EN BANC ORAL ARGUMENT SCHEDULED FOR JANUARY 27, 2010
No. 09-5342
(consolidated with No. 08-5223)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DAVID KEATING, EDWARD H. CRANE, III, FRED M. YOUNG, JR., BRAD RUSSO, AND SCOTT BURKHARDT,
Plaintiffs-Appellants,
v.
FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Certified Questions from the United States District Court for the District of Columbia, Case No. 08-cv-00248 (JR)

Brief of Amici Curiae The Brennan Center for Justice and Professor Richard Briffault in Support of the Defendant-Appellee and Supporting Affirmance of the Decision Below

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CERTIFICATE OF COUNSEL FOR AMICI CURIAE AS TO PARTIES, RULINGS AND RELATED CASES UNDER CIRCUIT RULE 28(a)(1)

Pursuant to Rules 28(a)(1) and 26.1 of this Court and Federal Rule of Appellate Procedure 26.1, Amici Curiae the Brennan Center and Professor Richard Briffault certify as follows:

A. Parties and Amici

The parties in the District Court were Plaintiffs SpeechNow.org, David Keating, Fred M. Young, Jr., Edward H. Crane, III, Brad Russo, and Scott Burkhardt, and defendant Federal Election Commission ("FEC"). All parties below except SpeechNow.org are parties before this Court on the questions certified by the District Court. Amici Curiae in the District Court were Democracy 21 and the Campaign Legal Center ("CLC"). Amici Curiae in this Court are the Brennan Center for Justice at NYU School of Law ("Brennan Center"), Professor Richard Briffault, Democracy 21, and the CLC, in support of the FEC, as well as the Alliance for Justice, the Family Research Council Action, the Concerned Women for America Legislative Action Fund, the Kansas Policy Institute, the Mackinac Center for Public Policy, the Caesar Rodney Institute, FreedomWorks Foundation, the James Madison Institute, the Public Interest Institute, and the Commonwealth Foundation for Public Policy Alternatives, in support of the Plaintiffs.

B. Corporate Disclosure Statement

The Brennan Center is a nonprofit, non-partisan corporation. The Brennan Center has no parent corporation and no publicly held corporation has any form of ownership interest in the Brennan Center.

C. Rulings Under Review

The rulings under review are the Hon. James Robertson's Memorandum Opinion issued September 28, 2009 in the District Court, and the findings of fact and certified questions issued by the Hon. James Robertson on October 7, 2009. The certified questions for review by this Court are set forth in the Joint Appendix ("J.A."), filed in Docket No. 08-5223 on August 24, 2009, at pages 372-99.

D. Related Cases

The only related case pending in this Court or in any other court of which counsel for Amici are aware is the appeal from the opinion and order issued July 1, 2008, by the Hon. James Robertson in the same case, denying Plaintiffs' Motion for Preliminary Injunction. The District Court's opinion denying the preliminary injunction is reported as *Speechnow.Org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008), and the appeal is pending in this Court as No. 08-5223 and has been consolidated with the certified questions for consideration by the en banc Court.

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Glossary

BCRA	=	**Bipartisan Campaign Reform Act**
CFI	=	**Campaign Finance Institute**
CLC	=	**Campaign Legal Center**
FEC	=	**Federal Election Commission**
FECA	=	**Federal Election Campaign Act**
MCFL	=	**Massachusetts Citizens for Life**
MUR	=	**Matter Under Review**
PAC	=	**Political action committee**
WRTL	=	**Wisconsin Right to Life**

Interest of the Amici

The Brennan Center is a non-partisan institute dedicated to a vision of effective and inclusive democracy. The Brennan Center's Campaign Finance Reform Project promotes reforms to ensure that our elections embody the fundamental principle of political equality underlying the Constitution. Through public education, litigation, and advocacy, the Brennan Center actively supports strong federal campaign finance laws that meet constitutional standards and encourage broad candidate participation in federal elections. The Brennan Center served as counsel to Intervenor-Defendants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords in *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"). Pub. L. No. 107-155, 116 Stat. 81.

