UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF REPLY REGARDING PROPOSED FINDINGS OF FACT

In response to the Federal Election Commission's ("FEC" or "Commission") first round of proposed factual findings and briefing, the plaintiffs (collectively "SpeechNow") filed a Brief in Response to the FEC's Proposed Findings of Fact, Proposed Findings of Fact in Rebuttal, and two purported "motions in limine." As the Court stated in its Order of December 9, 2008 (Doc. 61), those latter motions "will be considered arguments" about the Court's consideration of the Commission's evidence and proposed facts, and the Commission "may respond to those arguments in the context of its general briefing . . ." For the convenience of the Court, the Commission is dividing its response into the following documents that mirror the presentation of SpeechNow:

1. This document — FEC's Memorandum in Support of Reply Regarding Proposed Findings of Fact ("FEC Reply Mem.").

2. Reply Regarding Proposed Findings of Fact ("FEC Reply"), which includes a paragraph-by-paragraph reply in support of the Commission's proposed facts.

3. FEC's Reply Arguments Related to Plaintiffs' First Motion in Limine ("Reply re 1st Mot.), which responds to the arguments presented in SpeechNow's first "motion in limine."

4. FEC's Reply Arguments Related to Plaintiffs' Second Motion in Limine ("Reply re 2nd Mot.), which responds to the arguments presented in SpeechNow's second "motion in limine."

5. FEC's Response to Plaintiffs' Proposed Findings of Fact in Rebuttal ("FEC Resp. to SN Rebuttal Facts").

In this memorandum, we focus on six repeated flaws or gaps in SpeechNow's understanding of the relevant law and facts.

I. THIS COURT SHOULD ACCEPT THE COMMISSION'S PROPOSED FINDINGS BECAUSE THEY SUPPORT LEGISLATIVE FACTS

A. The Legislative Facts at Issue Here Are Relevant to the Broad Policy Questions Raised by Plaintiffs' Constitutional Challenge

Virtually all of the Commission's proposed findings of fact challenged by SpeechNow are not "adjudicative facts" subject to the Federal Rules of Evidence, but "legislative facts," which those Rules do not govern.[1] This Court may, therefore, include the Commission's proposed findings for the appellate courts to consider regardless of the usual evidentiary requirements.

As the Advisory Committee Notes (1972) to Federal Rule of Evidence 201(a) explain,

> [n]o [evidence] rule deals with judicial notice of "legislative" facts…. The omission of any treatment of legislative facts results from fundamental differences between adjudicative facts and legislative facts. Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the law-making process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. . . .

[1] Professor Kenneth Davis coined the terms "adjudicative facts" and "legislative facts," which the Advisory Committee on the Federal Rules of Evidence adopted. See the Advisory Committee's notes in 1972 to Rule 201 ("Judicial Notice of Adjudicative Facts").

Adjudicative facts "'are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses.'" Advisory Committee Notes (quoting 2 Kenneth Davis, *Administrative Law Treatise* 353 (1958)). Or, stated slightly differently, adjudicative facts are those that concern the immediate parties to a lawsuit and address who did what, where, when, and how. *See, e.g., Alaska Airlines Inc. v. CAB*, 545 F.2d 194, 200 n.11 (D.C. Cir. 1976). These facts address specific incidents giving rise to a lawsuit and must comport with the rules of evidence. Advisory Committee Notes ("The usual method of establishing adjudicative facts is through the introduction of evidence . . . . A high degree of indisputability is the essential prerequisite."); Kenneth S. Broun, ed., *McCormick on Evidence* ¶ 328, at 428 (2006 ed.) ("The very existence of the jury … helped create the demand for the rigorous guarantees of accuracy which typify the law of evidence.")

In contrast, legislative facts are broader in scope and import, may be disputable, and no Federal Rule of Evidence directly limits a court's authority to consider them. They are usually more "general" than adjudicative facts and "help the tribunal decide questions of law and policy." *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992) (internal quotation marks and citation omitted); *see also, e.g.*, *Landell v. Sorrell*, 382 F.3d 91, 202, 203 (2d Cir. 2004) ("facts that determine the appropriateness of a rule of law"; "factual assumptions or conclusions that cause a court to choose one rule of law rather than another or to hold that certain circumstances meet a particular legal test") (Winter, J., dissenting), *rev'd on other grounds*, *Randall v. Sorrell*, 545 U.S. 1165 (2005); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971) ("questions of law and policy and discretion") (Friendly, C.J.). In other words, legislative facts serve a purpose different from the purpose of adjudicative facts; they reflect larger conclusions about the way in which the world operates — conclusions similar to those

found by Congress when enacting laws — that relate to determinations of fact outside the confines of a particular dispute and are frequently based on a variety of materials such as reports, news articles, and academic studies, including political and social science studies.

