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

ORAL ARGUMENT HAS BEEN SCHEDULED FOR JANUARY 27, 2010

In The

United States Court of Appeals

For The District of Columbia Circuit

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

Plaintiffs - Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant - Appellee.

ON 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, with the exception of SpeechNow.org, are parties before this Court's consideration of Plaintiffs' certified questions of law.

Amici below for the Defendant were the Campaign Legal Center and Democracy 21, who are also *amici* for Defendant before this Court.

Amici for Plaintiffs before this Court are the Alliance for Justice, the Family Research Council Action, the Concerned Women for America Legislative Action Fund, the Kansas Policy Institute, the Mackinac Center for Public Policy, the Caesar Rodney Institute, FreedomWorks Foundation, the James Madison Institute, the Public Interest Institute, and the Commonwealth Foundation for Public Policy Alternatives.

B. Rulings Under Review.

The rulings and orders relevant to these proceedings under 2 U.S.C. § 437h are the District Court's Memorandum Order issued July 29, 2008, and the findings of fact and certified questions the District Court issued on October 7, 2009. The

certified questions for review by this Court are set forth both under the Plaintiffs' Statement of Issues and in the Joint Appendix at pp. 372-399.

C. Related Cases.

This Court has consolidated the instant action with case no. 08-5223, Plaintiffs' appeal of the District Court's denial of their Motion for Preliminary Injunction. While briefing in no. 08-5223 is complete, neither case has previously been before this or any other court apart from the original proceeding in the District Court.

CORPORATE DISCLOSURE STATEMENT

Plaintiff SpeechNow.org, a party to case no. 08-5223, is an unincorporated association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29-971.01-.15. 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

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
MUR	Matter Under Review
PAC	Political Action Committee, a political committee as defined by 2 U.S.C. § 431(4)(A)
RFAI	Request for Additional Information

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 2201 because Plaintiffs sought a declaratory judgment on federal questions: 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 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 in the instant action under 2 U.S.C. § 437h because the Plaintiffs ask the en banc Court of Appeals to resolve the five questions of law certified by the District Court.

STATEMENT OF THE ISSUES

The District Court on July 29, 2008, certified the following questions for consideration by this Court:

1. Whether the contribution limits contained in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3) violate the First Amendment by preventing David Keating, SpeechNow.org's president and treasurer, from accepting contributions to SpeechNow.org in excess of the limits contained in §§ 441a(a)(1)(C) and 441a(a)(3)?

2. Whether the contribution limit contained in 2 U.S.C. § 441a(a)(1)(C) violates the First Amendment by preventing the individual plaintiffs from making contributions to SpeechNow.org in excess of $5000 per calendar year?

3. Whether the biennial aggregate contribution limit contained in 2 U.S.C. § 441a(a)(3) violates the First Amendment by preventing Fred Young from making contributions to SpeechNow.org that would exceed his individual biennial aggregate limit?

4. Whether the organizational, administrative, and continuous reporting requirements contained in 2 U.S.C. §§ 432, 433, and 434(a) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee, to adopt the organizational structure of a political committee, and to comply with the continuous reporting requirements that apply to political committees?

5. Whether 2 U.S.C. §§ 431(4) and 431(8) violate the First Amendment by requiring David Keating, SpeechNow.org's president and treasurer, to register SpeechNow.org as a political committee and comply with the organizational and continuous reporting requirements for political committees before SpeechNow.org has made any expenditures or broadcast any advertisements?

STATUTES AND REGULATIONS

A separately bound addendum contains the statutes and regulations that Plaintiffs refer to in this brief.

STATEMENT OF THE CASE

On February 14, 2008, SpeechNow.org and the individual Plaintiffs filed their complaint along with a motion for preliminary injunction. The motion sought to enjoin the application of contribution limits that apply to the Plaintiffs. The District Court denied that motion on July 1, 2008. The Plaintiffs timely filed their notice of appeal to this Court on July 22, 2008.

Meanwhile, the Plaintiffs on June 27, 2008, asked the District Court to certify five constitutional questions for consideration by the en banc Court of Appeals pursuant to 2 U.S.C. § 437h. The District Court granted that motion on July 11, 2008. After conducting discovery during the late summer and fall of 2008, the parties submitted proposed findings of fact and briefs on evidentiary and other issues related to the proposed findings, which was completed on January 13, 2009.

On September 28, 2009, the District Court issued its findings of fact, which focused on three topics: how SpeechNow.org was organized, what SpeechNow.org's activities are, and how the challenged laws affect those activities. J.A. 1260. On October 7, 2009, the District Court transmitted these findings, along with the previously certified questions of law, to the en banc Court of Appeals.

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 are individuals who have created a group called SpeechNow.org and those who wish to contribute money to the group. SpeechNow.org's mission is to engage in express advocacy in favor of candidates who support the freedom of speech and against those who do not.

Plaintiff David Keating, SpeechNow.org's president, created the group specifically to allow individuals to speak out about candidates without creating concerns about corruption that would justify extensive regulation under the campaign-finance laws. Thus, SpeechNow.org is an unincorporated association that accepts donations only from individuals. It spends money only on its own speech and related activities—that is, on independent expenditures—but does not make contributions to, or coordinate with, candidates or political parties. And it will disclose under the provisions applicable to those who make independent expenditures.

Nevertheless, the FEC has concluded that SpeechNow.org must be regulated as a "political committee" under the campaign-finance laws. Political committees are among the most heavily regulated entities under the campaign-finance laws. Contributions to them are limited to no more than $5,000 from any individual in a

calendar year. They must register with the FEC and comply with onerous administrative, organizational, and continuous-reporting requirements that apply regardless of whether they are engaged in any political activity. Penalties for violations of these laws include civil and criminal fines and even jail time.

The theory of Plaintiffs' case is simple. Individuals acting alone are constitutionally entitled to spend unlimited amounts of money on their independent expenditures; several individuals acting in association with one another are thus entitled to do the same thing. This conclusion follows inexorably from the Supreme Court's many cases holding that independent expenditures are core political speech that create no concerns about corruption and thus may not be limited. The FEC can overcome this conclusion only by destroying the principle that independent expenditures may not be limited or by destroying the right of association.

For the same reason, SpeechNow.org cannot be required to become a political committee. The Supreme Court has recognized that political-committee status imposes serious burdens on small groups. As a result, Plaintiffs should be permitted to satisfy the government's interest in disclosure in the least-burdensome manner. The campaign-finance laws already provide that narrowly tailored option in the form of disclosure and disclaimer provisions for those making independent expenditures. Plaintiffs will comply with all of these provisions.

In sum, the Supreme Court has long recognized a basic distinction in the campaign-finance laws between entities that are composed of, work with, or donate to candidates and those that do not. The former create concerns about corruption or circumvention of the campaign-finance laws that justify more burdensome and extensive regulation. The latter—individuals and groups like SpeechNow.org that are independent of candidates and spend their money on their own speech—do not. The interests that underlie the campaign-finance laws do not justify regulating those who independently exercise First Amendment freedoms. As the Supreme Court has said, the "tie goes to the speaker, not the censor." *FEC v. Wis. Right to Life, Inc.* (*WRTL II*), 551 U.S. 449, 474 (2007).

STATEMENT OF FACTS

The District Court entered findings of fact in this action pursuant to 2 U.S.C. § 437h. J.A. 1260-83. Plaintiffs have also summarized many of the pertinent facts in the statement of facts in their opening brief in the consolidated case, no. 08-5223. Where possible, Plaintiffs have summarized relevant facts here rather than repeating what they have already stated in the consolidated case.