Richard Briffault, the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, has devoted much of his career to the study of election law, especially campaign finance law. He has published 23 articles or book chapters on campaign finance law, which have been cited by the Supreme Court in its campaign finance cases. *See, e.g.*, *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2001); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 406 (2000) (Kennedy, J., dissenting). His article, *The 527 Problem . . . and the*

Buckley Problem, 73 Geo. Wash. L. Rev. 949 (2005) was cited by the court below in this case, *see Speechnow.Org*, 567 F. Supp. 2d at 73 n.4, 75, as well as by this Court in *Emily's List v. FEC*, 581 F.3d 1, 10, 18, 19, 23 (D.C. Cir. 2009); *see also Emily's List*, 581 F.3d at 34, 35 (Brown, J., concurring).

Pursuant to Federal Rule of Appellate Procedure 29(c)(3), the source of Amici's authority to file is pursuant to their motion for leave to file, currently pending before the Court.

Summary of Argument

The District Court was correct in rejecting the constitutional challenge of Plaintiffs-Appellants ("Plaintiffs") to contribution limits for organizations whose major purpose is the election or defeat of candidates for federal office. The District Court correctly applied both long-standing Supreme Court precedent, and the constitutional principles enunciated in those cases, to the circumstances and proposed operational structure of the Plaintiffs' organization. Moreover, the District Court gave appropriate recognition to the strong governmental interest in preventing corruption and the appearance of corruption underlying the statutory and regulatory scheme challenged by the Plaintiffs; courts have consistently upheld this strong anti-corruption interest supporting regulation in this constitutionally sensitive area.

In this case, Plaintiffs assert that they intend to run advertisements calling for the election and defeat of candidates paid for exclusively by private donations from individuals, not corporations, labor unions, or anyone else not permitted to contribute to candidates for federal election. (Pl. Br. at 6-7). Plaintiffs assert that any limitations on contributions to an organization that would engage only in independent expenditures are unconstitutional. (*Id.* at 21-41). In making this argument, however, Plaintiffs confuse and conflate the governing constitutional principles of this area of the law by equating limits on the receipts of contributions

with limits on spending by the proposed organization, in contravention of longstanding Supreme Court precedents that differentiate between the First Amendment status of contributions and expenditures in connection with electoral activity.

Plaintiffs' argument mistakes two fundamental premises of the previous Supreme Court decisions. First, Plaintiffs wrongly assume that the associational rights at issue in the regulation of contributions to organizations are identical to the freedom of speech concerns at issue in the regulation of spending. Second, Plaintiffs also mistakenly assume that the governmental interest behind regulation of contributions is equivalent to, and no stronger than, the governmental interest in regulating the spending and speech itself. (*E.g.*, Pl. Br. at 27-28.) But the record before this Court, the extensive legislative and judicial findings underlying previous restrictions on contributions, and the well-documented real world experience of past election cycles demonstrate that Congress, the FEC, and the courts have identified serious issues of corruption and the appearance of corruption that would result from potentially unlimited contributions expressly directed at determining the outcome of federal elections. Under controlling Supreme Court cases, these anti-corruption interests amply support the constitutionality of the portion of the campaign finance regulatory framework challenged in this litigation. Overturning campaign finance laws that regulate organizations whose major

purpose is to influence federal elections would lead to circumvention of contribution limits that apply to candidates and political parties and would frustrate Congress' important anti-corruption goals.

Argument

I. The District Court Correctly Ruled that Regulation of Contributions to Major Purpose Political Committees Serves a Strong Government Interest in Preventing Corruption and the Appearance of Corruption in Federal Elections.

A. The Statutory and Constitutional Background

Since the beginning of the twentieth century, Congress and the courts have struggled with balancing regulations and constitutional rights in their effort to address the corrupting influence of unrestricted contributions to federal elections. The flow of money into federal election campaigns and the attendant problems of actual and potential corruption of public officials and public institutions has been and continues to be a central concern behind legislative restrictions on campaign contributions and disclosure requirements in the context of political campaigns and is also behind the judicial recognition of the legitimacy of those restrictions. The Supreme Court has recognized the special importance of this issue in a series of seminal cases that addressed congressional efforts to impose limitations on, or regulation of, political contributions. *Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Mass. Citizens for Life, Inc.*, ("MCFL"), 479 U.S. 238 (1986); *McConnell v. FEC*, 540 U.S. 93 (2003). Congress in 1907 prohibited corporate contributions to federal