Courts have long relied upon legislative facts. "Authority for the distinction . . . is overwhelming. The best authority is the centuries of judicial recognition of the distinction by courts' accustomed practices." II Richard J. Pierce, Jr., *Administrative Law Treatise* ¶ 10.5, at 732 (4th ed. 2002); s*ee also, e.g., Ass'n of Nat'l Advertisers, Inc. v. FTC,* 62 F.2d 1151, 1161 (D.C. Cir. 1979) ("The distinction between legislative and adjudicative facts has been widely accepted both within and without this circuit" (listing cases from six circuits).) Indeed, one of the Supreme Court's most notable cases became famous largely because of its use of legislative facts. One hundred years ago, in *Muller v. Oregon,* 208 U.S. 412 (1908), legislative facts presented by counsel Louis Brandeis (later Justice Brandeis) persuaded the Court to uphold an Oregon law protecting women from health and safety risks they suffered by working long hours in a laundry.[2] The State of Oregon had not presented these legislative facts in the trial court, and Brandeis as counsel for the State did not submit the extra-record reports and books that his Supreme Court brief cited and quoted.

Federal courts have frequently cited legislative facts (although not always under that label) in determining the constitutionality of a law or regulation, including campaign finance laws. A ruling on the constitutionality of a statute or a regulation always has an impact on many non-litigants. Understandably, therefore, the courts' reasons for their constitutional decisions

[2] That original "Brandeis brief" contained only a few pages of traditional legal argument but over 100 pages of legislative facts, including sociological and economic reports, committee testimony, and quotations from various texts. Brief for State of Oregon, 1908 WL 27605.

extend beyond reference to the limited set of adjudicatory facts concerning the particular interests and business of the actual parties to the litigation. As the Seventh Circuit has explained:

> The constitutionality of statutes is typically determined by reference to general considerations, values, intuitions, and other "legislative facts" (in the sense of considerations that typically influence legislative judgments) rather than to facts presented through testimony and other formal evidence subject to evidence developed largely for control of lay juries.

Metzl v. Leininger, 57 F.3d 618, 622 (7th Cir. 1995) (evaluating whether state law requiring school closure on Good Friday violated the Establishment Clause). *Accord, e.g., Dunagin v. City of Oxford, Mississippi*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (constitutional challenge to state's ban on liquor advertising) ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court." (Internal citations omitted.))[3] *See also Landell v. Sorrell*, 382 F.3d at 203 (Winter, J., dissenting) ("Legislative facts . . . govern all future cases implicating the particular rule of law or its application.").

Courts rely upon legislative facts even though "'[f]acts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.'" 1972 Advisory Committee Notes (quoting Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *Perspectives of Law* 69 (1964)). *See also, e.g.*, 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 200[03], at 200-17 (1990) ("Limitations in the form of indisputability or rigid and formal requirements of notice are inappropriate."). In

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[3] The Fifth Circuit in *Dunagin* observed (718 F.2d at 748 n.8) that

> whether there is a correlation between advertising and consumption is a legislative and not an adjudicative fact question. It is not a question specifically related to this one case or controversy; it is a question of social factors and happenings which may submit to some partial empirical solution but is likely to remain subject to opinion and reasoning. See Fed. R. Evid. 201 advisory committee note. That reasoning is the responsibility of legislators and judges, assisted by scholars as well as social scientists. . . .

Atkins v. Virginia, 536 U.S. 304 (2002), for example, the majority found that contemporary standards of decency compelled the conclusion that the execution of a mentally retarded individual had become cruel and unusual punishment under the Eighth Amendment. The majority opinion — despite the dissenters' dispute about the accuracy of certain legislative facts — cited, *inter alia*, the results of opinion polls and the views of religious and professional organizations, and referred to world opinion. 536 U.S. at 316 n.21. Similarly, in *Grutter v. Bollinger*, 539 U.S. 306 (2003), the controversy over the University of Michigan Law School's admissions policy gave rise to two versions of legislative facts. The majority relied heavily on one set of legislative facts in upholding the constitutionality of the policy, while dissenting Justice Thomas cited other legislative facts to support a contrary conclusion. More recently, in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007), Chief Justice Roberts disputed a fact relied upon by Justice Souter in dissent (*id.* at 2698) — that Wisconsin voters would have understood the advertisements in question as presenting a reason to vote against Senator Feingold. The Chief Justice in response cited a national survey of citizens by a social science research consortium for the legislative fact that most respondents could not even name the candidates running for federal office in their own congressional districts. *Id.* at 2667 n.6. (The Chief Justice cited to an Internet address for this survey, not to the district court record.) As these cases make clear, courts may rely on legislative facts even if they are subject to some dispute.

B. Courts Have Relied Heavily Upon Legislative Facts in Deciding Constitutional Challenges to FECA

In the seminal campaign finance case, *Buckley v. Valeo*, the D.C. Circuit instructed the district court to gather all "necessary" evidence, and indicated that the courts would be considering "legislative facts" to help resolve the constitutional issues raised. 519 F.2d 817, 818

(D.C. Cir. 1975). In its subsequent merits opinion, 519 F.2d 821 (D.C. Cir. 1975) (en banc), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976), the appellate court cited, among other sources, polling data by the Center for Political Studies and Market Opinion research prepared for the Republican National Committee, *id.* at 838-39, n.34; a report concerning illegal contributions by the dairy industry, *id.* at 839 n.36; and congressional statements on the floor, *id.* at 837 n.23; 838 n.28. The D.C. Circuit also relied upon the Final Report of the Senate Select Committee on Presidential Campaign Activities, *id.* at 838 n.35; 839 n.38. The court did not apply the Federal Rules of Evidence in using the information in these sources but instead treated the information as legislative facts. Far from criticizing this use of the information, the Supreme Court explicitly relied on the D.C. Circuit's discussion of these legislative facts. 424 U.S. at 27 & n.28.

