RECORD NO. 08-5223

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The
United States Court of Appeals
For The District of Columbia Circuit

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

Plaintiffs - Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties & 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. All parties below are parties before this Court in this appeal.

Amici below for the defendant were the Campaign Legal Center and Democracy 21.

B. Rulings Under Review

The rulings under review are contained within the district court's Memorandum Order issued July 1, 2008, by the Hon. James Robertson, denying Plaintiffs' Motion for Preliminary Injunction. The district court's opinion is published at *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008). The rulings under review and judgment being appealed are set forth in the Joint Appendix at pp. 372-399.

C. Related Cases

The case on review has not previously been before this or any other court apart from the original proceeding in the district court. The merits of this case are governed by 2 U.S.C. § 437h, which requires the district court to "immediately . . . certify all questions of constitutionality of [the Federal Election Campaign Act] to

the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc." The district court has not yet certified the merits to the en banc Circuit.

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant SpeechNow.org is an unincorporated association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29-971.01-.15. SpeechNow.org was formed for the purpose of protecting the First Amendment at the ballot box by expressly advocating the election of federal candidates who support First Amendment rights and the defeat of candidates who oppose those rights.

SpeechNow.org has no parent company and there is no publicly held company that has a 10% or greater ownership interest in SpeechNow.org. No member of SpeechNow.org has issued shares or debt securities to the public.

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GLOSSARY

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

STATEMENT OF JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 2201 because Plaintiffs-Appellants sought a declaratory judgment on a federal question: whether various provisions of the Federal Election Campaign Act (FECA) were constitutional as applied to their proposed activities. The district court also had jurisdiction under 2 U.S.C. § 437h, because the individual Plaintiffs-Appellants are eligible to vote in an election for the office of President and sought a declaratory judgment concerning the constitutionality of provisions of FECA.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) because this is an appeal from a denial of a motion for preliminary injunction for which direct review with the Supreme Court is not available. The district court denied Plaintiffs-Appellants' motion for preliminary injunction on July 1, 2008. Plaintiffs-Appellants timely filed their notice of appeal on July 22, 2008.

STATEMENT OF THE ISSUES

Did the district court err by failing to preliminarily enjoin contribution limits that apply to SpeechNow.org, a group that accepts funds only from individuals, spends those funds only on independent political advocacy, and is independent of political candidates and party committees?

STATUTES AND REGULATIONS

An addendum contains the following:

2 U.S.C. §§ 431-34, 437f, 437h, 441a, 441d, 441i

11 C.F.R. §§ 100.16, 109.21, 110.11, 112.4, 114.10

Cal. Gov. Code § 84506(a)

D.C. Code §§ 29-971.01-.15

Wash. Rev. Code § 42.17.510(4)

INTRODUCTION

This case presents a constitutional challenge to campaign-finance laws that prevent individuals from joining together to exercise their First Amendment rights to speak and associate. Plaintiffs-Appellants (collectively "SpeechNow.org") are an independent group of citizens whose mission is to engage in express advocacy in favor of candidates who support the First Amendment and against those who do not. Toward that end, SpeechNow.org would like to run advertisements urging voters to elect federal candidates who support full protections for First Amendment rights and to defeat candidates who are hostile to those rights. In 2008, when this case was filed, SpeechNow.org had prepared scripts for four television ads and was prepared to produce the ads, purchase the air time, and begin broadcasting those ads. Plaintiffs-Appellants David Keating, Edward Crane, Fred Young and others were prepared to donate the necessary funds to SpeechNow.org to finance the ads.

Unfortunately, certain provisions of the federal campaign-finance laws prevent SpeechNow.org from producing and broadcasting these ads. On July 1, 2008, the district court denied SpeechNow.org's motion to preliminarily enjoin those laws. This appeal followed.

Under the campaign-finance laws, SpeechNow.org is considered a "political committee" because it is a group of individuals who will raise and spend more than $1,000 to expressly advocate the election or defeat of candidates for federal office. Political committees are subject to contribution limits that prevent them from accepting donations of more than $5,000 from any individual in a calendar year. Those same laws prevent individuals from making donations to such committees exceeding $5,000 per year. Penalties for violations of contribution limits include civil and criminal fines and even jail time.

As a result, SpeechNow.org cannot accept the amounts that Messrs. Keating, Crane, Young and others wish to donate to fund its political ads, and the group cannot produce and broadcast its ads. Television advertisements do not come cheap. Even running a few ads in one congressional race can cost upwards of $500,000. To get SpeechNow.org up and running effectively therefore requires a core group of donors to donate more than $5,000 apiece. The contribution limits thus harm not only SpeechNow.org and those who wish to donate more than $5,000 each; they also harm smaller donors who agree with SpeechNow.org's

message and wish to add their voices to that message, albeit by donating less than $5,000. Two such donors, Brad Russo and Scott Burkhardt, also join this suit as Plaintiffs.

In short, the campaign-finance laws treat SpeechNow.org as though it were a full-fledged political action committee, or PAC. But there is a crucial difference between SpeechNow.org and the PACs and party committees that the Supreme Court has held raise concerns about corruption that justify contribution limits. SpeechNow.org will make only independent expenditures—that is, it will spend its own money on its own speech entirely independently of the candidates it supports or opposes. It will not make direct contributions to candidates.

Independent expenditures are the very essence of political speech. The Supreme Court has repeatedly recognized that protecting independent expenditures is crucial to maintaining a balance between campaign-finance laws and the robust political debate that the First Amendment was designed to preserve. It has never held or implied that independent expenditures create concerns about corruption as do direct contributions to candidates.

David Keating, the president of SpeechNow.org, established the group with this in mind. He wrote right into its bylaws restrictions that avoid any of the concerns the Supreme Court has raised about corruption. SpeechNow.org cannot

make contributions to candidates, it accepts no corporate or union funds, and it cannot coordinate its activities with candidates or party committees.

The theory of SpeechNow.org's case is simple. If a group's independent expenditures cannot create concerns about corruption, and the group is confined to making only independent expenditures, then the money that goes to fund those independent expenditures cannot create concerns about corruption either. As a result, requiring it to become a PAC and limiting its contributions is unconstitutional under the First Amendment. The Supreme Court's campaign-finance cases do not grant government a roving commission to limit anything it chooses to call a "contribution." Instead, that case law requires the government to justify its limitations by demonstrating that they serve the purpose of eliminating corruption.

The district court ignored this basic truth. Claiming that SpeechNow.org's argument exhibited a "crabbed" view of corruption, the district court denied its motion for preliminary injunction, finding that applying contribution limits to SpeechNow.org served the government's interest in preventing circumvention of the campaign-finance laws. However, just two years ago, the Supreme Court concluded that "[e]nough is enough" and rejected the claim that preventing circumvention justified requiring another independent speech group to organize as

a PAC. *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 478 (2007). The same basic principle applies here as well.

In short, too much concern for circumventing the campaign-finance laws necessarily translates into too little concern for circumventing the First Amendment. The district court's denial of SpeechNow.org's motion for preliminary injunction should be reversed, and SpeechNow.org should be permitted to run ads in the 2010 election cycle while the merits of this case are being litigated.

STATEMENT OF FACTS

Plaintiff David Keating created SpeechNow.org because he believes that promoting the issue of free speech and exposing the threats posed to it by campaign-finance laws are vital to the future of the nation. J.A. 51. He wants individuals who share his concern to be able to associate by pooling their funds so they can speak out as loudly and effectively in favor of First Amendment rights as possible. J.A. 51. Because federal elections provide a rare opportunity both to impact public policy—by affecting the political futures of the candidates who make it—and to influence public debate, David believes that running advertisements calling for the election or defeat of candidates based on their support for free speech and association is the most effective way for private citizens to protect those rights. J.A. 51. In David's view, if individuals acting

alone are permitted to spend unlimited amounts of money advocating the election or defeat of candidates for office—as the Supreme Court has held they are—there is absolutely no reason why groups of individuals should be prevented from doing the same thing. David created SpeechNow.org to give ordinary Americans the ability to band together to achieve these purposes. J.A. 51.

II. Structure and Operations of SpeechNow.org.

SpeechNow.org is a nonprofit "political organization" registered under Section 527 of the Internal Revenue Code. SpeechNow.org plans to solicit donations from individuals for funds to cover operating expenses and to buy public, political advertising to promote the election or defeat of candidates based on their positions on free speech and associational rights. J.A. 53. SpeechNow.org's solicitations will inform potential donors that their donations may be used for political advertising that will advocate the election or defeat of candidates to federal office based on their support for First Amendment rights. J.A. 53. SpeechNow.org will also advise its donors that their donations are not tax deductible. J.A. 54. Some of SpeechNow.org's solicitations will refer to particular candidates for federal office by name. J.A. 53.