I. Structure and Operations of SpeechNow.org

Plaintiffs are members and supporters of SpeechNow.org, an independent group of citizens that wishes to increase protections for First Amendment rights by helping to elect candidates who support those rights. J.A. 827, 1266. To that end,

SpeechNow.org will raise funds from individuals to produce and broadcast advertisements during elections that urge voters to elect candidates who support First Amendment rights and defeat those who do not. J.A. 1270.

SpeechNow.org is the brainchild of David Keating, its president. Mr. Keating, a long-time activist, has experienced the difficulties of complying with campaign-finance laws first-hand. He decided to create the group as a way to allow individuals to band together and speak out about candidates without becoming mired in complicated campaign-finance regulations. J.A. 781-82 at ¶¶ 3, 6; FEC Ex. 11 in Support of FEC Proposed Findings of Fact, Transcript of Deposition of David Keating taken September 25, 2008 at 116:20-119:12. In creating SpeechNow.org, Mr. Keating reached out to like-minded individuals to help operate and fund it. He enlisted his friends Daniel Shapiro and Ed Crane to serve as governing members of the organization. J.A. 834-35; Keating Dep. at 132:10-22. He asked Jon Coupal, President of the Howard Jarvis Taxpayers Association, to serve as the group's vice president. J.A. 836; FEC Ex. 8 in Support of FEC Proposed Findings of Fact, Transcript of Deposition of John Coupal taken September 30, 2008 at 27:4-7; Keating Dep. at 133:22-134:4. He asked his brother-in-law, Richard Marder, and Fred Young, whom he met through his position with the Club for Growth, to pledge money. J.A. 791 at ¶ 39; Keating Dep. at 133:18-19, 134:15-135:5. Each of these individuals agrees with

SpeechNow.org's mission and its message. J.A. 791 at ¶ 39, 1268; Coupal Dep. at 27:4-7.

Mr. Keating set up SpeechNow.org to avoid any risk of corruption as the Supreme Court has understood and applied that term. Thus, SpeechNow.org will solicit and accept donations only from individuals who can legally spend money to influence federal elections. J.A. 1264. SpeechNow.org is an unincorporated association, and it will not accept funding from corporations, unions, political committees, or any other entity that is prohibited from making contributions to candidates. J.A. 1263-64. SpeechNow.org will also operate independently of and will make no contributions to political candidates or political-party committees. J.A. 1265. SpeechNow.org will make only independent expenditures. *Id*. Under its bylaws, SpeechNow.org's members and officers must review the FEC's coordination regulations and the group's bylaws and agree to abide by both. J.A. 1266.

SpeechNow.org will comply with the disclosure and disclaimer provisions that apply to groups that make independent expenditures. J.A. 789-90 at ¶¶ 33-36. Thus, under 2 U.S.C. § 434(c), SpeechNow.org will report its independent expenditures within the prescribed time frame under the FEC's rules (within either 24 or 48 hours, depending on the expenditure's size and when it is made). J.A. 1278. For each independent expenditure, SpeechNow.org will disclose the identity

of each donor who has contributed more than $200 to the group. J.A. 790 at ¶ 36, 1279. Pursuant to 2 U.S.C. § 441d, SpeechNow.org's communications will include its name, address, and telephone number or World Wide Web address, and will indicate that SpeechNow.org paid for the communication, that it was responsible for the content, and that the communication was not authorized by any candidate. J.A. 1281-82.

II. SpeechNow.org's Planned Activities

SpeechNow.org wants to produce and broadcast political advertisements during the 2010 and future election cycles. J.A. 1271. It had planned to run advertisements in 2008 and had prepared four television scripts that called for the defeat of two federal candidates, Representative Dan Burton and Senator Mary Landrieu. J.A. 1271-72. SpeechNow.org, however, was unable to produce and broadcast these advertisements during the pendency of this case. J.A. 1274; Brief of Appellants at 9, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Aug. 24, 2009).

The cost to produce these advertisements would have been roughly $12,000 dollars. J.A. 1272. Like all advertisements, the cost to air them would have depended on the number of times they were to be broadcast and the size of the audience reached. *Id.* To reach his target audience, Mr. Keating believed it would have been necessary to have spent at least $110,500; preferably, he would have spent upwards of $400,000. J.A. 786 at ¶ 22, 1273.

Four individuals are prepared immediately to donate funds to SpeechNow.org to pay for its advertisements. Plaintiff Fred Young wishes to donate $110,000. J.A. 1268. Plaintiff Edward Crane wishes to donate $6,000. *Id.* Richard Marder wishes to donate $5,500. J.A. 791 at ¶ 39. David Keating wishes to donate $5,500. J.A. 1267-68.

These donations, which would cover the costs to produce and broadcast the advertisements described above, would serve as the seed funding that SpeechNow.org needs to speak out and become a functioning organization. J.A. 786 at ¶ 22, 791-93 at ¶¶ 40-43, 1277. Two other Plaintiffs, Scott Burkhardt and Brad Russo, wish to donate $100 each to SpeechNow.org so their views can reach a wider audience than if they spoke alone. J.A. 1269. Mr. Burkhardt learned of SpeechNow.org in the media, and attempted to donate money to the group, but was told it could not accept donations due to the campaign-finance laws. J.A. 881-82 at ¶ 2.

Mr. Keating set up a website for SpeechNow.org, www.speechnow.org, on which he has posted information about the group and its proposed activities. J.A. 799. The website allows people to sign up to receive more information about the group and to indicate whether they would consider donating money if SpeechNow.org were legally able to operate without contribution limits or political-committee regulations. J.A. 803. More than 180 people have signed up

to receive more information, and about 75 of them have indicated that they would consider donating to SpeechNow.org. J.A. 1271. Mr. Keating has also opened a PayPal account that he will use to accept donations if SpeechNow.org is legally able to operate. J.A. 855, 1271.

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

On November 14, 2007, SpeechNow.org submitted an advisory-opinion request to the FEC to determine whether it would be permitted to operate without having to become a political committee under FECA. J.A. 478. Because the FEC at the time was operating without a full complement of commissioners, it was unable to issue a final advisory opinion. As a result, under the FEC's rules, SpeechNow.org's request to be permitted to operate as it wished was denied. J.A. 560; *see also* 11 C.F.R. § 112.4(a). The FEC's Office of General Counsel did, however, issue a draft opinion which concluded that SpeechNow.org met the statutory definition of "political committee" and was thus subject to FECA's contribution limits and other regulations of political committees. J.A. 563. The FEC has not altered the position of its general counsel's office in this case. J.A. 585-86.

The FEC's classification of SpeechNow.org as a political committee has two primary consequences. First, SpeechNow.org is subject to annual limits on the contributions it may accept from any one donor and its donors are subject to limits

on the amounts they may contribute. Second, SpeechNow.org is subject to the administrative, organizational, and continuous reporting obligations that apply to political committees.

A. Contribution Limits

Individuals may contribute no more than $5,000 per year to a political committee, 2 U.S.C. § 441a(a)(1)(C), and they may contribute no more than $115,500 in the aggregate to all political parties, committees, and candidates in any two-year period. *Id*. § 441a(a)(3).[1] As a result, SpeechNow.org may not accept the amounts that its prospective donors wish to contribute and the donors may not give those amounts to SpeechNow.org. J.A. 1277. Those who violate these limits are subject to fines and possible imprisonment if the violations are knowing and willful. 2 U.S.C. § 437g(d); J.A. 585. David Keating, as SpeechNow.org's treasurer, would be personally liable if the group knowingly accepted donations in excess of the limits. J.A. 1277; 2 U.S.C. § 437g(d).