candidates and since 1940 has placed dollar limits on individual donations in federal campaigns (now $2,400 per candidate per election). To deal with longstanding efforts to evade or circumvent these initial restrictions, Congress in 1971 comprehensively revamped federal contribution restrictions to make sure that limits apply to donations to candidates' campaign committees, to political party committees, and to other political committees that have the major purpose of supporting the election or defeat of federal candidates. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-455) ("FECA"). It is those limits that Plaintiffs sought to challenge below. In the years following FECA, the continuation of large contributions to parties and independent groups – and continuing evidence of either actual or potential corruption from such contributions as well as the appearance of such corruption – led to the passage in 2002 of the Bipartisan Campaign Reform Act, which attempted to close a number of loopholes that enabled those seeking to influence federal elections to circumvent the regulatory framework established in FECA. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002).

As the courts have reviewed regulations promulgated under FECA and BCRA, the central challenge has been to reconcile necessary anti-corruption regulation with First Amendment speech and associational rights in the arena of election-related activity. *E.g.*, *Buckley*, 424 U.S. at 26-27, 45; *FEC v. Wisc. Right*

To Life, Inc. ("WRTL"), 551 U.S. 449, 479-82 (2007). In addressing that reconciliation, the Supreme Court has repeatedly distinguished the constitutional issues that arise from direct contributions to candidates and other entities directly engaged in electoral activity from the constitutional issues that arise from expenditures by sympathetic parties supporting or opposing particular issues or candidates. *See Buckley*, 424 U.S. at 477-82; *McConnell*, 540 U.S. at 176-84; *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 195-98 (1981).

The justifications for campaign finance reform enunciated in *Buckley* and the legal principles based on those justifications have lasted through thirty years of federal, state, and local elections and have survived shifts in the political landscape, as well as developments in statutory schemes regulating the funding of political campaigns. In *Buckley*, the Court upheld contribution limits against a facial challenge to the entire regulatory scheme and drew a distinction between the First Amendment interests involved in spending directly on one's own political speech and the First Amendment interests that arise in the context of contributing to candidates, political committees or other election-related organizations.

It is well established under *Buckley* that limitations on contributions, unlike limitations on expenditures act as "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20.

> A contribution serves as a general expression of support for the candidate and his views, but does not

> communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate.

Id. at 21.

Thus, stating publicly that "I support Mr. Smith for Senate because he is for the working man…or local business… or protecting the environment," for example, implicates a different First Amendment interest than giving money to Mr. Smith. While both are indicative of support for Mr. Smith's candidacy, the constitutional protection afforded to the expression of this support through direct speech is much greater than the constitutional protection afforded to the expression of support that arises from a donation to the campaign of Mr. Smith. In addition, the *Buckley* Court noted that many avenues other than mere monetary contributions are available for interested people to demonstrate their support for a cause, candidate, or collection of candidates and thereby to exercise their associational rights. Even when individual contributions are limited to specified dollar amounts, individuals remain "free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." *Id.* at 28.

In addition to holding that contribution limits only marginally restrict contributors' First Amendment rights, the Court in *Buckley* expressly rejected arguments that contribution limits would have "any dramatic adverse effect" on financing campaigns and political committees. The Court reasoned that contribution limits "merely . . . require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Buckley*, 424 U.S. at 22; *McConnell*, 540 U.S. at 136 (quoting *Buckley*, 424 U.S. at 22); *accord Shrink Mo. Gov't PAC*, 528 U.S. at 395-96 (finding that there is no indication that Missouri contribution limitations would have any adverse effect on funding of campaigns).[1] History has amply vindicated the Court's wisdom on this point, as candidates, parties, and political committees continue to raise and spend ever-growing sums of money even though the size of the contributions they are legally allowed to receive

[1] The Court's decision in *Randall v. Sorrell*, 548 U.S. 230 (2006), does not undercut this reasoning. At issue in *Randall* were both expenditure and contribution limits in state races imposed by Vermont state law. While there is no majority opinion for the Court, the plurality opinion found that the extraordinarily low contribution limits did not pass constitutional muster. As the contribution limits at issue here are those contained in federal law, which are precisely the ones that the Court upheld in *Buckley* and *McConnell*, the *Randall* plurality opinion is not applicable.