Unlike many other types of political organizations, SpeechNow.org's structure and operations are specifically designed to avoid any risk of "corruption" that the Supreme Court has found sufficiently compelling to justify campaign-

finance laws. First, SpeechNow.org will operate solely on private donations from individuals who are legally permitted to spend money to influence federal elections. J.A. 79. SpeechNow.org will not accept, directly or indirectly, donations from corporations, unions, national banks, federal-government contractors, foreign nationals, or political committees. J.A. 84.

Second, in addition to refusing donations from corporations, SpeechNow.org itself is unincorporated, having been organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code sections 29-971.01-.15. J.A. 74-76. Indeed, SpeechNow.org's bylaws prohibit it from engaging in business activities or offering to any donors or members any benefit that is a disincentive for them to disassociate themselves from SpeechNow.org on the basis of the organization's position on a political issue. J.A. 83. These provisions ensure that all funds raised by SpeechNow.org come solely from individuals who wish to support its cause. As the district court concluded, this ensures that SpeechNow.org does not pose any risk of so-called "corporate-form" corruption. J.A. 396-97 (Slip op. at 25-26 n.10).

Finally, SpeechNow.org's bylaws require it to operate wholly independently of political candidates, committees, and parties. J.A. 84-85. SpeechNow.org cannot make contributions or donations of any kind directly or indirectly to any FEC-regulated candidate or political committee, and it cannot "coordinate" its

activities, as defined in 2 U.S.C. §§ 441a(a)(7)(B) & (C) and 11 C.F.R. part 109, with any candidates, national, state, district, or local political-party committees, or their agents. J.A. 83-85.

II. SpeechNow.org's Planned Political Advertisements.

SpeechNow.org wants to run political advertisements in 2010 and in future election cycles. J.A. 21, 54; Decl. of David Keating in Supp. Pls.' Mot. to Expedite Consideration of Appeal from Denial of Prelim. Inj. ¶¶ 6, 7. In 2007, SpeechNow.org had planned to run TV and radio ads during the 2008 election cycle, and it prepared television scripts and obtained cost estimates for four such advertisements. J.A. 54, 95-99. Ultimately, however, SpeechNow.org was prevented from producing and broadcasting its ads when the district court denied its motion for preliminary injunction.

Two of SpeechNow.org's planned advertisements called for the defeat of Dan Burton, a Republican Congressman who was then running for reelection in the fifth district of Indiana. Both ads criticized Representative Burton for voting for a bill that would restrict the speech of many public-interest groups. The first urged voters to "Say no to Burton for Congress." J.A. 96. The second stated, "Dan Burton voted to restrict our rights. Don't let him do it again." J.A. 97. SpeechNow.org planned to broadcast these advertisements in Representative Burton's district. J.A. 55.

The other two advertisements called for the defeat of Mary Landrieu, a Democratic Senator then running for reelection in Lousiana. Both ads criticized Landrieu for voting for the same law that Representative Burton had supported. The first urged voters to "Say no to Landrieu for Senate." J.A. 98. The second concluded by saying, "Our founding fathers made free speech the First Amendment to the Constitution. Mary Landrieu is taking that right away. Don't let her do it again." J.A. 99. SpeechNow.org wanted to broadcast these advertisements in Louisiana. J.A. 55.

The cost to produce these advertisements would have been approximately $12,000. J.A. 55. The cost to air the advertisements would have depended on the number of times they were run and the size of the audience SpeechNow.org wanted to reach. J.A. 55-56, 100-01, 106. Ideally, David Keating wanted to run the ads often enough to allow their target audience to view them at least ten times, but that would have cost roughly $400,000. J.A. 56. A less expensive option would have been simply to run the ads fewer times. J.A. 55-56.

SpeechNow.org knows of at least four individuals who are willing, ready, and able to donate funds that will allow it to produce and broadcast advertisements like those described above. J.A. 23, 57. David Keating is willing to donate $5,500. J.A. 57-58. Edward Crane is willing to donate $6,000. J.A. 104. Richard Marder is willing to donate $5,500. J.A. 57-58. Fred M. Young is willing to

donate $110,000. J.A.116-17. However, under the federal campaign-finance laws, these individuals may not make their donations and SpeechNow.org may not accept them because they are over the limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3).

SpeechNow.org also knows of two individuals who are willing to donate amounts under the contribution limits. Plaintiffs Brad Russo and Scott Burkhardt are each willing to donate $100 to SpeechNow.org. J.A. 49, 120. Even though Plaintiffs Russo and Burkhardt could not themselves finance the production and broadcast of SpeechNow.org's ads, they wish to associate with SpeechNow.org's other supporters in order to amplify their voices and reach an audience far greater than they would be able to achieve without SpeechNow.org. J.A. 48, 119. However, because SpeechNow.org cannot become a functioning organization without accepting contributions above the $5,000 limit, it cannot operate at all and thus cannot accept donations even below the contribution limits. J.A. 61-62.

III. The Application of the Federal Election Campaign Act to SpeechNow.org.

Under the Federal Election Campaign Act (FECA), SpeechNow.org's expenditures for advertisements would be "independent expenditures." Independent expenditures are expenditures by a person "expressly advocating the election or defeat of a clearly identified candidate" that are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's

authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17). SpeechNow.org will comply with all disclaimer and reporting obligations for those who make independent expenditures under the campaign-finance laws. J.A. 57, 82. For instance, under 2 U.S.C. § 441d(a), SpeechNow.org's advertisements and other communications will include its name, address and telephone number or World Wide Web address, along with a statement indicating that the communication was paid for by SpeechNow.org and was not authorized by any candidate or candidate's committee. J.A. 57, 82. Under 2 U.S.C. § 441d(d)(2), SpeechNow.org's advertisements will also include a statement indicating that SpeechNow.org is responsible for the content of the advertisement. J.A. 57, 82. And, as required by 2 U.S.C. § 434(c), SpeechNow.org will file statements with the FEC reporting its donations and its donors' identities as well as its expenditures. J.A. 57, 82.

At the same time, however, if SpeechNow.org accepts any of the donations that Messrs. Keating, Crane, or Young are prepared to make or produces and broadcasts advertisements like those identified above, SpeechNow.org will immediately become a "political committee"—or PAC—and be subject to all regulations that apply to PACs, including limits on contributions.

A "political committee" is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a

calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . . ." 2 U.S.C. § 431(4). A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office . . . ." *Id.* § 431(8). "Expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . . ." *Id.* § 431(9).

Under these provisions, SpeechNow.org would become a political committee if it accepted any of the donations from Messrs. Keating, Crane, or Young because they would be made "for the purpose of influencing" a federal election. J.A. 57-58, 103, 115-16. Likewise, if SpeechNow.org spent the money necessary to produce and broadcast the ads for which it has scripts, it would also become a political committee because those expenditures would be made "for the purpose of influencing" a federal election. J.A. 60-61.

Political committees are subject to limits on the contributions they may accept. Two limits in particular would apply to SpeechNow.org and its donors. Under 2 U.S.C. § 441a(a)(1)(C), SpeechNow.org and its donors would be subject to annual contribution limits of $5,000 from any one person; and under 2 U.S.C. § 441a(a)(1)(C), supporters of SpeechNow.org would be subject to biennial aggregate limits of $69,900 for contributions to political committees and parties

and $115,500 for all contributions to candidates, political committees and party committees. J.A. 160-62, 366-67. Under these provisions, Plaintiffs Keating, Crane, and Young cannot make the donations to SpeechNow.org that they are ready, willing, and able to make and SpeechNow.org cannot accept those donations.[1]

In addition to being subject to contribution limits, political committees are subject to burdensome organizational, administrative, and reporting requirements. These include, among other things, the obligation to file a statement of organization, appoint a treasurer, maintain records of all contributions and expenditures for three years, and file regular reports disclosing detailed information concerning the amounts of all contributions and expenditures, the identities of all contributors, persons who provide any dividend or interest to the committee, the identities of those to whom expenditures are made, and the committees' operating expenses, among other information. *See* 2 U.S.C. §§ 432, 433, 434; J.A. 160, 366-67. While SpeechNow.org is challenging the application

[1] The biennial aggregate limit applicable to Mr. Young's donation has been adjusted for inflation since the time this case was filed. However, Mr. Young's pledged contribution of $110,000 would still exceed this limit for two reasons. First, Mr. Young's contribution would exceed the $69,900 limit on contributions to groups other than candidate committees. 2 U.S.C. § 441a(a)(3)(B). Second, Mr. Young has already made more than $5,500 in candidate contributions during the 2010 election cycle, meaning that a $110,000 contribution to SpeechNow.org would bring him over the $115,500 aggregate limit. FEC, Advanced Individual Search, http://www.fec.gov/finance/disclosure/advindsea.shtml (search for name "Young, Fred," city "Racine," state "Wisconsin," date range from "01/01/2009").

of these provisions to it in the merits case, it sought to enjoin only the application of contribution limits in its motion for preliminary injunction.

