Internet fundraising cost ratios. (Smith Dep. at 166, FEC Exh. 15.) Smith's report is largely taken verbatim from portions of a book he wrote. The book, written in 2000, includes the sentence: "How its use will evolve is still unclear, but there is absolutely no doubt that the Internet has a bright future in political fund-raising." (Smith Dep. Exh. 7.) Smith testified that he omitted the sentence from his report for space reasons. (Smith Dep. at 169-70, FEC Exh. 15.) Finally, the Court should not accept plaintiffs' proposed facts on Internet fundraising because Smith does not have the expertise to testify about the effect the Internet may have on fundraising costs. His last foray into Internet political fundraising was with the National Republican Congressional Committee more than ten years ago (*id*. at 24), and he admits that he "would not purport to be an expert in internet fundraising" (*id*. at 19.) His opinion on the subject thus does not provide a basis upon which the Court should make a finding of fact.

C. SpeechNow's Belief That It Promotes a Cause That Is Presently Unpopular And Underreported Is Irrelevant.

A number of SpeechNow's proposed facts attempt to distinguish groups advocating for high profile issues with groups focusing on issues that get less attention from the media and the public. (*See, e.g.*, SN Facts ¶¶ 79-81, 85-87.) The relative salience of different issues, however, is irrelevant, and the Court should make no findings distinguishing groups based on the

prominence or popularity of issues they pursue. Such findings would suggest that Constitution must equalize the relative financial resources or political influence of competing political actors. In ruling on the constitutionality of various expenditure and contribution limits, the Supreme Court has rejected any notion that political actors have a right to equal resources and influence. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 54 (1976) (holding that the interest in equalizing political resources is inadequate to sustain the constitutionality of expenditure caps); *Davis v. FEC*, 128 S.Ct. 2759, 2772 & n.7, 2773-774 (2008) (holding unconstitutional federal election campaign provisions that, under certain circumstances, imposed different contribution limits on candidates competing for the same congressional seat; argument that the provisions "ameliorate[ ] the [allegedly] deleterious effects" of the law's campaign contribution limits "is fundamentally at war with the analysis of expenditure and contribution limits … adopted in *Buckley*."). The Court should make no findings of fact about the relative popularity of different issues because such facts are premised on the notion that it would be acceptable for Congress to impose contribution limits on popular groups and constitutionally required for Congress to remove for advocates of less popular causes. As the Supreme Court has held, however, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49.

Many of SpeechNow's proposed facts also appear to be premised on its right to media publicity equal to the publicity provided others. (*See* SN Facts ¶¶ 80, 83.) Those facts are irrelevant because the Constitution does not grant any such right to equal publicity. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (finding unconstitutional a state statute requiring newspapers to provide free space to a candidate for a reply to newspaper's criticism of

the candidate's character); *Pacific Gas and Elec. Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1 (1986) (vacating state utility commission's order directing utility to place newsletter of third party in utility's billing envelopes).

D. Plaintiffs Have Not Demonstrated that Contribution Limits Inhibit the Ability of Groups Like SpeechNow To Get Started.

SpeechNow is capable of raising significant sums within the contribution limits, including the seed money it purports to need, but has chosen not to do so. (*See* FEC Facts ¶¶ 392–437.) SpeechNow has received a considerable amount of free publicity, including radio talk show interviews, newspaper articles and editorials (*id*. at ¶¶ 403–08), and it has already attracted a significant number of supporters and potential contributors. (*Id.* at ¶¶ 396–401.) As of mid-August, 2008, 182 individuals had signed up on SpeechNow's website to receive its newsletters, including 75 who indicated they would be interested in making a donation. (*Id.* at ¶ 397.) These potential contributors include a number of prominent activists and donors. (*Id*. at ¶¶ 410-25.) Nonetheless, SpeechNow has chosen not to accept any contributions during the pendency of this litigation, and declined any of the contributions offered to date. (*Id*. at ¶¶ 398-400.)

Plaintiffs rely on Jeffrey Milyo and Rodney Smith to argue that contribution limits inhibit the ability of groups like SpeechNow to "get started." (*See* SN Facts § IV(B).) We have already seen the weaknesses of Smith's attempted support. Milyo's report relies, in part, on contributions received by the "top 10 non-party, federally focused 527 organizations in 2004." (*See* SN Facts ¶¶ 76-79.) However, numerous analytical errors undermine Milyo's assertions and, therefore, SpeechNow's corresponding proposed findings of fact.