As a result of the contribution limits, SpeechNow.org was unable to accept the donations that Messrs. Keating, Crane, Young, and Marder wished to make and

[1] Since the filing of this lawsuit, the FEC has adjusted the biennial aggregate limits to account for inflation. Price Index Increases for Contribution and Expenditure Limitations, 74 Fed. Reg. 7435 (Feb. 17, 2009).

thus unable to fund the ads it wished to produce and broadcast. J.A. 791-92 at ¶¶ 39-41.[2]

B. Administrative, Organizational, and Continuous-Reporting Requirements for Political Committees

Political committees are among the most regulated entities under the federal campaign-finance laws. They are, in essence, creatures of federal law, and federal law dictates every aspect of their existence and operations, from how they may be created, to how they may operate, and even when and under what circumstances they may terminate.

1. Registering a Political Committee

If SpeechNow.org registered as a political committee, it would be classified as a "non-connected" committee. J.A. 1279. Registering as a non-connected committee is a multi-step process. First, a would-be political committee must obtain a taxpayer-identification number from the IRS in order to open the required bank account into which it must deposit all funds. J.A. 638 at 108:16-109:3; 11 C.F.R. § 103.2. Within 10 days of becoming a political committee, the group must file FEC Form 1, a statement of organization, with the Commission. 11 C.F.R.

[2] Plaintiffs also introduced expert testimony below that shows the burden of contribution limits on their ability to speak effectively. *See* Declarations of Rodney Smith and Jeffrey Milyo, Ph.D.in Support of Plaintiffs' Proposed Findings of Fact. Both were submitted to the District Court along with Plaintiffs' Proposed Findings of Fact for Certification (dkt. # 44).

§ 102.1. On that form, the group must designate its treasurer, custodian of records, and the account in which it will deposit all funds. J.A. 1280; 11 C.F.R. §§ 102.2(a)(1)(i)-(vi). If any of the information on the FEC Form 1 changes, the political committee must file an amended statement within 10 days. J.A. 1280; 11 C.F.R. § 102.2(a)(2). Once registered, a political committee must file regular reports of all of its activities, even if it has nothing to report. J.A. 644 at 130:2-11. These obligations continue until the committee is terminated, which it may do only with the FEC's permission. J.A. 643-44 at 127:6-130:11; 11 C.F.R. § 102.3(a)(1).

2. Operating a Political Committee

The primary purpose of the regulations that apply to political committees is to account for every dollar that goes into and comes out of the committee. As a result, the operational requirements for political committees can be divided into two categories: (1) recordkeeping and allocation requirements; and (2) reporting requirements.

a. Recordkeeping and Allocations

Political committees, and, specifically, their treasurers, must maintain detailed records of all the group's receipts and disbursements. Treasurers must deposit all contributions into the committee's account within ten days of receipt. 11 C.F.R. § 103.3. They must keep photocopies or digital images of every contribution over $50 made by check. *Id*. § 102.9(a)(4)(i)-(ii). And they must

keep receipts for all disbursements over $200. *Id*. § 102.9(b)(2). All of these records must be maintained for three years. *Id*. § 102.9(c).

In order to track its contributions and expenditures, a political committee must first determine into what category they fall and often whether they must be allocated to the committee at all. For instance, David Keating, SpeechNow.org's treasurer, operates the group out of his home. J.A. 794 at ¶ 47. If SpeechNow.org were required to become a political committee, Mr. Keating would have to determine the fair-market value of the portion of his home—including such things as telephone and Internet connections—used by the committee and properly account for it, in much the same way that an individual must determine how to account for a home office on his income taxes. J.A. 645-46 at 136:8-137:8, 139:6-20. If Mr. Keating were to conduct a fundraiser at his home, he would have to engage in the same process. J.A. 1280-81; 11 C.F.R. §§ 100.75, .77.

b. Reporting

Non-connected committees must file detailed reports with the FEC of all receipts and disbursements on a regular basis. J.A. 1280. The appropriate form—FEC Form 3X—consists of five pages of summary information on receipts and disbursements followed by sixteen different "schedules." J.A. 687. The schedules require detailed information on a wide variety of topics, including, among other things, all contributors and the amounts they donate (schedule A); all

disbursements and to whom they are made (schedule B); any loans the committee receives (schedule C); all of the committee's debts and obligations (schedule D); any itemized independent expenditures the committee makes (schedule E); any itemized coordinated party expenditures the committee makes (schedule F); the committee's activities relating to state or local elections (schedule H1-H6); and the committee's "Levin" funds (schedules L, L-A, and L-B). J.A. 642-43 at 125:22-127:5; J.A. 687. Form 3X and the various schedules are accompanied by thirty-one pages of instructions. J.A. 709.

A non-connected committee must make these disclosures four times in an election year and twice in a nonelection year. J.A. 644 at 131:10-12, 18-20; 11 C.F.R. §§ 104.5(c)(1)(i), (c)(2)(i)(A)-(B). Additionally, it must file a twelve-day pre-primary report in every state in which it participates in a primary election, 11 C.F.R. § 104.5(c)(1)(ii)(A), and both pre- and post-general-election reports for any general election and for any special election in which it participates. *Id.*; 11 C.F.R. § 104.5(c)(1)(iii)(A), (h)(1). Alternatively, it can choose to file its periodic disclosures monthly rather than quarterly. J.A. 644 at 131:7-9; 11 C.F.R. § 104.5(c). It may change its filing schedule only once per year and only after giving the FEC written notice. 11 C.F.R. § 104.5(c). In addition to this general reporting, non-connected committees must disclose any independent expenditures

they make. *See id*. § 104.5(g). Political committees have been fined for failing to file timely reports in accordance with these regulations. J.A. 644 at 132:12-15.

The FEC provides advice and information to help committee treasurers comply with the regulations that apply to political committees. J.A. 614-16 at 11:3-21:11, 624-25 at 53:16-54:20. This includes a 134-page Campaign Guide for Non-Connected Committees as well as monthly supplements containing new rules, interpretations, and policies of the Commission. J.A. 616 at 18:3-20:3. However, reliance on this information is not a shield to liability. J.A. 651 at 158:17-20. An entire cottage industry of lawyers, accountants, and consultants has emerged to guide political committees through the reporting process. J.A. 632-33 at 84:17-22, 88:12-89:2.

C. FEC Audits and Investigations

The FEC can audit political committees or issue a Request for Additional Information (RFAI) if a committee's reports indicate compliance, accounting, or reporting problems. J.A. 649 at 150:1-151:9; J.A. 1282. Out of roughly 8,000 registered political committees, the FEC issues approximately 5,000 RFAIs per year. J.A. 630 at 75:16-76:12.

The FEC also investigates political committees for alleged violations of the campaign-finance laws. J.A. 1283. Since October 1, 1999, the FEC has found reason to believe that one or more violations have occurred in 427 "Matters Under

Review" and has conducted an investigation in 118 of these MURs. J.A. 592-94. For these investigations, 544 days on average passed from when the MUR opened until it was closed with respect to the last respondent. J.A. 594.

D. Independent-Expenditure Reporting

Individuals and qualified nonprofit corporations that make independent expenditures are subject to less-extensive recordkeeping and reporting requirements than those that apply to political committees. Those who make independent expenditures must report those expenditures and the contributors who funded them within 24 or 48 hours of making each expenditure, depending on the size of the expenditure and when it occurs. J.A. 1278. This reporting is done using a three-page form that requires the individual or group to identify the size of the independent expenditure, to whom the expenditure was made, everyone who contributed $200 or more for the purpose of furthering the expenditure, and the candidate it was intended to support or oppose. *Id*. The form also asks, under the threat of perjury, if the group coordinated the expenditure with a candidate or his authorized committee or agent. The form's instructions are three pages long. *Id*.