IV. SpeechNow.org's Advisory Opinion Request.

On November 19, 2007, SpeechNow.org filed a request for an advisory opinion (AOR) with the FEC pursuant to 2 U.S.C. § 437f. The request presented, in essence, three questions: (1) Must SpeechNow.org register as a political committee as defined in 2 U.S.C. § 431(4), and, if so, when? (2) Are donations to SpeechNow.org "contributions" (as defined in 2 U.S.C. § 431(8)) subject to the limits described in 2 U.S.C. § 441a(a)(1)(C)? (3) Must an individual donor to SpeechNow.org count his donations to the group among the contributions applicable to his biennial aggregate contribution limit described in 2 U.S.C. § 441a(a)(3)? J.A. 127-28.

Under FEC rules, the Commission is required to issue a written advisory opinion within sixty days of accepting a request. 11 C.F.R. § 112.4(a). If it is unable to render an advisory opinion within that time, the rules state that the FEC "shall issue a written response stating that the Commission was unable to approve" the request by a required vote of four commissioners. *Id.* The FEC issued its response to SpeechNow.org's AOR on January 28, 2008. J.A. 146. Because the FEC was at the time without a full complement of commissioners, it lacked a quorum and thus could not issue an advisory opinion in response to

SpeechNow.org's request. Accordingly, under FEC rules, SpeechNow.org's request was not approved. J.A. 146-47.

However, the general counsel's office of the FEC issued a draft advisory opinion in response to SpeechNow.org's AOR. J.A. 148-68. The draft advisory opinion concluded that, among other things, the donations Messrs. Keating, Crane, and Young wish to make to SpeechNow.org would be "contributions" under 2 U.S.C. § 431(8); expenditures by SpeechNow.org on advertisements calling for the election or defeat of candidates for federal office would be "expenditures" under 2 U.S.C. § 431(9); SpeechNow.org has a "major purpose" of campaign activity; accepting the contributions noted above to fund its advertisements would make SpeechNow.org a "political committee" under § 431(4); as a political committee, SpeechNow.org would be subject to the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) and the registration, administrative and reporting requirements for political committees contained in 2 U.S.C. §§ 432, 433, and 434. J.A. 148-68. In short, the draft advisory opinion concluded that the campaign-finance laws prohibit SpeechNow.org from accepting donations that exceed the contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) to fund its advertisements.

The application of the PAC requirements and contribution limits to SpeechNow.org places the organization and its supporters in an impossible

position. If SpeechNow.org accepts the donations that Messrs. Crane, Young, and Keating want to make, it immediately becomes a "political committee," making those donations illegal and subjecting both SpeechNow.org and those who make the donations to civil and criminal liability. If it does not accept those donations, SpeechNow.org cannot produce and broadcast its advertisements and fulfill its mission. J.A. 58. Moreover, if it does not accept donations above the contribution limits, SpeechNow.org will not only be unable to produce the ads it currently wants to run, it will be prevented from obtaining the funding necessary to begin operations and to allow it to raise additional funds to produce and broadcast additional advertisements. J.A. 58.

V. Proceedings Below.

On February 14, 2008, SpeechNow.org filed its complaint in this case along with a motion for preliminary injunction. The motion sought to enjoin the contribution limits that would prevent SpeechNow.org from raising the money necessary to begin producing and broadcasting advertisements. Although Speechnow.org challenges the administrative and continuous reporting requirements for PACs in its merits case, it sought to enjoin only the contribution limits. Thus, if this Court reverses the district court, SpeechNow.org will comply with the same administrative and disclosure requirements that PACs comply with while the merits of its case are litigated.

The district court heard argument on SpeechNow.org's motion on April 11, 2008, and denied the motion on July 1, 2008. SpeechNow.org timely appealed the denial of its motion for preliminary injunction on July 22, 2008.

In the merits case, SpeechNow.org is proceeding under 2 U.S.C. § 437h, which allows certain constitutional challenges to the campaign-finance laws to be certified immediately to an en banc hearing before the court of appeals after the district court makes factual findings. Speechnow.org moved for certification of five issues in its case,[2] which the district court ultimately granted on July 11, 2008.[3] The parties conducted discovery during the late summer and fall of 2008 and submitted proposed findings of fact and briefs on various issues related to the proposed findings. That briefing was completed on January 13, 2009.

In the meantime, this Court initially scheduled opening briefs in this appeal to be due on December 1, 2008. Because SpeechNow.org expected the merits of this case to receive expedited consideration under 2 U.S.C. § 437h, and because it could not have received a ruling on this appeal in time to run ads for the 2008

[2] While "SpeechNow.org" is used throughout this brief to refer collectively to the Plaintiffs-Appellants, SpeechNow.org itself is ineligible for certification under 2 U.S.C. § 437h because it is an organization. Thus, the en banc hearing will consist only of the individual plaintiffs, who will assert both their own rights to speak and associate through SpeechNow.org and their rights to create a group such as SpeechNow.org to do so.

[3] The district court initially denied the motion for certification in its order denying the motion for preliminary injunction, but it later reversed this decision when SpeechNow.org filed a motion for reconsideration.

primary or general elections, SpeechNow.org moved to hold this appeal in abeyance while the district court proceeded with certification under § 437h. *See* Appellants' Unopposed Mot. to Suspend Briefing Schedule & Hold Appeal in Abeyance. When it became clear that certification to the Court of Appeals might not occur before August 31, 2009, SpeechNow.org asked this Court to reactivate its appeal so that it might secure a preliminary injunction in time to run ads for the 2010 primary-election season. *See* Appellants' Mot. to Remove Case from Abeyance & Issue Briefing Schedule. After receiving the briefing schedule for this appeal, SpeechNow.org moved for expedited consideration under 28 U.S.C. § 1657, which this Court granted on July 24, 2009. Recently, the district court entered an order directing the clerk to set a hearing on the parties' proposed findings of fact for the week of September 14, 2008. *SpeechNow.org v. FEC*, No. 1:08-cv-00248 (D.D.C. Aug. 18, 2009).

STANDARD OF REVIEW

"This Court review[s] a district court's weighing of the four preliminary injunction factors and its ultimate decision to issue or deny such relief for abuse of discretion." *Davis v. Pension Benefit Guar. Corp.*, No. 08-5524, 2009 U.S. App. LEXIS 15318, at *5 (D.C. Cir. July 10, 2009) (internal quotation marks omitted). However, "[l]egal conclusions—including whether the movant has established irreparable harm—are reviewed *de novo.*" *Id.*

SUMMARY OF ARGUMENT

SpeechNow.org's independent expenditures are at the very core of the First Amendment's protections. As the Supreme Court has repeatedly stated, a fundamental purpose of the First Amendment was to protect the discussion of governmental affairs, and, in particular, of candidates, in order to "'assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Thus, the First Amendment protects vigorous advocacy intended to influence the outcome of elections no less than the discussion of ideas. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). Accordingly, SpeechNow.org's independent expenditures "produce speech at the core of the First Amendment." *FEC v. Nat'l Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 493 (1985); *see also FEC v. Mass. Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 251 (1986) (plurality opinion); *Buckley*, 424 U.S. at 39.

As a result, it is unconstitutional for the government to limit SpeechNow.org's political speech without a sufficient reason for doing so. That is true regardless of what level of scrutiny applies to SpeechNow.org's challenge to the contribution limits. In a case that implicates First Amendment rights, the burden is squarely on the government to demonstrate a sufficient reason for

limiting those rights. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). That is, and must be, the starting point of any analysis of laws that burden First Amendment rights if decisions are to be based on the substance of the rights and the restrictions that apply to them, rather than on formalistic distinctions.

Here, the contribution limits clearly burden SpeechNow.org's First Amendment rights to speech and association because they require SpeechNow.org and its supporters to choose between their rights to speech and their rights to association. As a result, strict scrutiny applies to SpeechNow.org's challenge. Even if strict scrutiny does not apply, however, the FEC cannot prevail because it can demonstrate no sufficient interest in applying contribution limits to SpeechNow.org. The reason is simple. No matter what arguments the FEC makes or what alleged evidence it cites, it cannot escape the fact that SpeechNow.org will only engage in speech that that Supreme Court has repeatedly held lies at the very core of the First Amendment. SpeechNow.org will make only independent expenditures, and independent expenditures cause no concerns about corruption. It is thus immaterial that the limit at issue here directly apply to contributions rather than expenditures, because that money will be used to fund only independent expenditures and SpeechNow.org is completely independent of candidates and party committees. Those facts sever any possible link between the money alleged to be corrupting and the candidates that would allegedly be corrupted by it. The

only way to avoid that fact is to hold that independent expenditures themselves cause corruption, which is what the district court, in essence, did.