is restricted. *See*, *e.g.*, Laura MacCleery, *Goodbye Soft Money, Hello Grassroots: How Campaign Finance Reform Restructured Campaigns and the Political World*, 58 Cath. U. L. Rev. 965, 994-1009 (2009) For example, when BCRA sharply limited "soft money" donations to the political parties, the parties turned to more vigorous grass-roots fundraising efforts and were soon able to replace the now illegal large soft money gifts with increased legal hard money donations. *See id.*

An important principle of campaign finance jurisprudence stemming from the holding *Buckley* is that in the context of contributions to entities, such as candidate committees or organizations, the political speech that such contributions enable is not the speech of the contributor, but rather is the speech of the receiving entity:

> While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Buckley, 424 U.S. at 21. Accordingly, courts have consistently accorded the speech-related expenditures made by the entity receiving contributions (the candidate committee or organization) greater First Amendment protection than the contributions that fund such expenditures.

The *Buckley* Court further found that the important government interests in preventing corruption of candidates, public officials, and public institutions justify

the limitation of contributions. "The . . . contribution limitation focuses precisely on the problem of large campaign contributions -- the narrow aspect of political association where the actuality and potential for corruption have been identified . . . ." *Id.* at 28. Picking up the same themes in *Shrink Missouri Gov't PAC*, the Court upheld contribution limits imposed by the state of Missouri on state elections. The Court stated that in its previous decisions upholding contribution limits, "we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Shrink Mo. Gov't PAC*, 528 U.S. at 389

Because of continuing problems with circumvention of contribution limits and other federal campaign finance reforms, in 2002, Congress tightened the campaign finance laws to narrow the amounts of unregulated "soft money" that could be spent in conjunction with a federal election. *See* 2 U.S.C. § 441i, BCRA § 101. In *McConnell*, the Supreme Court rejected the principal constitutional challenges to BCRA and specifically upheld reforms meant to stem the flow of soft money in *McConnell*. In so doing, the Court reiterated its previous holding in *Buckley* that the Constitution permits contribution limits aimed directly at the prevention of corruption and the appearance of corruption. *McConnell*, 540 U.S. at 137-38.

The Plaintiffs in this case, however, argue that because they wish to use contributions only for independent expenditures, they may not be constitutionally subjected to the federal statutes and regulations that limit contributions. Plaintiffs' argument ignores the strong anti-corruption interests that support these laws, both in the context of the campaign finance system as a whole and standing alone.

B. Regulation of Contributions to "Major Purpose" Political Committees Serves an Important Government Interest in Preventing Corruption and the Appearance of Corruption in Federal Elections.

Federal campaign finance law regulates three basic types of vehicles for campaign finance contributions – (i) the candidates' campaigns themselves (candidate committees); (ii) political parties (political party committees); and (iii) non-party political committees.[2] It is this third group that has attracted the majority of recent litigation, including this case. Under current law, each of these groups are subject to limits on the amount of contributions they may receive from any one source for purposes of influencing the election or defeat of candidates for office. 2 U.S.C. § 441a(a)(1). Both candidate committees and political parties

[2] Unlike cases such as *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008), *appeal docketed*, No. 08-205 (U.S. Aug. 18, 2008), *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), *MCFL*, 479 U.S. 238 (1986), *WRTL*, 551 U.S. 449 (2007), and others, the entity in this case is a single purpose election related organization, organized pursuant to Section 527 of the Internal Revenue Code. That is to say, SpeechNow was established and has as its stated and sole purpose the goal of producing and disseminating express advocacy communications for and against specific candidates for federal office.

may raise and use only "hard money," that is, money subject to both individual and overall contribution limits,[3] to finance campaign activities. 2 U.S.C. § 441a.