Milyo's general claims regarding "new political organizations" are invalid because in examining the fundraising of independent groups, he fails to consider political action committees ("PACs") that properly registered with the FEC and complied with the contribution limits, or the

relationship between unregistered 527 committees and their associated PACs. (*See* SN Facts ¶ 79 (citing Declaration of Jeffrey Milyo, Ph.D., in support of Plaintiffs' Proposed Findings of Fact ("Milyo Decl.") ¶ 92).) Relying exclusively on Milyo's declaration, SpeechNow asserts that limits on political groups are likely to harm independent political organizations, that they will have difficulty "getting off the ground," and that such groups will be less effective if unable to receive unlimited contributions. (SN Facts ¶ 79, 90.) In his attempt to support this claim, Milyo states only that several 527 organizations collected large contributions in 2004. (*See* Milyo Decl. ¶¶ 87-93.) Almost all of these groups were set up to influence federal elections outside of the FEC's contribution limits, however, and were accordingly found to be raising funds and making independent expenditures in violation of the law. (*See* FEC Facts ¶ 162; e.g., it was determined that the following groups should have registered as political committees: The Media Fund, Progress for America, Swift Vets & POWs for Truth, MoveOn.org Voter Fund, and Club for Growth, Inc.) The Court thus should not draw general conclusions regarding independent political committees from a few groups found to have broken the law.

Milyo's analysis also fails to take into account the many successful nonconnected PACs that have formed and actively engaged in candidate advocacy using funds raised within the limits of the law. As discussed above (*see supra* pp. 6-7), from the 1990 election cycle to the 2006 election cycle, the number of nonconnected PACs rose from 1,321 to 1,797, while their total receipts increased from $72 million to more than $350 million. (*See* FEC Facts ¶¶ 376-79, 383.) Those groups were able to "get started" in spite of the contribution limits. Furthermore, the fact that many of the 527s that Milyo examines were associated with affiliated PACs skews the significance of the large contributions they did receive. It only appears that the 527s raised so much of their money from large contributions because smaller contributions were more often

given to their associated, legally registered PACs. (*See* Tables 3-6, Milyo Decl. at 28-29.) Donors ordinarily provide hard money contributions first, and then, if they want to provide additional funds, they give to entities that can accept unlimited funds such as 527s. (*See* Wilcox Rept. at 6, FEC Exh. 1; Rozen Decl. ¶ 11, FEC Exh. 3; *McConnell v. FEC*, 540 U.S. 93, 125 n.15 (2003).)

Even if we set aside the significance of registered PACs, Milyo's broad conclusion that "newly formed 527 political organizations tend to raise funds from a few large contributors, compared to more established 527s," is still unsupported. (See SN Facts ¶ 76, Milyo Decl. ¶ 87.) The only data that Milyo relies for this point is his "Table 2: Timing and Amount of Itemized Contributions to Top 527 Organizations," which appears at page 27 of his declaration and lists the number and average contribution to ten 527s in 2003 and 2004. (Milyo Decl. ¶ 87.) In order for his generalization to be true, Milyo makes an exception for one group, the Swift Boat Vets, even though he only examined ten groups in all. (*Id.*) The fact that some of the "newly formed" groups such as America Coming Together, Media Fund, and Progress for America received higher contributions on average (*id.*) is simply a reflection of their ability to raise extremely large contributions, not any indication of a sequence of funding over the life of an organization. Moreover, the "newly formed" groups were able to raise such large funds because they were closely associated with the two major political parties and their presidential candidates. (*See* FEC Facts 157-60, 201, 251-65.) The older groups would no doubt have gladly accepted the large contributions raised by the primary groups referred to as the "shadow party" groups, had they been able to raise such large contributions. Furthermore, Milyo conceded in his deposition that "it's possible that these top 527 political groups are unrepresentative of the size distribution

of contributions" to 527 groups generally.[2] Milyo's assertions are thus unreliable even with regard to 527s, let alone registered PACs and independent political groups as a whole. Without any assurance of reliability, the Court should not enter plaintiffs' proposed findings of fact regarding contributions to independent groups generally when plaintiffs' expert himself states that the data relied upon may not be representative.