Despite the Supreme Court's repeated denials that independent expenditures cause corruption, the district court concluded that the time was right for lower courts to decide that the evidence proves otherwise. J.A. 388-89. Relegating the crucial concept of independence to second-class status, the district court concluded that "shadow parties"—that is, independent groups—were using their "nominally independent" status to, in essence, avoid the spirit of the campaign finance laws and spend too much money affecting the outcome of elections. J.A. 383. The district court thus did precisely what the Supreme Court recently warned against in *WRTL II*. It relied on the alleged intentions of a number of groups not at issue in this case to uphold onerous burdens on an independent group's speech out of concern that that speech might lead to gratitude by candidates who might be motivated to give the group's donors access and special favors. J.A. 391-93. Precisely this sort of reasoning led the Supreme Court to state in *WRTL II* that "[e]nough is enough" and to reject an approach in campaign-finance cases that will necessarily result in an endlessly widening gyre of regulations and the continued erosion of freedom of speech. *See* 551 U.S. at 478-79 (rejecting "prophylaxis-upon-prophylaxis approach to regulating expression . . . .").

The district court also ignored another aspect of the *WRTL* cases—the importance of as-applied challenges. In *WRTL I*, a unanimous Supreme Court held that as-applied challenges to campaign-finance laws are available even where the Court has recently upheld their facial validity. *See Wis. Right to Life, Inc. v. FEC* (*WRTL I*), 546 U.S. 410, 411-12 (2006). In *WRTL II*, the Court held that the government must demonstrate a sufficient interest in limiting speech for "each application" of a statute. 551 U.S. at 478. Yet the district court here denied SpeechNow.org's request for a preliminary injunction by focusing on the application of the law to virtually every group other than SpeechNow.org. J.A. 382-83, 391-93.

There is simply no way to square the district court's approach to this case with Supreme Court precedent protecting independent expenditures. The basic flaw in its analysis—that the importance of independent expenditures can be set aside in favor of preventing the possible circumvention of campaign-finance laws—permeated the court's entire decision. It thus concluded not only that SpeechNow.org lacked a substantial likelihood of success on the merits, but also that SpeechNow.org could not demonstrate a sufficient level of irreparable harm. But the harm to SpeechNow.org and its supporters is clear. Contribution limits force each of them to choose between exercising their First Amendment right to make unlimited independent expenditures and exercising their right to associate

with others. Each of the Plaintiffs-Appellants may do either of those things, but none may do both. While any of them as individuals may spend as much as they want on independent expenditures, as soon as they join together in SpeechNow.org, they are limited to $5,000 apiece. As a result of this restriction, SpeechNow.org cannot raise sufficient funds to speak out as it wishes, and its supporters are deprived of the right to associate with others to exercise their First Amendment rights.

The district court was wrong to conclude that SpeechNow.org lacked a substantial likelihood of success on the merits and wrong to conclude that it failed to demonstrate irreparable harm and the other factors necessary for a preliminary injunction. The district court's decision should be reversed.

ARGUMENT

To warrant a preliminary injunction, SpeechNow.org was required to show "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable injury if the injunction were not granted, (3) that an injunction would not substantially injure other interested parties, and (4) that the public interest would be furthered by the injunction." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). As demonstrated below, SpeechNow.org met this burden, and the district court's contrary decision should be reversed.

I. SpeechNow.org Is Substantially Likely to Prevail on the Merits of Its As-Applied Challenge to the Contribution Limits.

Because this is a First Amendment challenge and the burden of proof at the preliminary injunction stage tracks the burden of proof at trial, the burden is on the FEC to show that SpeechNow.org does not have a likelihood of success on the merits. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). The FEC should properly have to demonstrate that the contribution limits as applied to SpeechNow.org meet strict scrutiny, because the limits impose a substantial burden on speech. *See, e.g.*, *WRTL II*, 551 U.S. at 464. The district court's application of intermediate scrutiny was thus error and its decision should be reversed on that ground alone. However, even if intermediate scrutiny were the appropriate standard, the district court's application of that standard was flawed. SpeechNow.org is substantially likely to prevail even under intermediate scrutiny, because limits on SpeechNow.org's ability to fund independent political advocacy do not further any substantial government interest.

A. As Applied to SpeechNow.org and Its Supporters, the Contribution Limits Are Subject to Strict Scrutiny.

Burdens on core political speech are reviewed under strict scrutiny, meaning that the government must demonstrate a compelling state interest and narrow tailoring. *WRTL II*, 551 U.S. at 464 ("Because BCRA § 203 burdens political

speech, it is subject to strict scrutiny."); *see also Davis v. FEC*, 128 S. Ct. 2759, 2772 (2008) (collecting cases). The contribution limits at issue in this case place substantial burdens on both the right to speak and the right to associate. SpeechNow.org offers its contributors the opportunity to amplify their own political voices by making independent expenditures, which "constitute expression at the core of our electoral process and of the First Amendment freedoms." *MCFL*, 479 U.S. at 254 (quoting *Buckley*, 424 U.S. at 39). Individuals like David Keating, Richard Marder, Ed Crane, Brad Russo, and Scott Burkhardt lack the resources to finance these expenditures on their own. J.A. 48, 62, 103, 119. Fred Young has the resources, but he lacks the experience or the time to do so effectively. J.A. 116. Only by pooling their resources—both money and political know-how—can they effectively advocate for the changes they seek. This fact is not lost on the Supreme Court, which has long recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981) (stating that the purpose of the right of association is to allow individuals to amplify their voices by associating with others).

The contribution limits that apply to SpeechNow.org, however, put its supporters in a constitutionally untenable position: They may each spend

unlimited amounts of money alone advocating for or against candidates or they may associate with others and may each spend only $5,000 apiece, but they may not both associate with others and spend unlimited amounts for independent advocacy—that is, they may not do what they wish to do through SpeechNow.org. Indeed, the FEC itself recognizes that this is the choice that SpeechNow.org and its supporters face. In its briefs below, the FEC blithely stated that SpeechNow.org cannot demonstrate any harm from the contribution limits at all because Fred Young may simply forgo his right of association and finance SpeechNow.org's proposed advertisements alone. Def.'s Mem. Opp'n Pls.' Mot. Prelim. Inj. at 34.

The Supreme Court has repeatedly held that laws requiring citizens to choose among First Amendment rights are subject to strict scrutiny. Thus, in *Citizens Against Rent Control* the Court applied strict scrutiny to a state law limiting contributions to a group that wanted to advocate passage of a ballot issue because the law imposed burdens on groups that it did not impose on individuals.

454 U.S. at 296.[4] Similarly, in *Davis v. FEC*, the Supreme Court just last year applied strict scrutiny and struck down a differential contribution limit that forced candidates to "choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." 128 S. Ct. at 2771. And in *WRTL II*, the Court applied strict scrutiny to BCRA's requirement that a group become a PAC in order to spend money for issue advocacy that came within the electioneering-communications ban. 551 U.S. at 464. Likewise, here, the FEC seeks to require SpeechNow.org to become a PAC and become subject to PAC contribution limits for making only independent

[4] The district court concluded that the Supreme Court applied something less than strict scrutiny in *Citizens Against Rent Control* because it used the term "exacting" rather than "strict." J.A. 387. But this is semantics. SpeechNow.org's position is that the FEC must demonstrate a compelling interest and narrow tailoring. The Supreme Court has called this level of scrutiny "exacting" before. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 n.12, 204 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). While the Court did not use any particular terms to describe what it meant by "exacting scrutiny" in *Citizens Against Rent Control*, it did reverse the California Supreme Court, which had upheld the law under strict scrutiny. 454 U.S. at 293-94, 298-99. Moreover, the Supreme Court stated that the law must be tailored to fit the State's permissible interest. *Id*. at 294. This is the language of strict, rather than intermediate, scrutiny. *See also Am. Constitutional Law Found.*, 525 U.S. at 207 (Thomas, J., concurring in the judgment) (noting that "[i]n *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, we subjected to strict scrutiny a city ordinance limiting contributions to committees formed to oppose ballot initiatives because it impermissibly burdened association and expression"); *Grant v. Meyer*, 828 F.2d 1446, 1457 (10th Cir. 1987) (en banc) ("Thus the reasoning of the dissent, which seeks to escape the strict scrutiny test for First Amendment restrictions, does not withstand analysis and that test must be followed as in *Bellotti* and *Citizens Against Rent Control.*"), *aff'd*, 486 U.S. 414 (1988).

expenditures. Finally, in *McConnell v. FEC*, the Supreme Court struck down a provision of BCRA that required political party committees to choose between making unlimited independent expenditures in support of candidates and contributions—in the form of coordinated expenditures—to those candidates. 540 U.S. 93, 213-19 (2003). The same principle applies to independent expenditures by individuals—a campaign-finance law that "does not seek to mute the voice of one individual . . . cannot be allowed to hobble the collective expressions of a group." *Citizens Against Rent Control*, 454 U.S. at 297.