SUMMARY OF ARGUMENT

Plaintiffs' first three certified questions ask whether it is constitutional to impose limits on the amount of money that Plaintiffs may pool for the purpose of funding independent speech about candidates. This Court recently held in *EMILY's List v. FEC* that contribution limits as they apply to groups like SpeechNow.org are unconstitutional. It should reaffirm that conclusion here. The Supreme Court has repeatedly held that individuals and groups have a right to make unlimited independent expenditures—that is, to spend money on speech that expressly advocates the election or defeat of candidates—and that doing so poses no concerns about corruption or its appearance. The FEC admits, as it must, that each Plaintiff individually has the right to spend as much as he wishes on his own independent expenditures. The FEC can show no constitutionally legitimate grounds for imposing contribution limits on the Plaintiffs simply because they have chosen to do collectively what they have an undisputed right to do individually. The act of associating does not create concerns about corruption that do not exist when Plaintiffs are acting individually. The FEC's contrary position is an attack on the principle of independence and the right of association.

Plaintiffs' fourth certified question asks whether Plaintiffs may report their activities under the disclosure and disclaimer provisions that apply to those who make independent expenditures, rather than registering as a political committee.

The political-committee regulations impose significant and well-documented burdens on small groups. As a result, Plaintiffs should be permitted to satisfy the government's interest in disclosure in the more narrowly tailored manner that applies to those who do what the Plaintiffs will do—make only independent expenditures. The FEC's sole argument to the contrary rests on *dicta* from a case, *FEC v. Massachusetts Citizens for Life, Inc.* (*MCFL*), in which the Supreme Court did *not* require a small association to register as a political committee. Contrary to decades of Supreme Court precedent, the FEC applies this dicta as though it obviates the need for any constitutional scrutiny at all. The FEC's position is supported by neither *MCFL* nor *Buckley v. Valeo*.

Finally, Plaintiffs' fifth certified question asks when Plaintiffs must register as a political committee if it turns out that they must register at all. The FEC's position is that groups must become political committees even *before* they make any expenditures for express advocacy. This increases the burdens on groups like SpeechNow.org and it serves no constitutionally legitimate purpose.

ARGUMENT

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

Plaintiffs'[3] first three certified questions ask whether the contribution limits that apply to their independent political activity are unconstitutional.[4] This Court should hold that they are. As a panel of this Court recently stated:

> [I]f one person is constitutionally entitled to spend $1 million to run advertisements supporting a candidate (as *Buckley* held), it logically follows that 100 people are constitutionally entitled to donate $10,000 each to a non-profit group that will run advertisements supporting a candidate.

EMILY's List v. FEC, 581 F.3d 1, 10 (D.C. Cir. 2009) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

With its decision in *EMILY's List*, this Court joined the Fourth Circuit as the second federal court of appeals to consider this issue and hold that the First

[3] SpeechNow.org is not a party to case No. 09-5342 because it is ineligible for certification under 2 U.S.C. § 437h. However, David Keating, SpeechNow.org's president and treasurer, is subject to both official and personal liability if SpeechNow.org violates the law. *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 3-6 (Jan. 3, 2005). Ed Crane, a governing member of SpeechNow.org, is also a party to this action. J.A. 874. Both have standing to assert SpeechNow.org's First Amendment claims on their own behalf. *See Cal. Med. Ass'n v. FEC* (*CalMed*), 453 U.S. 182, 187 n.6 (1981) (holding that CalMed's members and officers had standing to raise the constitutional claims at issue); *Athens Lumber Co. v. FEC*, 689 F.2d 1006, 1014 (11th Cir. 1982) (holding that corporate president had standing to bring corporation's claims under § 437h).

[4] Because this case was certified under 2 U.S.C. § 437h, these issues are before the Court for the first time. Therefore the "standard of review" for all Plaintiffs' issues is de novo.

Amendment prohibits limits on contributions to groups that make only independent expenditures. *See N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 291-95 (4th Cir. 2008). This Court's decision in *EMILY's List* is not only Circuit precedent,[5] it is correct.

This Court's decision in *EMILY's List*—and Plaintiffs' position in this case—follow from several fundamental constitutional principles. 581 F.3d at 5-8. The First Amendment protects the right to raise and spend money for political speech just as it protects speech itself. *Buckley*, 424 U.S. at 14. It also protects the right to associate for the purpose of amplifying one's voice and speaking more effectively. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Buckley*, 424 U.S. at 15. While the Supreme Court has upheld limits on contributions to candidates and political-party committees, it has made clear that "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008) (quoting *FEC v. Nat'l Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 496-97 (1985)). As a result, the burden is squarely on the government to demonstrate not only that a limit serves the purposes of preventing corruption, but that each application of the

[5] This Court's prior panel decisions should not be overturned lightly. *See Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 876 (D.C. Cir. 1992) (en banc).

law does so. *WRTL II*, 551 U.S. at 478. The Court has also made clear that the interest in preventing corruption is far from limitless, and it has rejected the government's efforts to allow the interest in circumventing existing limits to expand without end. *Id*. ("Enough is enough."). Finally, the government may not impose any limits to try to equalize the relative voices of those participating in the marketplace of political ideas. *Davis*, 128 S. Ct. at 2773-74.

These principles lead inexorably to the conclusion that SpeechNow.org may raise and its donors may make unlimited contributions to fund its independent speech.[6] David Keating established SpeechNow.org to operate independently of both candidates and political-party committees; that independence is written right into the group's bylaws. J.A. 827. It will make only independent expenditures, which the Supreme Court has long held are core political speech and create no concerns about corruption. *Buckley*, 424 U.S. at 39; *NCPAC*, 470 U.S at 497-98. As a result, the money that funds those independent expenditures can create no greater concerns about corruption or its appearance than the independent expenditures themselves. *EMILY's List*, 581 F.3d at 9-11. Absent any legitimate

[6] Plaintiffs have made this argument in detail in the preliminary-injunction appeal that was consolidated with this action. *See* Brief of Appellants at 25-44, *SpeechNow.org v. FEC*, no. 08-5223 (D.C. Cir. Aug. 24, 2009); Reply Brief of Appellants at 2-6, 17-28, *SpeechNow.org v. FEC*, no. 08-5223 (D.C. Cir. Oct. 15, 2009).

concerns about corruption, the government lacks any grounds for imposing contribution limits on the Plaintiffs regardless of what level of scrutiny applies.[7]

A. Plaintiffs want to associate in order to do collectively what they have the right to do individually

The FEC admits, as it must, that Plaintiff Fred Young may spend, without limit, the entire $110,000 he wishes to donate to SpeechNow.org on his own independent expenditures. *See* Defendant Federal Election Commission's Memorandum In Opposition To Plaintiffs' Motion for Preliminary Injunction at 34, *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008). This is, of course, entirely consistent with over 30 years of campaign-finance jurisprudence. It is axiomatic not only that political speech "is at the core of what the First Amendment is designed to protect," *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (internal quotation marks omitted), but also that individuals and groups may spend unlimited amounts of money urging the election or defeat of candidates as long as their expenditures are independent of candidates. *Buckley*, 424 U.S. at 51; *see also NCPAC*, 470 U.S. at 497; *Colo. Republican Fed. Campaign Comm. v. FEC*

[7] As Plaintiffs explained in detail in their preliminary-injunction appeal, their challenge to the contribution limits is entitled to strict scrutiny. *See* Brief of Appellants at 25-32, *SpeechNow.org v. FEC*, no. 08-5223 (D.C. Cir. Aug. 24, 2009). But because the FEC can demonstrate no legitimate interest in imposing contribution limits on them, Plaintiffs' challenge prevails under even intermediate scrutiny.

(*Colorado I*), 518 U.S. 604, 614-19 (1996); *McConnell v. FEC*, 540 U.S. 93, 221-22 (2003).

But there is a catch. Fred Young and the other individual Plaintiffs may speak as loudly and robustly as they want using as much of their own money for express advocacy as they wish, as long as they do so alone. The moment any of them chooses to join with even one other like-minded individual and they collectively spend their funds on the same type of independent expenditures, they become a political committee and each may devote only $5,000 to their speech. *See* Defendant Federal Election Commission's Memorandum In Opposition To Plaintiffs' Motion for Preliminary Injunction at 5, *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008).