Finally, the Court should not accept Milyo's assertions, and thus SpeechNow's proposed findings of fact, regarding the significance of large contributions as seed funding and a signaling tool because Milyo's report lacks support. (*See* SN Facts ¶¶ 79, 90; Milyo Decl. ¶¶ 93, 54.) Milyo relies exclusively on the amounts of contributions given to 527s in 2003 and 2004. (See Milyo Decl. § VIII, ¶¶ 87-93; Milyo Decl. ¶ 54.) He does not conduct interviews with the operators of political groups or the donors who decide to support them, or cite to published comments by them. (*Id.)* He does not discuss or cite any scholarly articles or studies regarding the role of large contributions as signals. (*Id.)* And he pays no consideration to the multi-faceted circumstances that could affect whether or not a political organization is successful in any particular election cycle, why they are or are not successful at fundraising. (*Id.)* Milyo's conclusions are pure conjecture, and thus do not support SpeechNow's corresponding proposed findings of fact. (*See* SN Facts ¶¶ 79, 90.)

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[2] Milyo responded as follows to another question regarding whether the numbers in Table 2 were representative of 527s generally:

> Q I was just wondering if you made any claim that they are representative of 527 groups more generally.
> A. In fact, the claim I made is that it's possible that they're unrepresentative.

(Milyo Dep. at 321.)

E. Contribution Limits Do Not Prevent Any "Specialization of Labor."

Another aspect of plaintiffs' proposed facts, based on Milyo's report, is that "contribution limits make it impossible for individuals to take full and effective advantage of the specialization, economies of scale, and division of labor that group association affords." (*See* SN Facts ¶ 93; Milyo Decl. ¶¶ 49-51.) In fact, contribution limits do not prevent individuals with different skill sets or resources from coming together for the purposes of disseminating campaign messages. The only limitation is on how much money a single individual can give to the group. Individuals are free to form groups and make independent expenditures. One individual can produce and broadcast advertisements while others fund the group, up to the contribution limit. Limiting the amount that a donor can contribute does not take away that person's ability to be a funder of the group or prevent any "specialization of labor" that the group may prefer.

F. Contribution Limits Do Not Restrict The Amount of Funds Available To Groups.

Plaintiffs claim that contribution limits reduce the overall amount of money available to groups like SpeechNow to use on independent expenditures. (*See* SN Facts ¶¶ 98-114.) Even if contribution limits do somewhat increase the costs of fundraising, they do not necessarily reduce total funds received. The most relevant historical precedent reveals that funds received do not diminish when new donors are sought. Furthermore, plaintiffs' claims are not anchored in actual fact, but inadequately supported by "basic economic principles" put forth by their expert witness — an economist — that are not fully applicable to political entities.

Citing Milyo, SpeechNow asks the Court to find that political groups will be able to raise less money when faced with contribution limits than if they were able to freely pursue "small" and "large" donations based on the lowest cost per donor dollar raised in an unconstrained environment. (*See* SN Facts ¶¶ 100-101; Milyo Decl. ¶¶ 37-39.) Milyo labels this concept the

"equi-marginal principle." (*Id.*) Milyo's theoretical discussion, however, is undercut by the recent historical example of "soft money." (*See* FEC Facts § V(B), ¶¶ 385-391.) By recruiting new small donors, political parties have raised roughly the same amount of money under contribution limits as they did before the enactment of BCRA when they could seek unlimited "large" soft money donations. (*Id.*) Milyo's abstract theory is thus at odds with historical reality. He hypothesizes how the equi-marginal principle, a theory from an "undergraduate intermediate microeconomics textbook," may apply to political committees without reference to more relevant academic sources or any supportive factual developments. For example, Milyo does not assign any values to what he refers to as "small" and "large" donors. (*See* Milyo Dep. at 198-199.) His discussion bears no relation to the actual contribution limits that apply to SpeechNow. Similarly, he does no research, nor does he cite or discuss any research regarding what the comparative costs of seeking "large" or "small" contributions actually are for a group like SpeechNow. (*Id.*) While Milyo asserts that political groups which operate under contribution limits may gather "less" money, he cannot say how much "less" and concedes that the negative effect of contribution limits on fundraising may be as little as a penny. (*See* Milyo Dep. at 203-204.)

Plaintiffs also rely on Milyo's discussion of the concept of "revealed preference" to argue that contribution limits make it more difficult for political groups to raise money. (SN Facts ¶¶ 102-112.) In his deposition, Milyo explained the concept as follows:

> Revealed preference has to do with the idea that while we may not be able to observe preferences, we can observe behavior. And given that an individual … is purposive, we can then infer that the actions that the purposive individual takes are revealing something about preferences.

(Milyo Dep. at 205.) Milyo argues that the fundraising practices of groups operating without any contribution limits reveal the groups' preferences. (*See* SN Facts ¶¶ 102-103; Milyo Decl.