In *FEC v. Colorado Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431 (2001), the Supreme Court relied extensively on legislative facts to reach the kind of conclusion about the potential for corruption at issue in this case. When the Court upheld the limits on expenditures that political parties can make in coordination with their own candidates, it relied in part upon a general factual conclusion:

> Parties are … necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.

Id. at 451-52. In turn, that broad factual conclusion was based on a series of other legislative facts, such as PACs' proclivity to support candidates who share their views, regardless of party affiliation, and their habit of giving to competing parties or candidates in the same election. In its discussion of these facts, the Court cited a political scientist's statement submitted in the lawsuit, a former Senator's anecdote about a debate among his colleagues, a book by a political science professor, and FEC disclosure reports. *Id.* at 451-52 & nn.12-13. The Court also

reiterated that it has "long recognized Congress's concern with this reality of political life" and quoted Senator Robinson's 1924 statement that "[m]any believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions…" *Id.* at 452 n.14 (quoting *United States v. Automobile Workers*, 352 U.S. 567, 576 (1957), quoting 65 Cong. Rec. 9507-08 (1924); (internal quotation marks omitted)). These are precisely the sort of legislative facts that go beyond the activity of individual litigants in a single case, that cannot be proved with indisputability, but that are essential to the consideration of the constitutionality of the campaign finance laws.

Two years later, in *McConnell v. FEC,* 540 U.S. 93 (2003), the Supreme Court relied even more extensively on legislative facts, without regard to the Federal Rules of Evidence. For example, the Court discussed at length "the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections." *Id.* at 122, 129-32. The Court did not test the evidentiary foundations of the information contained in the investigators' report. Nor did the Court hesitate to quote hearsay in an expert's report and to treat it as evidence of legislative fact. *Id.* at 128 n.23. *See also, e.g., id.* at 145 ("Both common sense and the ample record . . . confirm Congress' belief" that "large *soft-money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption."); *id.* ("It is not only plausible, but likely, that candidates would feel grateful for such [large soft-money] donations and that donors would seek to exploit that gratitude."); *id.* at 146-52 & nn.46-47 (quoting numerous declarations from, *inter alia,* a CEO who felt pressured to make soft money donations, political party staff, consultants, and Members of Congress); *id.* at 167 ("Common sense dictates

... that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office.").

C. The Federal Rules of Evidence Do Not Apply to Courts' Consideration of Legislative Facts, So Plaintiffs' Challenge to the Admissibility of the Commission's Evidence Lacks Merit

Just as the Supreme Court and the D.C. Circuit in *Buckley* and other cases did not "make a fetish of the rules of evidence," *Metzl*, 57 F.3d at 622, this Court should do likewise and reject SpeechNow's attack on the Commission's proposed legislative facts. "Determination of legislative facts is not governed by the Federal Rules of Evidence." *Landell v. Sorrell*, 382 F.3d at 203 (Winter, J., dissenting) (citing 1972 Advisory Committee Notes). The Advisory Committee opined that a court's access to legislative facts should be "'unrestricted.'" (Internal citation omitted.)[4]

In *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court accepted evidence similar to the Commission's evidence that SpeechNow has condemned as violating the Federal Rules of Evidence. *Florida Bar* involved a First Amendment challenge to a state bar rule prohibiting lawyers from using direct mail to solicit personal injury or wrongful death clients within 30 days of an accident. The Court found that the state had a substantial interest in protecting the reputation of the bar as well as in protecting the privacy and tranquility of personal injury victims and their loved ones. *Id.* at 624-25. To support its rule, the state bar had

[4] SpeechNow's First Motion in Limine does not address the distinction between adjudicative and legislative facts. SpeechNow does briefly discuss the distinction in its Response to the FEC's Proposed Findings of Fact (at 12 n.1; 13), but SpeechNow does so only generally, without recognizing that the Federal Rules of Evidence do not control the courts' consideration of legislative facts in this non-jury case. SpeechNow cites (Response 13) *Mariani v. United States*, 80 F. Supp. 2d 352, 356 (M.D. Pa. 1999), as authority for applying the evidentiary rules to proposed findings of fact. The court in *Mariani*, however, failed to mention the difference between adjudicative and legislative facts or even implicitly to take into account this important distinction.

presented a summary of a two-year study, including both statistical and anecdotal data, of lawyer advertising and solicitation; a survey of the views of Florida adults about those practices; newspaper editorials critical of the solicitations; and "page upon page of excerpts from complaints of direct mail recipients." *Id.* at 626-27. The Supreme Court referred to the "anecdotal record" in *Florida Bar* as "noteworthy for its breadth and detail," *id.* at 627:

> [I]n other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

515 U.S. at 628 (internal citations omitted). These "anecdotal record[s]" relied upon by the Court consist, of course, of legislative facts.