That position—which forms the core of the FEC's entire argument in this case—is untenable. No principle in law or logic supports the proposition that although the government may not limit an individual's independent expenditures, it may limit the amount of money he wishes to pool with others for the same independent expenditures; that, alone, Fred Young's independent expenditures create no concerns about corruption, but if he joins with others, the amounts he wishes to spend are suddenly suspect; that the government may not limit a group's independent spending, but that it may limit the funds the group raises to pay for that spending. Brief of Appellants at 34, *SpeechNow.org v. FEC*, No. 08-5223

(D.C. Cir. Aug. 24, 2009); *EMILY's List*, 581 F.3d at 11; *Leake*, 525 F.3d at 293. As the Supreme Court has recognized, "[t]here are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." *Citizens Against Rent Control*, 454 U.S. at 296.

Fred Young and the other individual Plaintiffs—indeed, anyone who wishes to donate money to SpeechNow.org—are simply exercising the fundamental right of association. The Supreme Court has long held that the First Amendment protects the right to associate just as surely as it protects the right to speak. *Buckley*, 424 U.S. at 25. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control*, 454 U.S. at 294. This practice has manifested itself in many ways; "in the political process it can focus on a candidate or on a ballot measure." *Id*. The value of associating is that "by collective effort, individuals can make their views known, when, individually, their voices would be faint or lost." *Id*.

Plaintiffs wish to take advantage of the right of association by joining together in SpeechNow.org. David Keating possesses the experience to run a group like SpeechNow.org, but he lacks the funds to produce and broadcast ads on his own. J.A. 796-97 at ¶ 52. Ed Crane possesses the experience, but he lacks the time and the funds. J.A. 875 at ¶ 4. Fred Young can contribute large sums of

money, but he lacks the experience to produce and broadcast advertisements. J.A. 871 at ¶ 4. Richard Marder, Scott Burkhardt, and Brad Russo wish to capitalize on the attributes of like-minded individuals in order to amplify their voices beyond what they could achieve on their own. J.A 791 at ¶ 39, 882-83 at ¶ 4, 879-80 at ¶ 4. In short, each of the individuals who wish to associate in SpeechNow.org will take advantage of various aspects of the right of association to do collectively what they would be unable to do alone. *Cf. NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . .").

The FEC's position ignores the right of association entirely. Like the city in *Citizens Against Rent Control*, the FEC seeks to impose a limit "on individuals wishing to band together to advance their views" that it could not place on those individuals acting alone. 454 U.S. at 296. And just as the limit was "clearly a restraint on the right of association" in *Citizens Against Rent Control*, so it is here. *Id*. As the next section demonstrates, the FEC can offer no legitimate reason to impose this limit on the Plaintiffs.

B. Plaintiffs' contributions to SpeechNow.org raise no greater concerns about corruption than their independent expenditures

Since *Buckley*, the Supreme Court has consistently held that independent expenditures are core political speech that pose no concerns about corruption and may not be limited. *See FEC v. Mass. Citizens for Life, Inc*. (*MCFL*), 479 U.S.

238 (1986); *NCPAC*, 470 U.S. at 491-501; *Citizens Against Rent Control*, 454 U.S. at 295-300. The same principle must apply to the money that funds independent expenditures. So long as SpeechNow.org remains independent of candidates and political parties and only makes independent expenditures, the money that funds the group and its independent expenditures is necessarily independent of candidates as well. That money can no more be considered "contributions" to a candidate than the group's independent expenditures themselves. *See EMILY's List*, 581 F.3d at 11.

In opposing this simple point, the FEC attempts to lay waste to the principle of independence. David Keating created SpeechNow.org as an independent group, and the FEC has responded by arguing, contrary to Supreme Court precedent, relevant statutes, and even its own regulations, that independence cannot truly exist. Beyond that, the FEC has no grounds for claiming that contributions to SpeechNow.org may be limited.

1. The FEC's position is an attack on the principle of independence

The principle of independence is a key component of campaign-finance law; indeed, it defines the difference between the financing of candidates' campaigns, which may be regulated on corruption grounds, and the speech of individuals and groups, which must be left free. *See Buckley*, 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 . . . ."); *Leake*, 525 F.3d at 291-93; s*ee also* 2 U.S.C. § 431(17); 11 C.F.R. §§ 100.16, 109.21.

The Supreme Court made this point clear in *Buckley* where it assessed the constitutionality of limits on independent expenditures. *See* 424 U.S. at 44-47. The Court drew a sharp distinction between contributions to candidates, on the one hand, and expenditures that advocate the election or defeat of candidates but are made independently of those candidates, on the other. *Id*. at 46-47.[8] It made clear that an expenditure for express advocacy that is "controlled by or coordinated with" a candidate is considered a contribution to that candidate. *Id*. at 46. Coordinated expenditures may thus be limited on corruption grounds, because they can be used to circumvent limits on contributions to a candidate. *Id*. However, an expenditure that is "made totally independently of the candidate" is the speech of the individual making it and may not be limited. *Id*. at 47-48, 51. As the Court stated, "[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the

[8] *See also id*. at 45 (stating that "unlike the contribution limitations' total ban on the giving of large amounts of money *to candidates*, [the expenditure limitation] prevents only some large expenditures." (emphasis added)).

candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id*. at 47.[9]

The distinction between independent speech and coordinated expenditures is reflected in the statutes and regulations as well. "Independent expenditure" is defined as an expenditure made for express advocacy that is not "made in concert or cooperation with or at the request or suggestion of" a candidate or political party committee. 2 U.S.C. § 431(17). The FEC's rules provide further guidance on the line between independent expenditures and coordinated expenditures. *See* 11 C.F.R. § 109.1. The rules make clear that independent expenditures are considered the expenditures of the person making them and are reported as such. *See id*. § 109.10. Coordinated expenditures, by contrast, are considered in-kind or "indirect" contributions to the candidates they benefit and are thus subject to contribution limits. *See id*. § 109.20(b).[10]

In short, the principle of independence is fundamental to campaign-finance law. It implements several key principles from *Buckley*. To speak effectively

[9] The Court in *Buckley* applied also the basic distinction to expenditures by volunteers, concluding that those made independently were not contributions to a candidate while those made at the candidate's direction were. *See* 424 U.S. at 36-37.

[10] The statutes and rules governing independent expenditures find their origins in the provisions of FECA at issue in *Buckley*. Indeed, the Court cited House and Senate reports describing the difference between independent and coordinated expenditures in much the same terms that the statutes and rules do today. *See* 424 U.S. at 46 n.53.

requires the expenditure of money, and the fact that an individual or group spends money on speech cannot, standing alone, provide grounds for limiting that speech. *See Buckley*, 424 U.S. at 16, 47-48. Corruption is a concern when money is being given to candidates, not when it is spent independently of them. *Id*. at 46-47. Independent spending, while potentially beneficial to candidates, is far less valuable and thus less likely to be used as a quid pro quo. *Id*. at 47.

The FEC's approach to SpeechNow.org eviscerates the principle of independence. The FEC ignores the simple fact that everything that the Supreme Court recognized about independent expenditures applies with equal, if not greater, force to the money that funds those expenditures. If independent expenditures are far less valuable to candidates than contributions, then the same must be true of the donations that fund those independent expenditures. If independent expenditures are less likely than contributions to lead to a quid pro quo, then so are the donations that fund those independent expenditures. *See EMILY's List*, 581 F.3d at 11 (stating that "it is implausible that contributions to independent expenditure political committees are corrupting" (internal quotation marks omitted)); *Leake*, 525 F.3d at 293-94. Concluding that donations to SpeechNow.org lead to corruption necessarily means that the same is true for SpeechNow.org's independent expenditures. There is no way around this.