¶¶ 40-43.) He then goes another step to assert that any constraint on those revealed fundraising preferences must harm the groups' ability to collect contributions. However, Milyo's general economic theories combined with his selective use of fundraising patterns of 527s in 2004 simply do not support the conclusion that SpeechNow will be unduly burdened by contribution limits.

In particular, in applying his theoretical approach, Milyo wrongly treats the "revealed preference" of 527s in 2004 as representative of independent political groups generally, mischaracterizes the fundraising of the 527 groups whose preferences he has purported to reveal, and ignores the actual results of the imposition of contribution limits in the past. As discussed above with regard to whether contribution limits affect political groups' ability to "get off the ground," the top non-party federally focused 527s in 2004 are not representative of independent political groups generally. (See *supra* pp. 16-18.) Apart from these groups, several of which illegally failed to register with the Commission and abide by contribution limits, many independent political committees chose to register with the FEC and collect contributions within the limits. Also, the amount of large donations that many of the 527s received is skewed because contributions within the limits were more likely to be given to their associated PACs, and, as Milyo concedes, the 527s he discusses may not even be representative of other 527s. (See *supra* pp. 16-18.)

Assuming *arguendo* that any conclusions regarding independent political groups generally can be drawn from the "preferences" of 527 groups in 2004, SpeechNow's proposed findings of fact are still inaccurate because Milyo mischaracterizes the 527s' fundraising practices. (See SN Facts ¶¶104-112; Milyo Decl. ¶¶ 76-84.) While Milyo claims that an analysis of these groups demonstrates that "groups do reveal a preference for larger over smaller

contributions," half of the groups he discusses received average contributions below the contribution limits, and several of the other groups would also fall into this category if one accounted for the small contributions received by their associated PACs (*e.g.*, MoveOn.org). (*See* SN Facts ¶ 104, Milyo Decl. Table 2 and Table 3 at pp. 27-28.)

Finally, because Milyo's discussion pays so little attention to the way that political groups actually work, he ignores what actually happens when contribution limits are applied to previously unconstrained groups and fails to consider any benefits that may be associated with raising money from many small contributions. As discussed above, when political party committees were first faced with contribution limits, the parties' fundraising ability did not significantly change. (See supra pp. 7-8.) Similarly, Chairman of the California Fair Political Practices Commission Ross Johnson testified that if currently unconstrained independent expenditures committees in that state were forced to comply with contribution limits, the committees would not necessarily decrease the amount of independent expenditures because they could still seek contributions from "hundreds of thousands of people." (Deposition of Chairman Ross Johnson ("Johnson Dep.") at 62-63.) Many commentators even believe that the political parties benefited from seeking a greater number of smaller contributions because they thereby developed an extensive grassroots network of dedicated supporters who could be encouraged to assist the parties in any number of ways. (*See, e.g.*, Richard H. Pildes¸ *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28, 143-44 (2004) ("In absolute terms, the national parties are emerging just as strong — arguably even stronger — after *McConnell*. In retrospect, large soft-money donations might have made the parties lazy about developing their grassroots.") (footnote omitted).) Milyo's analysis regarding the burdens of contribution limits is inaccurate and, accordingly, should not be adopted as fact.

IV. Unlimited Contributions Pose A Danger Of Corruption Regardless of the Motives of SpeechNow's Individual Donors.

Plaintiffs repeatedly propose facts regarding SpeechNow's mission and the individual plaintiffs' motives for donating (*see, e.g.,* SN Facts ¶¶ 115-117) but the Supreme Court has made clear that such individual protestations of benign motives are irrelevant to determining the danger of corruption. In *Buckley v. Valeo*, 424 U.S. 1, 29 (1976), the Supreme Court upheld the Act's then-$1,000 limit on contributions by individuals to candidate campaign committees and specifically rejected as a matter of law a challenge based on "the proposition that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." The Court held:

> Although the truth of that proposition may be assumed, it does not undercut the validity of the $1,000 contribution limit. Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."

(*Id.* at 29-30.) Other courts have followed suit. *See Jacobus v. Alaska*, 338 F.3d 1095, 1115-1116 (9th Cir. 2003) (quoting *Buckley*); *Mariani v. United States*, 212 F.2d 761, 771 (3rd Cir. 2000) (same), *McConnell v. FEC*, 251 F. Supp. 176, 661 (D.D.C. 2003) (Feinberg, J.) (same). Thus, it is the potential or appearance of corruption, not the motives of particular contributors, that is relevant. Because the motives of SpeechNow's individual contributors are therefore irrelevant, the Court should not make findings of fact regarding their particular motives.