The contribution limits that apply to SpeechNow.org can also be characterized as a limit on expenditures. As the Supreme Court reasoned in *Citizens Against Rent Control*, a limit on contributions necessarily limits the funds that a group can spend on its own speech. The reason is simple. While an individual may make unlimited expenditures under a law that limits contributions, she may not "contribute beyond the . . . limit when joining with others to advocate common views. The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression . . . ." *Id*. at 299; *see also id*. ("Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."). Thus, the contribution limits as applied to SpeechNow.org deserve strict scrutiny whether interpreted as a limit on its contributions or a limit on its independent expenditures.

However, the district court applied only intermediate scrutiny. Relying on *California Medical Association v. FEC* (*CalMed*), 453 U.S. 182 (1981), the court concluded that the contributions to SpeechNow.org were not entitled to full First Amendment protection because "SpeechNow, as a legally separate organization, is speaking as [the contributors'] proxy," and held that "[t]he fact that donors would not contribute to SpeechNow unless they agreed with its views is beside the point . . . ." J.A. 386. But this conclusion is in direct conflict with the Supreme Court's later ruling in *NCPAC*, which specifically rejected *CalMed*'s speech-by-proxy reasoning in the context of independent expenditures:

> [T]he "proxy speech" approach is not useful in this case [because] the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to *full First Amendment protection* would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

470 U.S. at 495 (emphasis added). The Court came to the same basic conclusion in *Citizens Against Rent Control*, finding it "beyond question" that "[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure" were "a very significant form of political expression." 454 U.S. at 298.

The district court distinguished *Citizens Against Rent Control* on the ground that it involved a ballot-issue election, which the Supreme Court has held raise no

concerns about corruption. J.A. 387-88. But this ignores the Court's discussion of the expressive nature of contributions in *NCPAC*, which, like this case, involved candidate elections. It also puts the cart before the horse—that is, it determines the level of scrutiny by reference to whether a limit on First Amendment activity might be justified by concerns about corruption. But the Supreme Court has long held the opposite—the level of scrutiny, "is based on the importance of the 'political activity at issue' to effective speech or political association," not on the level of government interest in regulating the activity. *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *MCFL*, 479 U.S. at 259; *FEC v. Colo. Republican Fed. Campaign Comm.* (*Colorado II*), 533 U.S. 431, 440-42 (2001).

The key to distinguishing between *Citizens Against Rent Control* and *NCPAC*, on the one hand, and *Buckley v. Valeo*, in which the Court stated that limits on contributions to candidates imposed "only a marginal restriction" on expression,[5] on the other, lies in the entity to which the contribution is being given. A direct contribution to a candidate can be said to convey only the "undifferentiated, symbolic act of contributing" because it does not necessarily convey agreement with the candidate's ideas. 424 U.S. at 21. A contribution to a group like SpeechNow.org, however, conveys agreement with its message. *See*

[5] 424 U.S. at 20-21.

NCPAC, 470 U.S. at 495; *Citizens Against Rent Control*, 454 U.S. at 296. As a result, limits on contributions to SpeechNow.org deserve strict scrutiny.

B. Plaintiffs Are Substantially Likely to Prevail on the Merits Even if Strict Scrutiny Does Not Apply.

Even if SpeechNow.org's claims were subject to intermediate scrutiny, the FEC would still bear the burden of establishing that the contribution limits are "closely drawn," to serve a "sufficiently important interest." *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 25). But, as the U.S. Court of Appeals for the Fourth Circuit recently recognized in a challenge to a virtually identical law, contribution limits like the ones that apply to SpeechNow.org and its donors cannot survive even this lower level of scrutiny. *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 293-95 (4th Cir. 2008).

The FEC alleged below that the contribution limits are closely drawn to serve three interests that it claimed are substantial: preventing political corruption, preventing the "distorting effects of immense aggregations of wealth," and making required advertising disclaimers more informative. Def.'s Mem. Opp'n Pls. Mot. Prelim. Inj. at 18-27. The district court properly disposed of the second interest—preventing electoral "distortion"—noting that it applies only to corporations and not to unincorporated groups like SpeechNow.org. J.A. 396-97 (Slip op. at 25-26 n.10). But the district court accepted the government's other two interests. This was error. The government's interest in combating corruption cannot be advanced

by limiting contributions to groups whose only activity is independent political advocacy, which the Supreme Court has found not to cause corruption as a matter of law. See *Buckley*, 424 U.S. at 46-47; *NCPAC*, 470 U.S. at 497. Further, the FEC's interest in ensuring the effectiveness of FECA's advertising-disclaimer requirements is not substantial, nor are contribution limits a closely drawn means of advancing that interest.

1. As a Matter of Law, SpeechNow.org's Independent Political Advocacy—and the Contributions That Fund It—Pose No Risk of Corruption.

Over the last 35 years the Supreme Court has reiterated time and again that independent expenditures—whether by individuals, PACs, or even political-party committees composed of federal officeholders—may not be limited because pure political advocacy poses no danger of corruption. *See Buckley*, 424 U.S. at 46-47; *NCPAC*, 470 U.S. at 497; *Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 614-19 (1996); *McConnell*, 540 U.S. at 221-22. Indeed, the Court in *Buckley* recognized that the continued availability of independent means of expression was crucial to its decision to uphold limits on direct contributions to candidates. *See* 424 U.S. at 28 ("The Act's $1,000 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—while leaving persons free to engage

in independent political expression . . . .”). The concept of independence plays a crucial role in the statutory scheme as well. Independent expenditures constitute the speech of the entity making them, whereas expenditures, even for speech, that are coordinated with a candidate are considered contributions to that candidate and may be limited. *Compare* 11 C.F.R. § 100.16 (defining “independent expenditure”) *with* 11 C.F.R. § 109.21(b)(1) (defining coordinated expenditures as regulable in-kind contributions).

SpeechNow.org’s case against the contribution limits that apply to it is the simple and logical extension of these principles. SpeechNow.org’s electoral advocacy is limited to independent expenditures, which, as a matter of law, cannot create concerns about corruption. As a result, the contributions that fund those expenditures cannot create concerns about corruption either and thus cannot be limited. *See Leake*, 525 F.3d at 293 (“[I]t is ‘implausible’ that contributions to independent expenditure political committees are corrupting.”). Indeed, David Keating set up SpeechNow.org to take advantage of the fact that independent expenditures create no concerns about corruption. He wanted to give individuals the opportunity to take advantage of this fact to their benefit by allowing them to speak out and associate without having to navigate extremely complicated campaign-finance laws or have the amounts they wish to spend limited.

Nevertheless, the district court held that even if independent expenditures themselves do not create a risk of corruption, the contributions that fund them can. As the district court saw it, "'[i]ndependence' does not prevent candidates, officeholders, and party apparatchiks from being made aware of the identities of large donors" and "people who operate independent expenditure committees can have the kind of 'close ties' to federal parties and officeholders that render them 'uniquely positioned to serve as conduits for corruption, both in terms of the sale of access and the circumvention of the soft money ban.'" J.A. 390-91 (quoting *McConnell*, 540 U.S. at 156 n.51).

This holding is both illogical and directly contrary to Supreme Court precedent. It is illogical because SpeechNow.org's independence severs any connection between the donations that allegedly corrupt candidates and the candidates that might be corrupted. *See Leake*, 525 F.3d at 293 ("[T]he entities furthest removed from the candidate are political committees that make solely independent expenditures."). There is simply no way around this. If the money an individual spends on his own independent expenditures does not corrupt candidates and thus may not be limited, it is senseless to claim that money coming from other individuals and paying for the same independent expenditures somehow does corrupt candidates and may be limited. The district court's reasoning would create "the bizarre result that identical ads aired at the same time could be protected

speech for one speaker, while leading to criminal penalties for another." *WRTL II*, 551 U.S. at 468.

The district court's holding is contrary to precedent because the Supreme Court held in *Buckley* that independent expenditures do not cause concerns about corruption and has never suggested that that has changed. *See* 424 U.S. at 47. The district court avoided this by relying on the implicit suggestion in *Buckley* that independent expenditures might one day cause corruption, stating that the "Supreme Court has never held that, by definition, independent expenditures pose no threat of corruption" and that the Court in *Buckley* "explained that independent expenditures made by individuals 'did not presently appear' to pose a danger of corruption." J.A. 388-89. However, while the Court may not have held that "by definition" independent expenditures do not cause corruption, it *did* hold as a matter of law that they do not. *Buckley*, 424 U.S. at 45-47; *NCPAC*, 480 U.S. at 497-98. If that legal conclusion is to be changed, the Supreme Court is the proper authority to do so, not the district court. The Supreme Court has not chosen to do so in the last thirty years, however, and there is no indication that it is about to do so now. *See*, *e.g.*, *McConnell*, 540 U.S. at 221-22 (reaffirming *Buckley*'s holding that limits on independent expenditures fail to serve any substantial government interest); *Colorado I*, 518 U.S. at 614-19 (same); *NCPAC*, 470 U.S. at 497 (same). Changing course on independent expenditures is the Supreme Court's prerogative,

not the district court's. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) ("lower courts [are] bound not only by the holdings of higher courts' decisions but also by their 'mode of analysis.'") (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)).