Indeed, that is what the FEC has argued. *See* Defendant Federal Election Commission's Memorandum In Opposition To Plaintiffs' Motion for Preliminary Injunction at 13-23, *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008). The FEC will no doubt make that argument again in this phase of the case, and Plaintiffs will address it in their reply brief. For now, it is important to note that the FEC can prevail only if the Supreme Court reverses three decades of consistent protections for independent expenditures, and the statutes and rules governing independence are eviscerated. *Cf. Colorado I*, 518 U.S. at 621-22 ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one.").

2. The FEC can offer no legitimate grounds for limiting contributions to SpeechNow.org

Aside from attacking the principle of independence, the FEC attempts to justify the application of contribution limits to SpeechNow.org in two primary ways. First, elevating form over substance, the FEC contends that it may limit contributions to SpeechNow.org simply because they are "contributions" and limits on contributions have long been held constitutional. *See* Brief for the Federal Election Commission at 19-20, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009). Second, the FEC claims that the limits are constitutional under *McConnell v. FEC*. *See id.* at 34-43. Both arguments are wrong.

a. "Contribution" is not a magic word

The FEC contends that Plaintiffs are challenging contribution limits that have been on the books for over 30 years. According to the FEC, the fact that the Supreme Court has upheld limits on contributions in certain contexts means that they are constitutional as applied to the Plaintiffs. *See* Brief for the Federal Election Commission at 19-43, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009).

However, the Supreme Court has made crystal clear that even laws previously upheld can be unconstitutional as they apply in certain contexts. *See Wis. Right to Life, Inc. v. FEC* (*WRTL I*), 546 U.S. 410, 411-12 (2006). At the root of the FEC's argument is the notion that the term "contribution" carries some constitutional significance by itself. *See* Brief for the Federal Election Commission at 19-20, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009); *see also* J.A. 384-86. But the Supreme Court has taken a functional approach to limits on campaign financing that is based, not on the labels that apply, but on the extent to which campaign financing has a sufficient nexus to the corruption of candidates. *See, e.g.*, *WRTL II*, 551 U.S. at 478-79; *Leake*, 525 F.3d at 293.

For example, in *Buckley* the Court held that a candidate's contributions to his own campaign—which are reported to the FEC as "contributions"—are

nevertheless exempt from limits, because they create no concerns about corruption. 424 U.S. at 52-54. Similarly, the Court has struck down limits on independent expenditures because they lack the necessary potential to corrupt candidates, but it has approved of limits on *coordinated* expenditures because they have the same potential for corruption as contributions. *See id*. at 47-48. And even though limits on contributions to candidates are constitutional, differential limits on contributions to the same candidates in the same race are not, *see Davis*, 129 S. Ct. at 2774, nor are contribution limits that are too low; *see Randall v. Sorrell*, 548 U.S. 230 (2006). Although the Court held in *Buckley* that limits on contributions to candidates are an insubstantial burden on First Amendment rights, *see* 424 U.S. at 20-21, it held precisely the opposite in *Citizens Against Rent Control* with respect to limits on contributions to groups engaged in ballot-issue advocacy. *See* 454 U.S. at 298-99; *see also MCFL*, 479 U.S. at 263 (holding that a nonprofit that makes only independent expenditures cannot be subject to the political-committee requirements, including contribution limits).

Thus, the question is not, as the FEC sees it, whether the label "contribution" or "expenditure" attaches to a particular sum of money. The question is whether that money is being spent in a way that is sufficiently connected to candidates to create concerns about corruption. *See*, *e.g.*, *Buckley*, 424 U.S. at 45-47. For the reasons already stated, money donated to SpeechNow.org has no connection to

candidates at all as a matter of law and thus creates no concerns about corruption that would justify restricting First Amendment rights.

Even the FEC's claim that the laws challenged in this case have been on the books for over three decades is at best a half-truth in this context. *Buckley* did not directly address limits on contributions to political committees at all, much less limits on contributions to groups like SpeechNow.org. *Buckley*'s discussion of contribution limits pertained to limits on contributions by individuals to candidates,[11] limits on contributions *by* political committees *to* candidates,[12] and limits on the aggregate amounts that individuals could give to all candidates or committees that contribute to candidates.[13]

The Court did not address the constitutionality of limits on contributions to a political committee until its decision in *California Medical Ass'n v. FEC* (*CalMed*), 453 U.S. 182 (1981). *CalMed* involved a challenge by an unincorporated association to limits on its contributions to a registered multicandidate political committee. *Id*. at 185-86. A plurality of four Justices

[11] *See* 424 U.S. at 23-24 (stating that the "$1,000 ceiling applies regardless of whether the contribution is given to the candidate, to a committee authorized in writing by the candidate to accept contributions on his behalf, or indirectly via earmarked gifts passed through an intermediary to the candidate").
[12] *See id*. at 35-36.
[13] *See id*. at 38 (upholding aggregate limit to prevent evasion of individual limits by "a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees *likely to contribute to that candidate,* or huge contributions to the candidate's political party" (emphasis added)).

would have upheld the limits under *Buckley* on the grounds that they prevent corruption and only minimally burden First Amendment rights. *Id*. at 197. According to the plurality, CalMed's desire to speak through a political committee by making contributions to it amounted only to "speech by proxy," which "is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection." *Id*. at 196.

This is not the holding of the case, however, because the fifth vote was provided by Justice Blackmun, who concurred only in the judgment, but not in the plurality's reasoning. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991). Justice Blackmun made clear that he disagreed with the plurality's view that CalMed's First Amendment rights were only entitled to minimal protection. *Id*. at 202. He concurred with the plurality only because CalMed wanted to make contributions to a multicandidate political committee that could in turn make direct contributions to candidates. *Id*. at 203. Thus, for Justice Blackmun, the limits were constitutional on the same anti-circumvention grounds that supported the aggregate limits at issue in *Buckley*. *Id*. However, the limits would not be constitutional, in Justice Blackmun's view, if they applied to a group that, like SpeechNow.org, made only independent expenditures. *Id*.

A panel of this Court adopted Justice Blackmun's concurrence as the law of this Circuit in *EMILY's List*. *See* 581 F.3d at 16-17. For all of the reasons already stated, Plaintiffs agree that Justice Blackmun's view is correct. But whether or not Justice Blackmun's concurrence is itself binding precedent, it is clear that the concurrence limited the holding of *CalMed*. *See Marks*, 430 U.S. at 193. The decision stands only for the proposition that contributions to a multicandidate political committee may be limited for the same reasons the Court in *Buckley* upheld the aggregate limits—because they prevent multicandidate political committees from being used to evade the individual limits. *See CalMed*, 453 U.S. at 197-99 (plurality opinion); *id*. at 203 (Blackmun, J., concurring).

Since *CalMed*, the Supreme Court has not ruled on the constitutionality of contribution limits as they apply to political committees. This Court in *EMILY's List* was thus addressing an open question, and the FEC's claim that the Plaintiffs are attacking limits with a long constitutional pedigree is simply false. As the next section shows, the FEC's last-ditch effort to support the limits that apply to the Plaintiffs—relying on *McConnell*—fails as well.

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

The FEC relies on *McConnell* for the proposition that the government's interests go beyond limiting quid pro quo corruption and apply to curbing undue influence on an officeholder's judgment as well. Brief for the Federal Election

Commission at 30-33, *SpeechNow.org v. FEC*, No. 08-5223 (Sept. 23, 2009). Likening SpeechNow.org to the political-party committees at issue in *McConnell*, the FEC contends that SpeechNow.org will be used to funnel millions in soft-money donations to candidates. *See id.* at 29.