Current law, stemming from the decision in *Buckley*, provides that entities such as SpeechNow may be regulated as political committees only if their major purpose is the election or defeat of a clearly identified candidate or candidates for federal office. Organizations that meet this test and thus qualify as political committees may make independent expenditures, contribute to other political committees, party committees, or candidate committees, and may contribute to state candidates.[4] Such "major purpose" political committees are inherently different from other tax-exempt organizations that may engage a wide range of political activity. The major, and often the sole purpose of such a "major purpose" political committee is to affect the outcome of a federal election. This is a central distinction in assessing whether limits on contributions to groups such as

[3] Federal election law limits the amount of money that an individual may contribute to a campaign or committee. These limits are either annual or per election (*e.g.*, primary, general, and special elections). In addition, individuals must adhere to "special" biennial limits on the total amount of money that may be contributed to candidates, committees, and political parties. Thus, every individual may contribute money to the candidates, committees, and parties of their choosing. However, no individual may contribute in the aggregate more than the biennial limit.

[4] Of course, state contributions are outside the regulation of FECA, and beyond the scope of this case, given the stated purpose of SpeechNow to run advertisements that seek to expressly advocate for the election or defeat of federal candidates.

SpeechNow are constitutionally valid.[5] Unlike other non-profit organizations, such as those organized under 501(c)(4) of the Internal Revenue Code, SpeechNow makes no claim that it intends to engage in a mixture of issue advertising, voter education, or other advocacy efforts. (Pl. Br. at 8.) Not only its major purpose, but its sole purpose is to influence federal elections by publicly advocating for the election or defeat of identified candidates for federal office.

Under the framework that Plaintiffs urge this Court to adopt, major purpose organizations such as SpeechNow that raise funds to elect or defeat specific candidates for office, would be the only organizations primarily devoted to express advocacy in federal campaigns that would not be subject to contribution limits. Such a result would effectively allow such organizations to solicit and collect unlimited contributions for use in federal election campaigns. This disparity would create an enormous loophole for those wanting to make large contributions. As numerous examples have shown, those wishing to gain influence over federal candidates and officeholders could potentially make use of such large contributions to circumvent existing safeguards against corruption.

[5] This difference in organizational purpose and structure is one reason why the panel decision in *Emily's List* should not control the outcome in this en banc appeal. As the additional reasons for distinguishing or overruling this case are extensively discussed in the Brief of Amici Curiae Campaign Legal Center and Democracy 21, filed December 15, 2009, they will not be repeated here.

Plaintiffs urge that this loophole should be created because their organization will not make contributions directly to candidates or parties but will instead pursue its federal electoral agenda indirectly by devoting its funds to nominally independent expenditures that advocate the election or defeat of federal candidates. They argue that because they seek to make independent expenditures no corruption or appearance of corruption could occur that would justify restrictions on contributions. (Pl. Br. at 27-28.) But to accept that argument would require this Court to assume that there could never be corruption or the appearance of corruption from contributions of unlimited funds to "major purpose" committees for direct advocacy on behalf of or against a particular candidate. To make their case, Plaintiffs assert that this new world order of unrestricted contributions to organizations that seek to elect or defeat candidates via television or other direct advertising would raise no possibility of corruption or the appearance of corruption. Under Plaintiffs' theory, an individual wealthy donor could contribute up to $4,800 to a candidate for Congress – $2,400 for the primary and $2,400 for the general election. That same donor could donate up to $30,400 to the Democratic or Republican Party to continue to help support that candidate. And that same donor could then donate an unlimited amount to a non-party committee formed for the express and exclusive purpose of running ads to defeat that candidate's opponent in the race for Congress or to support the candidate directly.

Plaintiffs argue that there is no risk that this kind of unlimited contribution could lead to the appearance of corruption, or actual corruption, despite the large sums involved. (Pl. Br. at 28-43.) Thus, Plaintiffs argue that there is no sufficient or plausible reason for the government to regulate such large contributions to such major purpose 527 organizations. (*Id.*)

Similarly, Plaintiffs' position is that citizens who become aware of such large contributions would believe that such support would have no impact on the views of the legislators benefited by those donations or the ability of the donor to gain a favorable audience for that donor's views. The realities of electoral politics, as demonstrated in the election cycles before the enactment of BCRA's limitations on "soft money" contributions to political parties, belies that assertion. As one former Senator testified in the District Court in *McConnell*:

> Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about–and quite possibly votes on–an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation.