The special status of legislative facts also makes irrelevant SpeechNow's hearsay objections to newspaper articles and other items.[5] For example, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000), upheld the constitutionality of a state law limiting the amount of contributions to candidates and approved the district court's reliance on newspaper accounts as evidence that concerns about corruption and the appearance of corruption support the Missouri law. *Id.* at 393. With *Shrink Missouri* as precedent, the First Circuit in *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), relied in part on legislative facts supported by newspaper stories and editorials in finding the evidence sufficient to show that Maine citizens and political leaders were concerned about the corruptive effect of large contributions on lawmakers. *Id.* at 457. In an earlier opinion in the same case, the court had noted that "'legislative facts' . . . go to the justification for a statute" and that "the ordinary

[5] In addition, as we explain in the FEC's Reply Arguments Related to Plaintiffs' First Motion in Limine, Section IV.B., some of the material to which SpeechNow objects comes within exceptions to the hearsay rule.

limits on judicial notice hav[e] no application to legislative facts." 172 F.3d 104, 112 (1st Cir. 1999) (citing the Advisory Committee Notes to Rule 201).

Just last year, Justice Souter in dissent in *Wisconsin Right to Life* freely quoted from newspaper articles in addition to publications by political scientists and election lawyers, surveys by professional pollsters, an *amici curiae* brief in *McConnell*, congressional hearings, and the conclusions of a state "blue ribbon" commission. 127 S. Ct. at 2687-89, 2693-94. Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, used these materials to support legislative facts.

In *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995), the D.C. Circuit relied in part on newspaper clippings in rejecting a First Amendment challenge to an SEC regulation prohibiting municipal securities professionals from contributing to or soliciting contributions for the political campaigns of state officials from whom the securities dealers obtain business. The challenger had argued that the regulation was defective because the record contained no evidence of specific instances of actual corruption or other *quid pro quo* arrangements. The D.C. Circuit observed that "the scope of such pernicious practices can never really be reliably ascertained," citing *Buckley*, 424 U.S. at 27, and approved the SEC's use of legislative facts in adopting the challenged regulation:

> In any event, the Commission observes that "[s]pecific abuses have been alleged in several state and local governments", SEC Approval Order at 8-11, and then cites newspaper clippings from 13 states and the District of Columbia with such headlines as "Kentucky Official Says He Served as Middleman to Solicit Funds", from The Bond Buyer, September 7, 1993. Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic.

61 F.3d at 945.

Finally, another district court recently rejected evidentiary arguments similar to those SpeechNow raises in this case. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 843-44 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion County Election Bd,* 472 F.3d 949 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1610 (2008). In *Indiana Democratic Party*, the plaintiffs moved to strike more than 40 of the defendants' exhibits on the grounds they were unsworn, unauthenticated, and contained hearsay. "The target of Plaintiffs' motion [was] various newspaper articles, transcribed oral statements, letters/press releases, committee reports, websites, polls, and journal articles." 458 F. Supp. 2d at 843-44. The defendants countered that the exhibits were "admissible as 'legislative facts' which tend 'to support [certain] reasonable conclusions'" about voter fraud. *Id.* at 844. The court characterized the motion to strike as "almost frivolous," *id.* at 845, and agreed with the defendants' position: "[T]he state is entitled to rely on 'legislative facts' to support its proffered justifications rather than being required to produce adjudicative facts to be evaluated by this court." *Id.* at 844. The Supreme Court later relied on the evidence of legislative facts to which the plaintiffs had objected and also on additional "facts of which . . . [it took] judicial notice." 128 S. Ct. at 1617-1621.[6]

[6] Legislative facts are often not introduced in a case until the appellate level. The courts themselves may find these facts on their own initiative, *see, e.g., Roe v. Wade*, 410 U.S. 113, 115-117, 130-32, 160-54 (1973), and *United States v. Shannon*, 110 F.3d 382, 387-88 (7th Cir. 1997) (en banc) (Posner, C.J., for the court), or, as in *Muller v. Oregon*, counsel may bring the legislative facts to the appellate court's attention. Parties (and amici) may, however, present legislative facts in the district court. And the Federal Rules of Civil Procedure set no deadline by which the parties may present those facts. Indeed, the parties may introduce those facts in their district court memoranda or briefs, for the Rules do not regulate the presentation of legislative facts in those filings and, more specifically, do not prohibit the parties (or amici) from filing Brandeis-like briefs. Thus, plaintiffs have no legal basis for complaining that, although the Commission disclosed dozens of documents as part of its initial and supplemental disclosures, it did not disclose six documents — all of which are publicly available and support legislative facts — until it filed its proposed findings of fact. (*See* 1st Mot. at 32-33.) The Commission made every effort to disclose publications on which it might rely; indeed, the significance of the five

In sum, the courts have long treated legislative facts differently from the way they treat adjudicative facts, and the Federal Rules of Evidence reflect this distinction. Legislative facts, unlike adjudicative facts, may be disputable, and constraints such as the general prohibition of hearsay do not apply to them. Because the proposed findings to which SpeechNow objects fall within the category of legislative facts, this Court should accept those findings and present them to the D.C. Circuit for its consideration.