The problem with this argument is that SpeechNow.org is not a political-party committee. *McConnell* involved a new law that Congress passed specifically to address the "manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence." 540 U.S. at 153-54. The Supreme Court upheld limits on soft-money donations to party committees after finding that, due to their close relationship with candidates, party committees were being used to gain undue influence over candidates and to circumvent limits on contributions to candidates. *Id.* at 145.

The same is not only untrue of SpeechNow.org, but it cannot be true. SpeechNow.org is independent of candidates and party committees and will make only independent expenditures. *See* J.A. 827, 832-33. Its independence isolates it from candidates and party committees as a matter of law. It can be likened to the party committees at issue in *McConnell* only by ignoring the fact that it makes only independent expenditures and thus cannot sell access to candidates or party committees.

Notwithstanding the obvious differences between *McConnell* and this case, the FEC contends that *McConnell* already resolved Plaintiffs' challenges. Relying on a single footnote in *McConnell*, the FEC argues that the Supreme Court has repudiated Justice Blackmun's concurrence in *CalMed* and interpreted that decision to allow the imposition of contribution limits on groups that make only independent expenditures. *See* Brief for the Federal Election Commission at 30-33, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009) (citing *McConnell*, 540 U.S. at 152 n.48).

But, as this Court explained in *EMILY's List*, "footnote 48 simply cited *Cal-Med* together with *Buckley* in the course of establishing the constitutionality of limits on contributions to *political parties*, not to *non-profits* (which the Court had no need to address)." *EMILY's List*, 581 F.3d at 14 n.13 (emphasis in original). Thus, the *McConnell* footnote simply applied the holding in *CalMed* as limited by Justice Blackmun's concurrence. That is, limits may be imposed on contributions to groups—like political-party committees or multicandidate political committees—that make contributions to candidates or work with and are composed of candidates. *See CalMed*, 453 U.S. at 203 (Blackmun, J., concurring). A broader reading of footnote 48 would conflict with the holding of *CalMed* itself, which *McConnell* did not purport to overrule.

Moreover, *McConnell* was a facial challenge. Later cases made clear that it did not foreclose subsequent as-applied challenges even to the same laws that were at issue in the case, much less to laws that were not at issue in the case. *See WRTL I*, 546 at 411-12; *WRTL II*, 551 U.S. at 456. Yet the FEC now contends that even though *McConnell* did not foreclose subsequent as-applied challenges to the very laws at issue in that case, it did somehow foreclose as-applied challenges—such as this one—to laws that *were not* at issue in *McConnell*. And it did so in "a few sentences of a footnote in one of the longest cases in Supreme Court history." *EMILY's List*, 581 F.3d at 14 n.13 (citation omitted). *McConnell* simply does not support the FEC's position.

* * * *

Plaintiffs' approach, like the approach of both this Court in *EMILY's List* and the Fourth Circuit in *Leake*, is entirely consistent with the Supreme Court's repeated recognition that regulation of campaign financing is a narrow exception to the general rule that political debate must remain robust and uninhibited. *See, e.g.*, *Citizens Against Rent Control*, 454 U.S. at 296-97 ("*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment."); *Davis*, 128 S. Ct. at 2773 ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." (quoting *NCPAC*,

470 U.S. at 496-97)). The Court has drawn a sharp distinction between independent political speech on one side, and campaign financing that is sufficiently connected to the corruption of candidates to justify regulation on the other. *See*, *e.g.*, *WRTL II*, 551 U.S. at 478-79 (concluding that grassroots-lobbying group cannot be required to register as a political committee because its issue ads "are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them."); *NCPAC*, 470 U.S. at 496-97 (concluding that a group's independent expenditures may not be limited); *MCFL*, 479 U.S. at 263 (concluding that nonprofit group that makes only independent expenditures may not be subjected to political committee regulations, including limits on contributions).

SpeechNow.org clearly falls on the independent-speech side of this line. That means both that the contribution limits are unconstitutional as they apply to the Plaintiffs and that SpeechNow.org should not be required to register as a political committee.

II. Because SpeechNow.org Will Disclose Its Independent Expenditures Under § 434(c), There Is No Constitutionally Legitimate Reason to Require It to Become a Political Committee

The government has no more interest in requiring SpeechNow.org to register as a political committee than it has in imposing contribution limits on SpeechNow.org and its donors. That is so for all of the reasons stated above, but

also for the simple and compelling reason that SpeechNow.org will disclose its contributors and its independent expenditures under 2 U.S.C. § 434(c) and comply with the disclaimer provisions of § 441d. That disclosure will inform the public where SpeechNow.org's money comes from and how it is being spent. *See Buckley*, 424 U.S. at 66-67. Plaintiffs will thus satisfy any government interest by disclosing their activities in the same manner that any individual would disclose his own independent expenditures. *See id*. at 80-81.

In short, Plaintiffs' fourth certified question asks not whether Plaintiffs must disclose, but *how* they must do so. Must Plaintiffs adopt the administrative and organizational framework of a full-fledged political committee that makes contributions to candidates simply to disclose independent expenditures? Or may they do what any of them would be required to do if acting alone?

Plaintiffs' argument in this section is a simple question of narrow tailoring. The Supreme Court has held that the burdens of political-committee status are onerous, especially when imposed on small groups. *MCFL*, 479 U.S. at 255 (plurality opinion); *id*. at 266 (O'Connor, J., concurring). Plaintiffs' discussion of these burdens in their statement of facts makes this point indisputable. *See supra* Statement of Facts, section III.B. Laws that burden First Amendment rights must be narrowly tailored to satisfy a compelling state interest. *See WRTL II*, 551 U.S. at 464. As the Supreme Court has made clear, "[w]here at all possible, government

must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *MCFL*, 479 U.S. at 265.

SpeechNow.org is independent of candidates and party committees. It makes no contributions to either; it will not coordinate with them; it is not itself a corporation; and it will accept no funds from corporations or unions. *See supra* Statement of Facts, Section I. It thus presents no reason to be treated like political committees that do give money to candidates and thus are not independent of them. *Cf. Buckley*, 424 U.S. at 56 (stating that the "[e]xtensive reporting, auditing, and disclosure requirements applicable to both contributions and expenditures by political campaigns are designed to facilitate the detection of illegal contributions").

The FEC's entire case for requiring SpeechNow.org to become a political committee relies on *dicta* from a case in which the Supreme Court *did not* require a small nonprofit to become a political committee. Relying on *MCFL*, the FEC contends that SpeechNow.org must become a political committee simply because its "major purpose" is campaign activity. *See* Brief for the Federal Election Commission at 28, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009). However, as demonstrated below, the Supreme Court has never held that a group that makes only independent expenditures can be required to become a

political committee simply because its spending, which does not otherwise create concerns about corruption, reaches a certain percentage of its overall budget. In short, the Supreme Court has simply not decided the issue that Plaintiffs' fourth certified question raises. This Court should answer it in Plaintiffs' favor.

A. Reporting under § 434(c) will satisfy any governmental interest in disclosure

In *Buckley*, the Supreme Court upheld disclosure requirements for those who make independent expenditures. 424 U.S. at 80-82. The disclosure provision required "[e]very person (other than a political committee or candidate)" to file reports with the FEC disclosing certain information in connection with their independent expenditures. *Id*. at 74-75. According to the Court, this provision served the interests of increasing "the fund of information concerning those who support the candidates" by requiring even those who do not make contributions to candidates to report. *Id*. at 81. Independent-expenditure disclosures were appropriate, according to the Court, because they were "narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id*.