540 U.S. at 149 (citation omitted) (internal quotation marks omitted). One of the core holdings of both *Buckley* and *McConnell* is that the primary purpose of the laws regulating campaign finance was to "'limit the actuality and appearance of

corruption resulting from large individual financial contributions.'" *Id.* at 120 (quoting *Buckley*, 424 U.S. at 26). Similarly, Plaintiffs assume that even when citizens become aware that unlimited contributions are being made to political committees devoted to federal electoral activity they would believe that such support would have no impact on the legislative process or the ability of such big donors to have special influence with elected officials. It seems unlikely that many citizens would take this view.

If existing contribution limitations were lifted, major purpose political committees would be particularly attractive conduits for influence peddling efforts. Unlike 501(c) organizations whose political activities are sharply limited, the "major purpose" – by definition – of the major purpose organizations subject to FECA's contribution restrictions is support of or opposition to specific candidates. The Court in *Buckley* emphasized one key requirement as the basis for the Court's conclusion that contributions to such groups can be constitutionally limited – that these groups must be operated in a manner that clearly demonstrates that their intention is to elect or defeat candidates for federal office. Enunciated as the "major purpose" test, the Court in *Buckley* held that such groups cannot be regulated by the FEC unless their "major purpose" is the election or defeat of a clearly identified candidate for federal office. 424 U.S. at 79. This central holding of *Buckley* has been followed by the courts in the intervening years, and used

extensively by the FEC in evaluating enforcement matters. *See, e.g.*, *In re Swift Boat Veterans and POWs for Truth*, FEC Matter Under Review ("MUR") 5511, 5525 (Dec. 13, 2006), *available at* http://eqs.sdrdc.com/eqsdocs/00005900.pdf; *In re Progress for Am. Voter Fund*, FEC MUR 5487 (Feb. 28, 2007), *available at* http://eqs.sdrdc.com/eqsdocs/00005AA7.pdf; *In re Media Fund*, FEC MUR 5440 (Nov. 19, 2007), *available at* http://eqs.sdrdc.com/eqsdocs/000066D5.pdf; *In re League of Conservation Voters 527*, FEC MUR 5753 (Dec. 13, 2006), *available at* http://eqs.sdrdc.com/eqsdocs/00005905.pdf.

As studies of recent elections have demonstrated, these kinds of 527 groups have raised enormous sums of money for their candidates and, further, have often had close ties to candidates and political parties. *See, e.g.*, Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 Geo. Wash. L. Rev. 949, 965-66 (2005). Were the source and amount limitations that apply to contributions to such major purpose groups to be struck down, one could expect that large contributors seeking political influence could use such groups to circumvent contribution limitations to candidates and political parties. As Professor Briffault's article in the George Washington Law Review recounted, during the 2004 presidential election campaign, a total amount of $405 million, nearly one-fifth of all money spent on the presidential election, came from eighty-eight different Section 527 organizations. Briffault, 73 Geo. Wash. L. Rev. at 960; *accord* S. Weissman & R.

Hassan, *BCRA and the 527 Groups* at 81, *in* The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act (Michael J. Malbin ed., 2005) (*cited in Speechnow.Org v. FEC*, 567 F. Supp. 2d 70, 74 (D.D.C. 2008). The same non-partisan organization – the Campaign Finance Institute ("CFI") – that was cited by the District Court and relied upon by the experts in the record below published similar analyses of the 2006 and 2008 federal election cycles. CFI found that during the 2006 congressional elections and the 2008 presidential election, such major purpose organizations raised and spent approximately $143 million and $202 million, respectively. S. Weissman and S. Sazawal, Press Release, The Campaign Finance Institute, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election* (Feb. 25, 2009), *available at* http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=221. And while the amount raised and contributed by 527s decreased overall in the most recent elections, it still was in the hundreds of millions and represented a significant piece of the campaign finance picture.

In addition to the sheer amount of money that these kinds of organizations have raised and spent during federal election cycles, there are other reasons to believe that if existing regulations on contributions to major purpose groups were struck down, very large contributions that raise the prospect of the corruption and the appearance of corruption of federal officeholders would inevitably result. The

structure of these organizations would allow them to become "mere vehicles for large contributions to aid candidates." (J.A. at 1036, 1052-53, Expert Report of Professor Clyde Wilcox ("Wilcox Report") at 9, 25-26.)