II. THE COMMISSION'S PROPOSED FACTS ARE CONSISTENT WITH SUPREME COURT PRECEDENT, NOT PRECLUDED BY IT

Plaintiffs devote 15 pages of their Brief in Response to the FEC's Proposed Findings of Fact ("SN Resp. to FEC Facts," at pages 17-32) erroneously arguing that many of the Commission's proposed facts should be rejected because they are supposedly legally irrelevant or contrary to Supreme Court precedent. Plaintiffs misunderstand the role of this Court in developing a factual record, but more important, they distort the Commission's actual arguments and legal theory.

Contrary to plaintiffs' mischaracterizations, the Commission is not defying Supreme Court precedent, the FECA, or the Commission's own regulations; not ignoring the difference between independent expenditures and coordinated expenditures; not trying to impose limits on independent expenditures; and not attempting to rewrite the FECA or regulations in this lawsuit. To the contrary, the Commission's proposed facts are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. It is SpeechNow, not the Commission, that seeks to alter the governing law: While it essentially concedes that its activities make it a political committee under the Act, SpeechNow nevertheless seeks to have the Act's contribution limits

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documents plaintiffs claim they never received is minuscule when they are considered as part of the nearly 2,500 pages of exhibits put forward by the Commission. (*See* 1st Mot. at 32, 34).

and reporting requirements struck down as applied to its activities. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. None of the Commission's proposed facts are irrelevant to the parties' disputes.

The Commission recognizes that the Act and the Supreme Court have long recognized a fundamental distinction between independent and coordinated expenditures. But SpeechNow, even if it is regulated as a political committee, would have no limits placed on the amount it can spend on independent expenditures, and the Commission has never suggested that it is attempting to impose any such limit in this case. As this Court has explained, limits on contributions and independent expenditures implicate different First Amendment freedoms and are subject to different levels of scrutiny:

> Since *Buckley*, the Supreme Court has treated expenditure limits as direct restraints on speech that are subject to strict scrutiny. *Buckley*, 424 U.S. at 39, 96 S. Ct. 612; *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386, 120 S. Ct. 897, 145 L.Ed.2d 886 (2000). In contrast, contribution limits involve "little direct restraint on [ ] political communication," because they permit "the symbolic expression of support evidenced by a contribution" without infringing on "the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 22, 96 S. Ct. 612. Because of the lesser burden imposed on speech and associational rights, the Supreme Court has generally upheld contribution limits when they are "closely drawn" to a sufficiently important government interest. *Id.* at 25, 96 S. Ct. 612; *McConnell*, 540 U.S. at 138, n.40, 124 S. Ct. 619.

SpeechNow.org v. FEC, 567 F. Supp. 2d 70, 76 (D.D.C. 2008). "Contributors to SpeechNow are not, through their donations, engaging in direct speech." *Id.* at 77.

Plaintiffs seem to concede (SN Resp. to FEC Facts at 21-22) that independent expenditures can benefit candidates, who may in turn be grateful to those who paid for them and may give such donors preferential treatment. Plaintiffs also recognize (*id.* at 31) that "it is true that the Court in *Buckley* and *NCPAC* noted that 'it does not presently appear' the independent

expenditures create concerns about corruption…" But plaintiffs then wrongly accuse (*id.*) the Commission of interpreting these holdings as "an invitation . . . to decide, on its own, to try to rewrite the statute that defines independent expenditures." The Commission does no such thing; we have nowhere argued for new limits on political committees' independent spending.

Rather, the arguments and facts we have presented have been marshaled in support of the Act's *contribution* limits, and our argument is a simple one: Even if the Supreme Court has not yet been satisfied that there "presently appear[s]," *Buckley*, 424 U.S. at 46, sufficient evidence of corruption to satisfy the strict scrutiny applicable to limits on independent expenditures, there is sufficient evidence of actual and potential corruption from large contributions used to fund independent expenditures to justify the contribution limits that SpeechNow challenges. As this Court explained, *SpeechNow.org v. FEC*, 567 F. Supp. 2d at 78,

> Plaintiffs' argument presents a false syllogism that relies on a "crabbed view of corruption, and particularly of the appearance of corruption" that is at odds with Supreme Court precedent. *McConnell*, 540 U.S. at 152, 124 S. Ct. 619. First of all, the Supreme Court has never held that, by definition, independent expenditures pose no threat of corruption. In *Buckley*, the Court explained that independent expenditures made by individuals "d[id] not presently appear" to pose a danger of corruption. 424 U.S. at 46, 96 S. Ct. 612. The Court "explicitly left open the possibility that a time might come when ... independent expenditures made by individuals to support candidates would raise an appearance of corruption." *McConnell v. FEC*, 251 F.Supp.2d 176, 624-25 (D.D.C.2003) (Kollar-Kotelly, J.). Second, that SpeechNow cannot literally funnel contributions to candidates, and therefore cannot serve as a vehicle for the direct exchange of dollars for political favors, is not dispositive. The Supreme Court has long acknowledged that "corruption," in the sense that word is used in campaign finance law, "extends beyond explicit cash-for-votes agreements to 'undue influence on an officeholder's judgment.' " *Id.* at 143, 124 S. Ct. 619 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.* ("*Colorado Republican II*"), 533 U.S. 431, 441, 121 S. Ct. 2351, 150 L.Ed.2d 461 (2001)).