The implications of the district court's decision go far beyond the application of contribution limits to SpeechNow.org. If SpeechNow.org's independent expenditures cause concerns about corruption, then individual independent expenditures must necessarily do so as well. Indeed, any activity that might lead to candidate gratitude is subject to limitation under the district court's analysis—from issue advocacy, to celebrity and newspaper endorsements, to favorable press, to Internet commentary, to books and movies that support or criticize candidates. *Cf. Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 690-91, 694-95 (1990) (Scalia, J., dissenting) (noting that any theory of "corruption" that allows regulation of independent expenditures would extend to speech by the media and celebrities). But this stretches the concept of corruption further than the Supreme Court has ever taken it before and is inconsistent with the Court's recent admonitions that the rationales supporting campaign-finance laws cannot continually be expanded to cover ever-widening circles of speech. *WRTL II*, 551 at 478-79 (stating that "[e]nough is enough" and rejecting "prophylaxis-upon-prophylaxis" approach to regulating speech).

The district court's decision is a direct attack on the very concept of independence. The district court was not coy about this. It repeatedly placed "independence" in scare quotes and, relying on articles about independent groups and their spending on issue advocacy during the 2004 election, claimed that "nominally independent" "shadow parties" were able to spend millions on speech during that election. J.A. 390-91, 393. Even were SpeechNow.org to grant the truth of every claim in the sources on which the district court relied, it would prove nothing of relevance to this case. One may just as easily describe the groups the district court cited as heroes, bravely exercising their First Amendment rights to find the best, most effective way to impact elections and thus the future course of their government. But either way, the district court's and the FEC's disdain for independent advocacy of this variety is not a grounds for limiting their speech or the money that goes to fund it. It simply demonstrates that SpeechNow.org's point in the preceding paragraph is true—if SpeechNow.org's independent expenditures cause corruption, then so do expenditures for issue advocacy and anything else that individuals and groups may do in the exercise of their First Amendment rights during elections.

Independence is not simply a constitutional principle; it is written into the fabric of the campaign-finance laws themselves. *See*, *e.g.*, 2 U.S.C. § 431(17). The principle of independence boils down to this: any action not coordinated with

a candidate or party committee is independent.[6] Thus, while independent expenditures may not be limited, expenditures that are coordinated with candidates are treated as contributions to those candidates and subjected to contribution limits. *See* 11 C.F.R. § 109.21(b)(1). If the district court's conclusion that independent expenditures amount to indirect contributions to candidates is correct, it is not at all clear why SpeechNow.org's—or any group's—independent expenditures would not be considered contributions to candidates as well. *Cf. Buckley*, 424 U.S. at 46-47. If the statutory concept of independence is to be changed, Congress ought to be the first to do so, not the courts.

Finally, the district court relied on *McConnell* and *CalMed* for the proposition that contribution limits may be imposed on groups that make independent expenditures. J.A. 394-95. However, there is a crucial distinction between the groups at issue in both of these cases and SpeechNow.org. Both cases involved groups that could be used to funnel money to, or provide access directly to, candidates, which SpeechNow.org cannot do. *CalMed* involved a PAC that

[6] FECA and the FEC's rules define the distinction between coordination and independence in various ways. For example, FECA defines who are agents, officers, and employees of candidates, and who are not. *See* 2 U.S.C. §§ 441a(f), 441i(e). It states that those organizations established, financed, maintained or controlled by candidates do not operate independently of candidates. *See id.* § 441i(e). And it establishes what it means for an organization to coordinate its activities with a candidate and, thereby, to sacrifice its independence. *See id.* § 441a(a)(7)(B). The district court's conclusion that SpeechNow.org's independence is only "nominal" ignores all of this.

could make *both* independent expenditures and direct contributions to candidates. 453 U.S. at 197-99. SpeechNow.org can only make independent expenditures. *McConnell* dealt with political party committees that had a well-documented record of providing contributors with access to elected officials. 540 U.S. at 153-54. SpeechNow.org is completely independent of candidates and party committees. It was the fact that the groups in *CalMed* and *McConnell* could make direct contributions to candidates or provide access to them—not the argument that independent expenditures themselves cause corruption—that persuaded the Court to uphold limits on the groups even though they made independent expenditures. *Id*. ("[I]t is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence.").

Indeed, in *CalMed*, Justice Blackmun, who provide the crucial fifth vote, made this point clear in a concurring opinion. Justice Blackmun argued that it would be unconstitutional to apply contribution limits to a group "established for the purpose of making independent expenditures" and he joined the plurality's decision in *CalMed* only because the group at issue made direct contributions to candidates as well. *See* 453 U.S. at 203 (Blackmun, J., concurring). Thus, while Justice Blackmun's concurring opinion is not binding precedent, it makes clear that the district court's reliance on *CalMed* is misplaced. *See Leake*, 525 F.3d at 292-93 (relying on Justice Blackmun's concurrence and striking down limits on to

independent expenditure groups); *see also Comm. on Jobs Candidate Advocacy Fund v. Herrera*, No. 07-03199, 2007 U.S. Dist. LEXIS 73736, at *16-17 (N.D. Cal. Sept. 20, 2007) (preliminarily enjoining law that limited contributions to independent groups).

In sum, the FEC cannot demonstrate a sufficient interest in limiting contributions to SpeechNow.org. Accordingly, limits on those contributions fail even intermediate scrutiny.

2. The FEC's Alleged Interest in More Informative Disclaimers Does Not Justify Limiting Contributions to SpeechNow.org.

The district court also held that contribution limits were necessary to ensure the proper functioning of FECA's disclaimer requirements, which require groups running political ads to identify themselves on the face of their ads. J.A. 396. The court reasoned that, under contribution limits, viewers reading a disclaimer can know that "no one person could have contributed more than $5,000 to the group running the ad," and that, without limits, the public may be misled about the actual number of people supporting the group. J.A. 396. This ruling is completely unprecedented. While disclosure laws have been upheld as a means of aiding the enforcement of substantive campaign-finance limits, SpeechNow.org is unaware of any court that has upheld a substantive campaign-finance limit on the grounds that it makes a form of *disclosure* more effective.

Indeed, the Supreme Court rejected a similar argument in *Citizens Against Rent Control*. There, the State argued that the contribution limits at issue were "necessary as a prophylactic measure to make known the identity of supporters and opponents of ballot measures." 454 U.S. at 298. The Court rejected this argument on the grounds that a separate provision of the statute required the groups at issue to disclose their supporters. *Id*. Similarly, here, SpeechNow.org will disclose its donors under the disclosure provisions applicable to those who make independent expenditures. J.A. 57.[7] Congress is free to change the disclosure and disclaimer requirements that apply to those who make independent expenditures. But neither Congress nor the FEC may limit contributions or expenditures as a means of augmenting disclosure provisions.

The district court's conclusion that contribution limits are necessary to serve the interest of disclosure is also based on a false premise—that disclaimers are intended to inform the public of the individual donors who fund an independent expenditure, rather than to identify the organization that made the expenditure. When the organization is identified in a disclaimer, the public and the media can

[7] Because SpeechNow.org only sought to enjoin the contribution limits in its motion for preliminary injunction, even if this Court reverses the district court's decision, SpeechNow.org will comply with all disclosure and administrative requirements that apply to political action committees during the pendency of this lawsuit. *See* 2 U.S.C. §§ 432-34.

access FEC records on its website to learn the identities of those who have contributed money to it.

Indeed, the FEC recently issued an advisory opinion allowing an individual to make independent expenditures through an LLC and to use disclaimers on his advertisements that identify only the LLC, not the individual providing the funding. FEC Advisory Op. 2009-02, *True Patriot Network, LLC* (Apr. 17, 2009) *available at* http://saos.nictusa.com/aodocs/AOR%202009-02%20(TPN)final.pdf (last visited Aug. 21, 2009). Thus, the FEC itself approves disclaimers that do not indicate how many individuals are funding an entity that makes independent expenditures or how much money they have provided.

In fact, precisely the same things has been going on for decades. Since 1986, qualified nonprofits—also known as *MCFL* organizations—have been able to make independent expenditures without becoming PACs or being subjected to contribution limits. *See MCFL*, 479 U.S. at 263-64.[8] Ads by *MCFL* organizations are subject to the same disclaimer requirement that applies to SpeechNow.org—that is, they may disclose the name of their organization only. *See* 11 C.F.R. § 110.11(a)(2). Yet *MCFL* organizations are not required to disclose their donors in their disclaimers nor has the FEC sought to impose different disclaimers

[8] SpeechNow.org does not meet the definition of a qualified nonprofit because, among other things, it is not a 501(c)(4) and it will spend all or nearly all of its funds on political ads. *See* 11 C.F.R. § 114.10(c).

requirements on them to make the disclaimers more clear. Those who wish to know who funded an *MCFL* group's independent expenditures may simply view their disclosure reports on the FEC's website, just as they may do for SpeechNow.org. *See* Press Release, FEC, *Disclosure Reports Added to FEC Webpage* (Jan. 2, 1998) *available at* http://www.fec.gov/press /press1998/ imagweb.htm (last visited Aug. 20, 2009).