Many political committees are clearly committed to supporting the candidates of just one or the other of the major political parties. Of the sixty-four organizations listed by the Campaign Finance Institute in 2009 that raised or spent more than $200,000 in the 2008 election cycle, only one organization was listed that did not have an affiliation with either the Republican or Democratic party. The 2004 presidential cycle also demonstrated the interrelationship between many Section 527 groups and the formal leadership of political parties. Briffault, 73 Geo. Wash. L. Rev. at 965-66.

The Plaintiffs before this Court demonstrate this same pattern of intersecting circles. The president and treasurer of SpeechNow, Plaintiff David Keating, is also the executive director of the Club for Growth, a prominent Republican leaning non profit. Club for Growth's president is a former Congressman who was also the Indiana Finance Chairman for Mitt Romney's presidential campaign. Club for Growth, http://www.clubforgrowth.org/aboutus/?subsec=0&id=14 (last visited Dec. 17, 2009). As a general matter, in recent elections, party operatives and consultants have shifted between party jobs, campaigns, and interest groups – sometimes holding more than one position simultaneously – to such a degree that major purpose organizations were essentially considered "shadow" political parties. (J.A. at 1036, Wilcox Report at

9)*; Speechnow.Org,* 567 F. Supp. 2d at 74. Such major purposes entities, therefore, are ideally situated to effectively use contributions for expenditures that fill in the gaps in campaign and party efforts, all without illegally "coordinating" their efforts with the actual parties and campaigns.

Finally, although legally "independent" from candidate campaigns and political parties, there are substantial overlaps of both donors and operational personnel among the 527 political committees, the parties, and the candidates. According to the CFI, "[f]or nearly all of the $75,000 and over donors [during the 2008 election cycle], [a contribution to a] 527 was part of a broader election strategy that included very substantial donations of 'hard money' to candidates, parties and PACs." Weissman and Sazawal, *supra*. This is reaffirmed by the testimony adduced in *McConnell* in which a former party official described the election landscape before the additional regulation of soft money:

> Once you've helped a federal candidate by contributing hard money to his or her campaign, you are sometimes asked to do more for the candidate by making donations of hard and/or soft money to the national party committees, the relevant state party (assuming it can accept corporate contributions), or an outside group that is planning on doing an independent expenditure or issue advertisement to help the candidate's campaign.

McConnell, 540 U.S. at 125 n.15 (citation omitted) (internal quotation marks omitted). While BCRA certainly created restrictions that were not present during the heyday of political party soft money dominance, donations to major purpose political committees, like SpeechNow, that solicit donations with the stated

intention of defeating particular candidates raise the same risk of corruption as donations to candidates and parties.

Just this year in *Caperton v. Massey*, 129 S.Ct. 2252 (2009), the Supreme Court acknowledged that unregulated large contributions to an independent expenditure organization could result in influence-buying, or the appearance thereof. In *Caperton*, an individual whose corporation was involved in a case before the West Virginia Supreme Court donated $2.5 million to a 527 organization that made independent expenditures in support of a candidate for election to the West Virginia Supreme Court. The individual also spent an additional $500,000 in the form of independent expenditures in support of the candidate. The Supreme Court held that these expenditures created a "risk of actual" bias, and required the judge to recuse himself from the case. *Caperton*, 129 S.Ct. at 2264-65.

To illustrate this risk of corruption, one can look to the example of states that have state campaign finance regulatory regimes that look very much like what the Plaintiffs are proposing here – no contribution limits on donations to political committees that make exclusively independent expenditures in state races. In those states, independent expenditure committees often served as ready conduits through which individuals have managed to circumvent contribution limits to candidate committees. In California, for example, there are no limits on the

amount of money an individual can contribute to a committee that engages solely in making independent expenditures.[6] Cal Gov. Code § 85303(c). During California's 2006 gubernatorial primary the contribution limit was $22,300.[7] Despite these limits, Californians for a Better Government, an independent expenditure organization, made all its expenditures, totaling nearly $10,000,000, in support of one candidate for state treasurer, Phil Angelides. (J.A. at 1039, Wilcox Report at 12.) More than eighty percent of these expenditures were paid for by two individuals, Angelo Tsakopoulos and his daughter Eleni Tsakopoulos. (*Id.*) Although, technically these expenditures were not coordinated with Angelides, it is implausible that he did not know the identity of the contributors or the amount of spending made on his behalf.