The Commission's proposed facts that plaintiffs view as irrelevant go directly to the broader view of corruption the Supreme Court reaffirmed in *McConnell*. In particular, when *McConnell* rejected a "crabbed view of corruption," 540 U.S. at 152, the Court addressed similar

scenarios in which large soft money contributions were given to parties that then spent the funds on supposedly nonfederal activities that nevertheless benefited federal candidates — not on direct contributions to candidates. Relying on *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) — the case that upheld the limits on contributions to political committees that SpeechNow challenges here — the Court specifically rejected the argument that the limit on soft money contributions to political parties could only be justified if those limits would "prevent[] individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates." *McConnell*, 540 U.S. at 152 n.48. As this Court explained, *SpeechNow.org*, 567 F. Supp. 2d at 80,

> Most importantly, a majority of the Supreme Court in *McConnell* rejected Justice Blackmun's reasoning, and explained that *CalMed* upheld § 441(a)(1)(C) on its face even though the provision limits "not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and *numerous other noncoordinated expenditures*." 540 U.S. at 152 n. 48, 124 S. Ct. 619 (emphasis added). The Court went on to explain that "[i]f indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, the otherwise-easy-to-remedy exploitation of parties as pass-throughs (e.g., a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation." *Id.*

In essence, then, the factual record the Commission is developing in this case will provide additional evidence to justify restrictions that go beyond the "otherwise-easy-to-remedy exploitation" of political committees as "pass-throughs." Such evidence is highly relevant to this case, and developing that evidence is not tantamount to advocating for new direct restraints on independent expenditures.

Plaintiffs also err when they argue (SN Resp. to FEC Facts at 27 & n.9) that the Commission's facts are irrelevant by accusing the Commission of "jettison[ing] the principle of coordination in favor of the principles of 'benefit' and 'gratitude'" and "attacking its current

definition of coordination." When the Commission proposed factual findings regarding the benefits candidates can receive from, and the gratitude they may express for, independent expenditures, the Commission was not attempting to rewrite the statutory or regulatory criteria for coordinated expenditures. The statutory and regulatory criteria for coordination simply do not reach all activity that may involve subtle forms of cooperation that may create an opportunity for, or appearance of, corruption. As the Supreme Court explained in *McConnell*, "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.' " 540 U.S. at 221, (quoting *Colorado II*, 533 U.S. at 442). But neither BCRA nor the Commission's regulations require or expect the Commission to police winks and nods. As this Court explained, *SpeechNow.org*, 567 F. Supp. 2d at 78, when the Supreme Court in *McConnell* upheld BCRA's soft money provisions, the Court affirmed Congress's power to prevent corruption that can occur even when entities are "legally independent" of candidates:

> In upholding BCRA's major provisions, *McConnell* affirmed Congress's power to enact prophylactic measures aimed at the "more subtle but equally dispiriting forms of corruption," such as the sale of access, that can occur even when contributions are made to entities that are legally independent of candidates' own campaign organizations. *Id.* at 153, 124 S. Ct. 619; *see id.* at 154-56, 124 S. Ct. 619 (upholding limits on contributions to national political parties); *id.* at 161-73, 124 S. Ct. 619 (upholding limits on contributions to state parties); *id.* at 174-81, 124 S. Ct. 619 (upholding ban on party solicitations for donations to tax-exempt organizations); *id.* at 184-85, 124 S. Ct. 619 (upholding limitations on the source and amount of contributions that can be spent by state and local candidates to directly impact federal elections).

In particular, this Court noted facts that illustrate how certain section 527 organizations may have met the legal test for independence but have still presented a potential for corruption that warrants restrictions on the contributions they can receive:

> Clearly, legally independent 527 groups can and do bear seals of approval from political parties. SpeechNow's carefully constructed test-case embodiment of "independence" does not shield it from reasonable campaign finance regulation. "[T]he First Amendment does not require Congress to ignore the fact that

> 'candidates, donors, and parties test the limits of the current law.' " *McConnell*, 540 U.S. at 144, 124 S. Ct. 619 (quoting *Colorado Republican II*, 533 U.S. at 457, 121 S. Ct. 2351). Nor does the First Amendment require Congress to ignore the corrosive effects that the *perception* of collusion and the circumvention of contribution limits have on public confidence in the integrity of federal elections. *Shrink Mo.*, 528 U.S. at 390, 120 S. Ct. 897. And finally, neither does the First Amendment require Congress to ignore what its members surely know — that an organization may be legally independent under FEC rules while nonetheless functioning as a fully integrated arm of a major political party.

SpeechNow.org, 567 F. Supp. 2d at 80.