V. There Is No Basis for a Finding that the Reputation of PACs Harms SpeechNow.

SpeechNow proposes two factual findings regarding effects that might arise from being identified as a political committee. Specifically, SpeechNow asserts that, as a political committee, it would be perceived unfavorably because "many people . . . have a negative view" of political committees (Pl.'s Facts ¶ 133), and it would have difficulty raising funds because "[d]onors are aware of the contribution limits" and would accordingly "be reluctant" to donate in excess of the limits even if they were not applicable to SpeechNow (*id*. ¶ 134.) These proposed findings have no basis in fact and are irrelevant.

First, as a practical matter, FECA does not require political committees to identify themselves as such when they support candidates or fundraise. SpeechNow is free to call itself almost anything it chooses; indeed, there are many political committees such as EMILY's List that omit the phrase "political committee" or "PAC" from their names, and entities funding independent expenditures need not use the words "political committee" in their mandatory advertising disclaimers. S*ee* 2 U.S.C. § 441d (disclaimer requirements); 11 C.F.R. § 110.11(b) (same). Second, even if SpeechNow were to choose to identify itself publicly as a political committee or PAC, no evidence bolsters its assertion that "many people" would then hold a "negative view" of it. The only support that SpeechNow provides is Mr. Keating's self-serving speculation, unverified by any external source, which is insufficient to warrant adoption by this Court. Third, as to the possibility that donors might be misled into believing that contribution limits applied to SpeechNow, the organization provides no evidence that any person has ever made such a mistake, much less that "many" people are likely to do so. *Cf. Wash. St. Grange v. Wash. St. Republican Party*, 128 S. Ct. 1184, 1193-94 (2008) (holding that plaintiffs' "sheer speculation" regarding "mere possibility" that "voters will be confused" was "fatal flaw" in

challenge to statute regarding candidate ballot listings). Thus, SpeechNow's assertion that the public is "aware of" the $5,000 contribution limit but unable to determine when that limit applies cannot be the basis for a finding of fact by this Court.

Finally, as a legal matter, the Supreme Court has clearly foreclosed this type of argument by SpeechNow, and the Court should deem the proposed facts irrelevant. *See Meese v. Keene*, 481 U.S. 465 (1987). The *Meese* plaintiff, who wished to exhibit certain films, claimed his First Amendment rights were violated by a statute that required the films to be labeled "political propaganda." *Id*. at 467-68. The Court rejected this claim and held that the plaintiff's rights were not violated because (a) the plaintiff was free to explain to his audience that the films were not "propaganda" in the common understanding of the term, *id*. at 480-81; (b) the statute did not require any information to be withheld from the public, *id*. at 481-82; (c) "a zeal to protect the public from too much information" does not state a constitutional claim, *id*. at 482 (internal quotation marks omitted); (d) the record included no evidence that the public misunderstood the label, *id*. at 483; and (e) "no constitutional provision prohibits the Congress" from using whatever labels it wishes to use in defining terms within legislation, *id*. at 484-85. Each of these rationales applies with equal force here: SpeechNow is free to explain the meaning of the terms "political committee" or "PAC" as much as it wishes, the statute withholds no information from the public, there is no evidence that the public is confused by the "political committee" label, and Congress was entirely within its power to use the term "political committee" instead of whatever term SpeechNow would prefer. The Court should thus deem plaintiffs' proposed facts about the reputations of PACs irrelevant.

VI. The Commission's Fulfillment of Its Statutory Duty to Provide Assistance to Political Committees Does Not Constitute Evidence of Undue Burden.

Plaintiffs' attempt to characterize the resources and assistance the Commission provides to political committees as evidence that the Act's registration and reporting requirements are difficult or unduly burdensome. (*See* SN Facts ¶¶ 141-151, 158-159.) To the contrary, this aid is evidence that the Commission helps alleviate whatever burdens the Act imposes. For example, the Commission provides assistance through publications (like the *Campaign Guide for Nonconnected Committees*), training, and a toll-free telephone help line, all upon the direction of Congress. Indeed, the 1974 Amendments to the Act, which established the Commission, explicitly authorize the Commission to "encourage voluntary compliance." Federal Election Campaign Act Amendments of 1974, § 311, Pub. L. No. 93-443, 88 Stat. 1263, 1983 (1974). *See* 2 U.S.C. § 437d(a)(9). In fact, the Commission's toll-free telephone help line is set up as a totally anonymous service so the public will "feel comfortable calling and asking any question at all." (Scott Dep. at 26-27, FEC Exh. 14.)