Finally, even if there were a substantial government interest in making SpeechNow.org's advertising disclaimers more informative than those of *MCFL* organizations, that interest could be met through means that were more closely tailored and that would not put substantive restrictions on SpeechNow.org's fundraising. For example, both California and Washington require groups making independent expenditures to reveal the names of certain large donors in their advertising disclaimers. *See* Cal. Gov. Code § 84506(a); Wash. Rev. Code § 42.17.510(4). Congress could do the same thing if this were truly an important issue.

II. SpeechNow.org Has Successfully Demonstrated the Other Elements of a Preliminary Injunction.

Because the district court erroneously ruled that SpeechNow.org was unlikely to succeed on the merits of its constitutional challenge, the court said virtually nothing about the remaining prongs of the preliminary injunction analysis: whether SpeechNow.org would suffer irreparable harm, whether an

injunction would harm the FEC, and whether an injunction would be in the public interest. But as SpeechNow.org amply demonstrated before the district court, and as is reiterated below, each of these additional factors weighs in favor of granting SpeechNow.org's motion for preliminary injunction.

A. Plaintiffs Have Suffered Irreparable Harm and Will Continue To Be Harmed Unless a Preliminary Injunction Is Granted.

The district court's conclusion that SpeechNow.org did not sufficiently demonstrate irreparable harm is wrong because, as this Court recently reaffirmed, "[i]t has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Mills v. District of Columbia*, 571 F.3d 1304, No. 08-7127, 2009 U.S. App. LEXIS 15324, at *20-21 (D.C. Cir. July 10, 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Furthermore, "[w]here a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 349 (2d Cir. 2003)). In disregarding this clearly established law, the district court committed reversible error.

SpeechNow.org clearly demonstrated irreparable harm because the contribution limits directly limit its ability to engage in speech, in the form of independent expenditures, that "constitute[s] expression 'at the core of our electoral process and of the First Amendment freedoms.'" *MCFL*, 479 U.S. at 251 (quoting *Buckley*, 424 U.S. at 39). SpeechNow.org is presumed to be harmed and, indeed, it has been harmed: The application of contribution limits to the organization and the individual Plaintiffs-Appellants has prevented them from speaking through advertisements that effectively communicate their views on candidates. Under the contribution limits applicable to PACs, SpeechNow.org cannot possibly produce and run advertisements that communicate its (and its supporters') views about candidates. Individual Plaintiffs-Appellants Keating, Crane, and Young, as well as Richard Marder, have been, and remain, ready, willing, and able to donate funds in excess of the contribution limits in order to give SpeechNow.org the money it needs to run those advertisements. J.A. 23. Because they cannot do so without facing punishment for breaking the law, SpeechNow.org could not run advertisements in the 2008 election season, and it cannot run them in the fast-approaching 2010 primary election season.

That the harm to SpeechNow.org is irreparable is indisputable. SpeechNow.org will never, no matter what occurs on the merits, have an opportunity to speak in the 2008 elections again. Members of Congress elected in

2008 are now proposing added restrictions on political speech that not only reflect differing views, but that directly seek to limit the speech of SpeechNow.org and its supporters, even beyond the limits at issue in this case. *See e.g.*, Clean Money, Clean Elections Act of 2009, H.R. 2056, 111th Cong. (2009); H.R. Con. Res. 13, 111th Cong. (2009); H.J.R. Res. 13, 111th Cong. (2009) (proposing a constitutional amendment to allow regulation of independent expenditures in campaigns); Let the People Decide Clean Campaign Act, H.R. 158, 111th Cong. (2009) ("To amend the Federal Election Campaign Act of 1971 to provide for expenditure limitations and public financing for House of Representatives general elections . . . ."). SpeechNow.org was formed to oppose candidates for supporting precisely this sort of legislation. Yet if it does not receive a preliminary injunction, it will continue to be unable to do so.

Thus, it is clear that the statute is directly limiting SpeechNow.org and its supporters' First Amendment rights to associate with one another and speak by making and receiving contributions in excess of the contribution limits. Indeed, the district court acknowledged as much when it found that the contribution limits forbid Plaintiffs-Appellants Keating, Crane, and Young, as well as Richard Marder, from giving donations to SpeechNow.org in excess of those limits: "None of these donations [above the contribution limits] have in fact been made, however, because, under longstanding provisions of the Federal Election Campaign Act

("FECA"), 2 U.S.C. §§ 431-55, donors to SpeechNow would be subject to an annual contribution limit of $5,000 per person, 2 U.S.C. § 441a(a)(1)(C), and biennial aggregate limits [under 2 U.S.C. § 441a(a)(3)]." J.A. 374. Given that contribution limits infringe upon the rights to free speech and association, *see, e.g.*, *Citizens Against Rent Control*, 454 U.S. at 299, and—as the FEC itself has recognized—create a substantial burden on speech,[9] that finding compelled a ruling that SpeechNow.org suffered irreparable harm.[10] Indeed, other district courts have concluded that independent speech groups are irreparably harmed by contribution limits. *See, e.g.*, *Herrera*, 2007 U.S. Dist. LEXIS 73736, at *15 (holding that contribution limits caused irreparable harm to independent expenditure committees and granting motion for preliminary injunction).

[9] S*ee Davis v. FEC*, 128 S. Ct. 2759, 2774 (2008) (noting the government's argument that BCRA section 319(a) "is justified because it ameliorates the deleterious effects that result from the tight limits that federal election law places on individual campaign contributions and coordinated party expenditures.").

[10] *See, e.g.*, *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301; *Bl(a)ck Tea Soc'y v. City of Boston*, 378 F.3d 8, 15 (1st Cir. 2004) ("A burden on protected speech always causes some degree of irreparable harm."); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1236 (10th Cir. 2005) (holding that an ordinance licensing door-to-door solicitors constituted irreparable injury); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) ("Violations of first amendment rights constitute per se irreparable injury.").

But the district court did not view the application of contribution limits to SpeechNow.org as sufficiently irreparable to warrant issuance of an injunction: "Plaintiffs cannot show they are so irreparably harmed as to justify setting aside [the contribution limits]." J.A. 398. The district court reached this conclusion, despite the fact that the contribution limits restrict SpeechNow.org' speech, because it assumed that forcing speakers to abandon their preferred method of speaking does not really harm them irreparably—at least not enough to require court intervention. J.A. 398. ("Even with these contribution caps in place, the individual plaintiffs retain the ability to associate with and contribute to SpeechNow—each must simply limit his contribution to $5,000 per year.").

This assumption could not be more wrong. The Supreme Court recently, and emphatically, reaffirmed—over the FEC's protestations— the general and long-standing principle that the availability of alternative means of communication cannot justify restrictions on ways that speakers have chosen communicate their views. *WRTL II*, 551 U.S. at 477 n.9 (rejecting the argument that because WRTL was free to form a PAC or to publish newspaper ads instead of television ads or to say something other than what it wanted to say that limits on its speech were permissible); *see also Davis v. FEC*, 128 S. Ct. 2759 (2008) (forbidding government from forcing self-financing candidate to change the way he funded his campaign in order to avoid system of discriminatory contribution limits); *Meyer v.*

Grant, 486 U.S. 414, 424 (1988) ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."); *MCFL*, 479 U.S. at 255 (holding that an organization could not be required to speak in a "more burdensome" manner than it chose).

Below, the FEC argued—in direct contravention of this principle—that SpeechNow.org and its supporters are not irreparably harmed because, if they disassociate, Fred Young, who is willing to donate $110,000 to SpeechNow.org, can fund at least some advertisements by himself. Def's Mem. Opp'n Pls.' Mot. Prelim. Inj. at 34. In other words, the speech of SpeechNow.org and its supporters can be limited because they can always forfeit their rights of association and speak separately. The district court embraced the flip side of that argument, also made by the FEC, that SpeechNow.org's speech can be limited on the ground that it can speak by joining with additional individuals. Like the first argument, this one assumes that the government can force speakers to give up their right to association, which "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (quoting *Democratic Party v. Wis. ex rel. La Follette*, 450 U.S. 107, 122 (1981)). Individuals who form associations have the autonomy—free from government micro-management—to

decide not only with whom they associate, but how and when they associate with others. *See Wis. ex rel. La Follette*, 450 U.S. at 123 n.25 ("[T]he stringency, and wisdom, of membership requirements is for the association and its members to decide—not the courts—so long as those requirements are otherwise constitutionally permissible."); *LaRouche v. Fowler*, 152 F.3d 974, 980 (D.C. Cir. 1998) (same); *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (plurality opinion) ("Speeches and assemblies are after all not ends in themselves but means to effect change through the political process. If that is so, there must be a right not only to form political associations but to organize and direct them in the way that will make them most effective."). If this were not the case, *WRTL II* would have been decided differently: the Court would have allowed, rather than rejected, the FEC's attempt to require Wisconsin Right to Life to speak through its PAC and thus raise funds from non-corporate donors before it could speak.