The phenomenon of legally independent groups circumventing the Act's restrictions is nothing new. When the D.C. Circuit in *Buckley* discussed the history of campaign finance practices leading up the 1974 amendments to FECA, it explained that the

> achievements of the [earlier] statutes were overmatched by what proved to be wholesale circumvention, including notably the invention and proliferation of political committees that purported to be independent and outside the knowledge and control of the candidates and designated campaign committees. The infinite ability to multiply committees eviscerated statutory limitations on contributions and expenditures.

Buckley v. Valeo, 519 F.2d 821, 837 (D.C. Cir. 1975) (en banc), *aff'd in part, rev'd in part*, *Buckley v. Valeo*, 424 U.S. 1 (1976). The Commission's proposed facts that plaintiffs argue are irrelevant will provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Presenting such evidence does not in any way constitute a disavowal of the existing statutory and regulatory criteria for coordinated expenditures.

III. THE CONCLUSIONS IN PROFESSOR WILCOX'S REPORT ARE FIRMLY GROUNDED IN EVIDENCE AND SCHOLARSHIP

Almost every time one of the Commission's proposed findings of fact relies on the expert testimony of Professor Clyde Wilcox, plaintiffs make a conclusory objection that the fact is "baseless." Whatever the context, plaintiffs assert the same unexplained claim. As demonstrated at length in the FEC's Reply Arguments Related to Plaintiffs' Second Motion in Limine,

Professor Wilcox is highly qualified to offer testimony on the subject of unlimited contributions, independent expenditures, corruption, and political spending generally. Professor Wilcox's report is thus firmly rooted in his expertise as a political scientist; years studying campaign spending; relationships with consultants, candidates, and party officials; and a review and knowledge of the relevant academic literature. (*See* Expert Report of Clyde Wilcox, Curriculum Vitae of Clyde Wilcox, FEC Exh. 1 at 30 *ff.*) Furthermore, to support and illustrate the specific conclusions incorporated in the Commission's proposed findings of fact, Professor Wilcox relies on actual systematic, empirical, or anecdotal data drawn from over 60 separate sources, including witness declarations, public opinion polls, personal interviews, newspaper accounts, state administrative reports, scholarly articles, and statistics regarding federal and state contributions and expenditures. (*See* Wilcox Rept. at 26-30.) Professor Wilcox's report is adequately supported and plaintiffs' nonspecific objections to the contrary should simply be ignored.

Additionally, plaintiffs characterize some of Professor Wilcox's conclusions as improper "speculation" because they require reasonable inferences to be made from the available data. Plaintiffs often make this allegation when Professor Wilcox does not happen to provide a citation for every clause. However, it is common for an expert to come to conclusions based upon "personal experience, training, method of observation, and deductive reasoning." *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1122, 1125 & n.5 (10th Cir. 2004) (affirming district court's decision to allow multiple experts to testify using "abductive inferences " — conclusions that best explain the available data); *see also Feliciano-Hill v. Principi*, 439 F.3d 18, 25 (1st Cir. 2006) (rejecting argument that expert testimony "did not meet the standard of *Daubert* and Rule 702 because the doctor failed to support his diagnosis with citations to published authorities"); *Brasher v. Sandoz Pharmaceuticals Corp.*, 160 F. Supp. 2d 1291, 1296 (N.D. Ala. 2001)

(allowing expert testimony because "in science, as in life, where there is smoke, fire can be inferred … ."). Professor Wilcox is entitled to draw the most reasonable inferences and deductions from the dozens of sources he cites in his report to make conclusions about political spending, corruption, and independent expenditures, particularly given that his inferences are informed by his decades of study.

For these reasons as well as those articulated in the Commission's Reply Arguments Related to Plaintiffs' Second Motion in Limine and the Commission's specific replies to plaintiffs' fact-by-fact objections, plaintiffs' repeated characterization of Professor Wilcox's conclusions as "baseless" has no merit. The Court should give no weight to this perfunctory objection. The Commission has made every effort to respond fully to the few specific objections that plaintiffs lodge against the report, but it was obviously impracticable to recapitulate Professor Wilcox's entire report or evidentiary progression each time plaintiffs superficially disagreed with his findings; the Court should nevertheless view each of his specific conclusions in light of the combined data and analysis in the report.

IV. THE EVIDENTIARY TEST OF RELEVANCE IS EASY TO MEET

Plaintiffs contend that a host of the Commission's evidence is not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. *See, e.g.*, *Fredrick v. District of Columbia*, 254 F.3d 156, 158 (D.C. Cir. 2001); *United States v. Foster*, 986 F.2d 541, 545 (D.C. Cir. 1993). "The threshold for relevancy is relatively low," *United States v. Powers*, 59 F.3d 1460, 1465 (4th Cir. 1995), and "quite minimal," *United States v. Holmes*, 413 F.3d 770, 773 (8th Cir. 2004) (internal quotation marks omitted). "This is because the degree of materiality and probativity necessary

for evidence to be relevant is minimal and must only provide a fact-finder with a basis for making some inference, or chain of inferences." *United States v. Jordan*, 485 F.3d 1214, 1218 (8th Cir.) (internal quotation marks omitted), *cert. denied*, 128 S. Ct. 636 (2007). All of the topics covered in the Commission's proposed findings of facts are plainly of consequence to the Court's determination and all of the evidence in support has a tendency to make the facts more probable.