Plaintiffs specifically cite the reporting forms, electronic filing software, and accompanying instructions issued by the Commission for use by political committees (*see e.g.*, SN Facts ¶¶ 137-138, 141, 143-144, 151), but the Act explicitly requires the Commission to "prescribe forms necessary to implement this Act," and "prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting." 2 U.S.C. § 438(a)(1)-(2). Furthermore, since 2002, the Act has required the Commission to make copies of reporting software available to each person required to file in electronic form under the Act. 2 U.S.C. § 434(a)(12)(ii); Bipartisan Campaign Reform Act of 2002, § 306, Pub. L. No. 107-155, 116 Stat. 81, 102 (2002). Thus, political committees do not have to purchase their own software for this purpose.

In sum, the Commission's provision of assistance to political committees does not constitute evidence that the Act's requirements are unduly burdensome. The Court therefore should reject plaintiffs' perverse attempt to use Commission efforts to provide assistance to political committees as a factual basis for declaring the statute unconstitutional. Instead, the Court should find that the Commission's efforts are irrelevant or, alternatively, find that this assistance actually makes compliance easier.

VII. Evidence in the Record Demonstrates that Reporting Is Not Difficult for Committees Like SpeechNow and David Keating Can "Handle" It.

Plaintiffs make repeated claims regarding the difficulty of complying with the Act's registration and reporting requirements, but these are refuted by the evidence in this case, including the testimony of the Commission official deposed by plaintiffs pursuant to Rule 30(b)(6) and repeated admissions by plaintiff David Keating himself.

Significantly, while plaintiffs cite the testimony of Assistant Staff Director Gregory Scott for other propositions (*see* SN Facts ¶¶ 30, 131-132, 135-139, 141-148, 150-155, 162-165), plaintiffs fail to mention Mr. Scott's testimony on this point. He testified that the reporting requirements that apply to nonconnected political committees generally are not complicated. While there may be some provisions of the regulations that are more complex than others, the basic provisions regarding registration, fundraising and reporting are straightforward. (*See* FEC Facts ¶ 444 (citing Scott Dep. at 156, FEC Exh. 14).)

David Keating's prior experience also belies the notion that SpeechNow cannot survive if it is required to file periodic reports. His duties as executive vice president of the National Taxpayers Union and Executive Director of Club for Growth included assisting their political committees in complying with the Act. (*See* FEC Facts ¶¶ 410-411, 449-450.) Plaintiffs also fail to mention that Mr. Keating, who as treasurer of SpeechNow would be the person primarily responsible for SpeechNow's registration and reporting, even admitted during a public forum in March 2008 about

this litigation that he understands the legal requirements under the Act for reporting by political committees and can perform the duties of treasurer, stating "I can handle it." (Partial Transcript of Policy Forum "Freeing SpeechNow: Free Speech and Association vs. Campaign Finance Regulation" (March 5, 2008) at 3, FEC Exh. 130; *see* FEC Facts ¶ 451.) Furthermore, Mr. Keating acknowledged during his deposition in this case that he "generally" understands the requirements for reporting by nonconnected political committees (Keating Dep. at 180, FEC Exh. 11), and could perform the responsibilities of treasurer of SpeechNow, saying "I'm sure I could do it." (Keating Dep. at 180-181, FEC Exh. 11.)

Thus, not only are plaintiffs' claims based upon the Commission's provision of assistance without merit, but plaintiffs' ultimate claim that complying with the Act would be difficult is refuted by Mr. Keating's admissions. This Court therefore should decline to include plaintiffs' proposed facts regarding SpeechNow's or Mr. Keating's purported difficulty complying with the registration and reporting requirements of the statute.

CONCLUSION

The evidence plaintiffs have offered to the Court does not prove the allegations they have been making in this case. What emerges instead is that the plaintiffs formed SpeechNow to bring a "test case," and accordingly, their actions or inaction are not probative of whether unlimited contributions pose a danger of corruption. When it comes to how political groups actually operate, plaintiffs are unable to prove that contribution limits prevent groups from forming, from raising funds, or from engaging in political speech. Similarly, plaintiffs fail to establish that disclosure requirements place an undue burden on political committees. Ultimately, most of plaintiffs' proposed findings of facts are unsupported by competent evidence, irrelevant, or contradicted by overwhelming evidence presented by defendant Federal Election Commission and should, therefore, not be entered by the Court.

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