As described more fully below, SpeechNow.org's plan is to speak first with its advertisements, which will, by giving the organization credibility, allow it to undertake successfully larger fundraising efforts. J.A. 58-59. The district court's refusal to find that SpeechNow.org suffered irreparable harm, based on the notion that it can still speak if it adds additional donors now, when the government chooses, allowed the FEC to do precisely what the Supreme Court has clearly held

it may not: restrict speech because it can posit the availability of some other means of speaking. *See supra* at 49-50. If the district court's reasoning held sway universally, speakers could never obtain a preliminary injunction when the government shuts off their preferred means of speech because available alternatives would always preclude a finding of irreparable harm. After all, the government could always plausibly argue that some alternative means of speech remained available: speech by groups can be limited because individuals can speak; speech by individuals can be limited because groups can speak; television advertising can be limited because radio advertising is available; radio advertising can be limited because print publications are available; print publications can be limited because face-to-face conversation is available; books can be limited because movies are available, etc. Even though this same argument would always fail at the merits stage, *see supra* at 49-50, the government could always use it to defeat a motion for a preliminary injunction. Thus, injured speakers who sued the government to protect their rights would have to wait until the conclusion of costly litigation, which could last for years, before obtaining relief that would allow them to speak in the manner of their choosing. In the meantime, there would be no barrier to the government's illegal suppression of speech. There is no preliminary-injunction loophole that allows the government to circumvent the First

Amendment by acting in this speech-chilling manner, and the district court was wrong to attempt to create one in this case.

Finally, even if the above-described errors are put aside, the district court's holding the SpeechNow.org can avoid irreparable harm by associating with others simply ignored David Keating's testimony that, in order to raise funds successfully from additional donors so that Plaintiffs can speak in the manner they have chosen, SpeechNow.org needs first to run advertisements to demonstrate to potential donors that it is a group worth their support. J.A. 58. The contribution limits prevent SpeechNow.org from obtaining the "seed" funding—in the form of contributions in excess of those limits—it needs to run those advertisements. J.A. 58. Without the ability to accept large donations that could fund its initial ads, accepting donations under the limits from individuals such as Plaintiffs-Appellants Russo and Burkhardt will continue to be pointless because it is virtually impossible for SpeechNow.org to broadcast its ads with only small donations. It is no answer for the FEC to say that Plaintiffs can instead speak in less expensive and effective ways, such as by volunteering for a campaign, emailing friends, or espousing views on a website. *WRTL II*, 551 U.S. at 477 n.9 (2007) (dismissing similar arguments).

Furthermore, accepting donations under the limits right now would be counterproductive because it would simply trigger the burdensome registration,

administrative, and reporting provisions that apply to PACs. If SpeechNow.org accepts donations of over $1,000, it will have to comply with those regulations without any assurance that it would ever be able to raise enough funds to run advertisements. J.A. 60-62. Thus, for these reasons as well, the contribution limits irreparably harm SpeechNow.org and all of its supporters, even those who wish to donate less than the contribution limits to join their voices with those who have more resources.

Accordingly, the district court erred on the issue of irreparable harm, and this Court should correct that error so that SpeechNow.org and its supporters may finally exercise their First Amendment right to speak and associate in the manner of their choosing.

B. A Preliminary Injunction Will Not Substantially Injure the FEC.

As demonstrated above in Part I, enforcing the individual and aggregate contribution limits against a group like SpeechNow.org—which poses no threat of corruption or its appearance—violates the First Amendment. The government has no interest in being able to enforce a statute in a manner that violates the Constitution. *ACLU v. Reno*, 217 F.3d 162, 181 (3d Cir. 2000) ("[N]either the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law."). Accordingly, the granting of a preliminary injunction here will not harm the government in any way.

The district court disagreed, holding that the FEC has an interest in enforcing the contribution limits that outweighed Plaintiffs' First Amendment rights. "The presumption of constitutionality which attached to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the government] in balancing hardships." J.A. 398-99. (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers)). The court's reliance on this statement by former Chief Justice Rehnquist, made while he sat alone as a Circuit Judge, is misplaced. The statement concerned a law that limited the compensation a person could pay to an attorney or agent who brought a claim for monetary benefits on his or her behalf. It did not concern an instance where, as here, enforcement of a law would restrict First Amendment rights. When those rights are implicated, no presumption of constitutionality exists. *United States v. Playboy Entm't Group*, 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). Indeed, as the Supreme Court has recently made clear, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL II*, 551 U.S. at 474; *see also MCFL*, 479 U.S. at 265 (holding that "government must curtail speech only to the degree necessary to meet the particular problem at hand . . . ."). In other words, in any conflict between First

Amendment rights and the government's limitation of those rights, courts "must give the benefit of any doubt to protecting rather than stifling speech." *WRTL II*, 551 U.S. at 469.

By giving the harms suffered by SpeechNow.org little, if any, weight and presuming that the equities ran in favor of the government, the district court committed a legal error that gave the benefit of the doubt to the limitation of First Amendment rights. To protect those rights, this Court should reverse that error.

C. Granting an Injunction Will Further the Public Interest.

The district court failed to consider whether granting an injunction would further the public interest. It is elementary that "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 689 (8th Cir. 2008); *see also Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005) ("Vindicating First Amendment freedoms is clearly in the public interest."); *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles."); *People for the Ethical Treatment of Animals v. Gittens*, 215 F. Supp. 2d 120, 134 (D.D.C. 2002) ("[T]he public interest favors a preliminary injunction whenever First Amendment rights have been violated.").

Protecting SpeechNow.org's First Amendment rights furthers the public interest because it preserves the free flow of debate in this nation's marketplace of ideas. In protecting that marketplace from assault, the Supreme Court has emphasized that, with the creation of the First Amendment, the Founding Fathers "eschewed silence coerced by law—the argument of force in its worst form." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (quoting *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring)). Instead, the Founders embraced "the free discussion of governmental affairs . . . includ[ing] discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). This free discussion is indispensable to the maintenance of our democracy. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). SpeechNow.org and its supporters wish to participate in the process of self-government by urging voters to support candidates who protect rights to free speech and association and to oppose those who do not.

The First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co.*, 376 U.S. at 270. SpeechNow.org and its supporters wish to ensure that debate on all topics—including the First Amendment itself—remains

uninhibited, robust, and wide-open by bringing to light abuses of First Amendment rights by particular politicians and urging Americans to vote against them.

In short, SpeechNow.org's activities are at the core of the First Amendment. Accordingly, enjoining the contribution limits that apply to SpeechNow.org and its supporters and thus allowing them to exercise their rights to free speech and association is entirely consistent with the public interest.[11]

CONCLUSION

For the foregoing reasons, the district court's decision denying SpeechNow.org's motion for preliminary injunction should be reversed.

[11] If this Court reverses the district court's decision and holds that SpeechNow.org is entitled to a preliminary injunction, SpeechNow.org respectfully requests (as it did below) that this Court waive the bond requirement under Federal Rule of Civil Procedure 65(c). That rule provides that no preliminary injunction shall issue without the giving of security by the applicant in an amount determined by the court. However, "[i]t is within the Court's discretion to waive Rule 65(c)'s security requirement where it finds such a waiver to be appropriate in the circumstances." *Cobell v. Norton*, 225 F.R.D. 41, 50 n.4 (D.D.C. 2004). In non-commercial cases, courts often waive the bond requirement where the likelihood of harm to the non-moving party is slight and the bond requirements would impose a significant burden on the moving party. *See, e.g.*, *Temple Univ. v. White*, 941 F.2d 201, 219 (3d Cir. 1991); *Herrera*, 2007 U.S. Dist. LEXIS 73736, at *17-*18. Cases raising constitutional issues are particularly appropriate for a waiver of the bond requirement. *See Ogden v. Marendt*, 264 F. Supp. 2d 785, 795 (S.D. Ind. 2003); *Smith v. Bd. of Election Comm'rs*, 591 F. Supp. 70, 71 (N.D. Ill. 1984). For these reasons, it is appropriate that the bond requirement be waived.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,536 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2009, I caused this Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System.

I further certify that on this 24th day of August, 2009, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand delivery, the required number of copies of this Brief of Appellants and Joint Appenidx, and further certify that I served, via UPS Next Day Air, the required number of said Brief to the following:

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