V. GRATITUDE OR INDEBTEDNESS THAT CANDIDATES MAY FEEL FROM DONATIONS TO INDEPENDENT EXPENDITURE GROUPS IS RELEVANT

Contrary to SpeechNow's repeated claims, the gratitude that might be engendered by unlimited contributions to fund independent expenditures is indeed relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. In *McConnell v. FEC*, 540 U.S. 93, 145 (2003), the Court explained, in the context of soft money donations to political party committees, that "[i]t is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." 540 U.S. at 145. The Supreme Court stated that "[t]he evidence in the record shows that candidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries." 540 U.S. at 146 (citations omitted). Furthermore, "[e]ven when not participating directly in the fundraising, federal officeholders were well aware of the identities of the donors: National party committees would distribute lists of potential or actual donors, or donors themselves would report their generosity to officeholders." 540 U.S. at 147. The activity

referred to in the Commission's facts is thus relevant to the determination of the constitutionality of the statutory provision challenged by plaintiffs.

Conversely, the gratitude that candidates might feel for a host of other activities that might benefit them is not relevant. While candidates may well be grateful for many activities other than contributions to organizations that make independent expenditures, the constitutionality of those activities is not at issue in this case. Congress has chosen not to regulate these activities, and plaintiffs have presented no evidence showing that Congress should have done so.

The evidence of gratitude upon which the Commission relies is not, contrary to SpeechNow's suggestion, inadmissible character evidence under Federal Rule of Evidence 404. Rather, it is the same type of anecdotal evidence that the Supreme Court has relied on to demonstrate the government's interest in preventing corruption of federal candidates and officeholders. In *Buckley*, the Court observed that the scope of practices that corrupt the integrity of the political system "can never be reliably ascertained, [but] the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one." 424 U.S. at 27. The Court thus found that actions by contributors in the past were sufficient to justify contribution limits as a way to address actual corruption or the appearance thereof. *Id.* at 26-27. Similarly, the Court in *McConnell* repeatedly relied on evidence of prior actions by contributors and members of Congress to justify the government's interest in preventing corruption through regulating soft-money. 540 U.S. at 144-46 (referring to statements by business leaders, lobbyists, and members of Congress describing the influence contributors seek to secure through making large donations).

More generally, it is well established that the application of prophylactic statutory rules does not depend upon an analysis of the extent to which the interests underlying them are served in each particular application. *See Hill v. Colorado*, 530 U.S. 703, 729 (2000) ("A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself"). It is the *potential* for abuse or corruption that it at stake, so evidence of that potential is relevant, even if specific examples of that potential do not involve particular parties such as SpeechNow. For instance, in *Buckley* the Supreme Court stressed that it "may be assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," but that the difficulty in isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified universal application of the $1,000 individual contribution limit. 424 U.S. at 29-30. *See also California Medical Ass'n v. FEC*, 453 U.S. 182, 198-99 (1981) (specific contributions to a political committee are subject to general FECA restrictions even if they were purportedly to be used for administrative support, rather than for affecting elections directly). Thus, examples in the Commission's proposed facts that demonstrate the potential risk of corruption from unlimited contributions to independent expenditure groups are highly relevant in assessing the constitutionality of this kind of prophylactic contribution limit.

VI. PROFESSOR WILCOX MAY RELY UPON ANY KIND OF INFORMATION REASONABLY RELIED UPON IN HIS FIELD OF EXPERTISE

Under Federal Rule of Evidence 703, an expert's opinion may be admitted even though the facts or data upon which the expert's opinion is based are inadmissible. Fed. R. Evid. 703. The expert may rely on otherwise inadmissible evidence, including hearsay, so long as the information is "of a type reasonably relied upon by experts in the particular field." *Id.*; *McReynolds v. Sodexho Marriot Servs., Inc.*, 349 F. Supp. 2d 30, 36 (D.D.C. 2004); *Lohrens v.*

Donnelly, 223 F. Supp. 2d 25, 37 (D.D.C. 2002). Although facts or data that are otherwise inadmissible may not be admitted as substantive evidence, they may be used for the purpose of evaluating the expert's opinion where probative value of the evidence substantially outweighs its prejudicial effect. Fed. R. Evid. 703. In this case, the opinions set forth in Professor Wilcox report are based upon sources, such as scholarly articles, interviews, and statistical data, that are relied on as evidence by experts in his field. (Wilcox Dep.25-26.) Thus, although the sources that form the basis of his opinion may be independently inadmissible in some instances, the sources may be used to evaluate his opinions, and the conclusions he reaches in his report may be properly considered by the Court.

CONCLUSION

For the foregoing reasons and those explained in the Commission's four other accompanying filings, the Court should accept the Commission's evidence and adopt the Commission's proposed findings of fact.

Respectfully submitted,

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Dated: December 12, 2008