Clearly those contributors who wish to gain influence over public officials will use all avenues available to gain access to those officials through direct and indirect funding for their campaigns. (J.A. at 1038, 1040, Wilcox Report at 11, 13.) Accordingly, an effective scheme of federal campaign finance regulation that

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[6] Under California law, "'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate . . . or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." Cal Gov Code § 82031.

[7] http://www.fppc.ca.gov/bulletin/statelimhistory.pdf

reduces corruption and its appearance by limiting contributions must apply to contributions to all of these entities – candidates, parties, and major purpose political committees.[8]

C. Nothing about the Proposed Committee or in the Record Before this Court Brings it Outside this Regulatory and Constitutional Framework.

Plaintiffs nevertheless argue that their proposed independent expenditures should remove them from longstanding restrictions of contributions to "major purpose" political committees. But the fact that they would spend their funds alongside – rather than contribute to – the parties and candidates does nothing to remove the corruption danger posed by the contributions they receive. Their ability to produce advertisements supporting or attacking federal candidates would free up scarce hard money resources for more direct campaign-related expenses. Indeed, such an unregulated pot of money would bring back the very corruption that Congress and the Court have worked so hard to prevent. Yet, according to Plaintiffs, the Constitution does not permit Congress to place any limits on the size of contributions to this type of organization.

[8] Should this Court have any concerns about the adequacy of the record before it on the nature and depth of the legitimate governmental interest in preventing corruption and the appearance of corruption posed by this case, Amici would respectfully join with Defendant FEC to urge the Court to remand the case to the District Court for more in depth fact-finding and, if desirable, additional discovery. (*See* Def. FEC Br. at 58-61.)

As the Court said in a slightly different context in *McConnell*:

> Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [limits on certain soft money donations] by scrambling to find another way to purchase influence. It was "neither novel nor implausible," for Congress to conclude that political parties would react to [those limits] by directing soft-money contributors to the state committees, and that federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties. We "must accord substantial deference to the predictive judgments of Congress," particularly when, as here, those predictions are so firmly rooted in relevant history and common sense. Preventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.

McConnell, 540 U.S. at 165 (citations omitted). There is no basis for this Court to second-guess Congress's predictions about the corruption that would result from the loophole that Plaintiffs propose to open.

Conclusion

Preventing corrupting activity from shifting wholesale to nominally independent organizations and thereby eviscerating FECA's longstanding and clearly constitutional limits on individual contributions in federal election campaigns, Amici submit, clearly also qualifies as an important governmental interest. For that reason the decision of the District Court should be affirmed.

December 21, 2009

Respectfully submitted,

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Certificate of Counsel Pursuant to Circuit Rule 29(d)

Amici's participation in this case and the filing of this separate brief is necessary for Amici to fully address the anti-corruption interests served by limiting contributions to political organizations that, technically-speaking, do not coordinate spending with candidates or political parties but make only independent expenditures. Involvement by Amici is of particular importance as the Brennan Center and Professor Briffault are uniquely positioned to explain that the challenged regulations are in fact essential to combating corruption and the appearance thereof. Indeed, Professor Briffault's legal scholarship on this subject was cited as persuasive authority by the District Court in its decision in this case denying the Plaintiffs-Appellants' request for a preliminary injunction. *See Speechnow.Org v. FEC*, 567 F. Supp. 2d 70, 73 n.4 & 75 (D.D.C. 2008). Amici's participation would allow us to point the Court to other relevant scholarship, and to explain how other legal precedent further bolsters this body of scholarship.

/s/ Howard R. Rubin

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 5,856 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2003, in 14-point Times New Roman.

/s/ Howard R. Rubin

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2009, the foregoing Amicus Brief of the Brennan Center for Justice at NYU School of Law and Professor Richard Briffault was served electronically by using the court's electronic filing system or first class U.S. Mail, postage pre-paid, according to the service preference report for this case, which is as follows:

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