The modern version of the provision upheld in *Buckley* is 2 U.S.C. § 434(c), which requires persons[14] "other than political committees" to report the recipients

[14] The term "person" in 2 U.S.C. § 434(c) applies to organizations such as SpeechNow.org no less than to individuals. *See* 2 U.S.C. § 431(11).

of their independent expenditures in excess of $250 and the names of those individuals who provide more than $200 to help finance its independent expenditures. SpeechNow.org will fully comply with these disclosure provisions. In addition, SpeechNow.org will include disclaimers on its independent expenditures under 2 U.S.C. § 441d.

As a result, for every independent expenditure that SpeechNow.org makes of more than $10,000 (or over $1,000 if made less than 20 days before an election), SpeechNow.org will disclose each contributor's name and how much he or she contributed as well as the size of the independent expenditure, who it was paid to, and which candidate it supports or opposes. The disclosures will also verify that SpeechNow.org did not coordinate its expenditures with any candidate or political party or their agents. J.A. 687. The disclosures will be made no later than 48 hours (or 24 hours if less than 20 days before an election) after the independent expenditure is made. 11 C.F.R. § 109.10. SpeechNow.org's disclaimers will give the public SpeechNow.org's name, address, and telephone number or World Wide Web address, and will indicate both that SpeechNow.org paid for the communication, that it was responsible for the content, and that the communication was not authorized by any candidate. 2 U.S.C. § 441d.

SpeechNow.org's compliance with these provisions will more than satisfy any governmental interest in disclosure. Indeed, a decade after *Buckley* was

decided, the Court held that disclosure under § 434(c) was the appropriately tailored option for a nonprofit group that made only independent expenditures. *See MCFL*, 479 U.S. at 262.

B. The FEC can offer no constitutionally legitimate reason to require speechnow.org to become a political committee

The Supreme Court has held that political-committee status imposes serious burdens on the exercise of First Amendment rights by groups like SpeechNow.org. As the Court stated in *MCFL* about these requirements,

> Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

479 U.S. at 255 (plurality opinion); *see also WRTL II*, 551 U.S. at 477 n.9 ("PACs impose well-documented and onerous burdens, particularly on small nonprofits."); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657-58 (1990) (same). It is fundamental that laws imposing significant burdens on First Amendment rights must be narrowly tailored. *See WRTL II*, 551 U.S. at 464 ("Under strict scrutiny, the *Government* must prove that [a challenged law] furthers a compelling interest and is narrowly tailored to achieve that interest." (emphasis in original)); *MCFL*, 479 U.S. at 265 (stating that government must burden speech "only to the degree necessary to meet the particular problem at hand"); *Blount v. SEC*, 61 F.3d

938, 944 (D.C. Cir. 1995) (question for narrow tailoring is "whether less restrictive alternatives to the rule would accomplish the government's goals equally or almost equally effectively"). As Plaintiffs demonstrate below, the requirements for political committees would impose a significant burden on their exercise of First Amendment rights without any constitutionally legitimate justification.

1. Political-committee status imposes a serious burden on the exercise of First Amendment rights

By joining together to speak out through SpeechNow.org, Plaintiffs are engaging in a practice that is "deeply embedded in the American political process." *Citizens Against Rent Control*, 454 U.S. at 294. Since the earliest days of our Republic, Americans have banded together into associations to pursue their common political goals. *See* 1 Alexis de Tocqueville, Democracy in America 191 (Phillips Bradley ed., Alfred A. Knopf 1994) (1848) ("In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America.").

But despite the obvious importance of political associations, forming and operating a political committee to urge voters to elect or defeat federal candidates is vastly more burdensome than speaking out alone. Whereas one person can simply make his independent expenditures and then report them to the FEC, two or

more people who meet the definition of "political committee"[15] are legally barred from doing so without first obtaining a tax ID number,[16] opening a bank account for the committee,[17] naming a treasurer,[18] registering as a committee with the FEC,[19] and then depositing money into the account and making all payments out of that account.[20] *See also MCFL*, 479 U.S. at 252 (plurality opinion).

Once registered, virtually all aspects of a group's existence are dictated by FEC regulations. The treasurer of a political committee must deposit all contributions into its account within ten days. 11 C.F.R. § 103.3. He must keep photocopies of every contribution over $50 made by check, and he must keep receipts for all disbursements over $200. All of these records must be maintained for three years. J.A. 645-46.

In order to track its expenses and contributions properly, the committee's treasurer must make complex allocations of "in-kind" contributions. For example, if SpeechNow.org is considered a political committee, David Keating will have to determine the fair-market value of the use of his home as SpeechNow.org's place

[15] 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).
[16] 11 C.F.R. § 103.2; J.A. 638.
[17] 2 U.S.C. § 432(h).
[18] 2 U.S.C. § 432(a).
[19] 2 U.S.C. § 433(a).
[20] 2 U.S.C. § 432(h)(1). These burdens and those that follow are described in greater detail in Plaintiffs' statement of facts.

of operations—including an allocation of utilities like electricity—and report that value to the FEC.

All of this information must then be reported in detail to the FEC. Political committees must file regular reports of *all* of their financial activity—meaning every penny that comes in and every penny that goes out. 2 U.S.C. § 434(a)-(b). This reporting is far more complicated than the reporting for individuals and groups that make independent expenditures. *Compare* 2 U.S.C. § 434(b), *with* 2 U.S.C. § 434(c). Indeed, the instructions accompanying the reporting form for political committees are 10 times longer than the instructions for reporting independent expenditures as an individual or group. *Compare* J.A. 710-40, *with* J.A. 777-79. In contrast to independent-expenditure reporting, political committees must report continuously on either a monthly or quarterly basis even if they have no expenditures to report. 2 U.S.C. § 434(a)(4), (c).

Moreover, the FEC regularly demands additional information from political committees and stands ready to audit them at any time. J.A. 630, 649, 1282. Political committees that are investigated can expect the investigations to last nearly 18 months. J.A. 594. Political committees must even ask the FEC for permission to terminate and, until it is granted they must continue to comply with all reporting obligations. 2 U.S.C. § 433(d).

These requirements not only make it extremely difficult to operate groups like SpeechNow.org. *Leake*, 525 F.3d at 296 (stating that "[i]t is no unfounded fear that one day the regulation of elections may resemble the Internal Revenue Code"). They also all but kill spontaneous speech by ad hoc associations in response to fast-moving political events. *Cf. Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162 (1968) (Harlan, J., concurring) (observing that "timing is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all"); *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1008 (9th Cir. 2003) ("Restrict[ions] [on] spontaneous political expression place[] a severe burden on political speech . . . ."). And they threaten the privacy rights of an association's members. *See Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92 (1982); *AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003).

As the Court in *MCFL* made clear, the government is obliged to regulate in a manner that achieves its interests with as little burden on First Amendment rights as possible. 479 U.S. at 265. As stated above, the Supreme Court in both *Buckley* and *MCFL* recognized that the independent-expenditure-disclosure provisions of § 434(c) are the appropriately narrowly tailored methods of disclosure for those, like the Plaintiffs, who make only independent expenditures. *See Buckley*, 424 U.S. at 80-82; *MCFL*, 479 U.S. at 262; *see also MCFL*, 479 U.S. at 266

(O'Connor, J., concurring) (stating that requiring MCFL to become a political committee "do[es] [not] further the Government's informational interest in campaign disclosure"). SpeechNow.org creates no concerns about corruption that would justify requiring Plaintiffs to register as a political committee. *Cf. Buckley*, 424 U.S. at 56 (stating that the "[e]xtensive reporting, auditing, and disclosure requirements . . . facilitate the detection of illegal contributions").

2. SpeechNow.org's "major purpose" does not justify treating it as a political committee

Relying on dicta from *MCFL*, the FEC claims the Supreme Court has held that all groups with the "major purpose" of advocating the election or defeat of candidates—even those that only make independent expenditures—can be regulated as political committees. *See* Brief for the Federal Election Commission at 28, *SpeechNow.org v. FEC*, No. 08-5223 (D.C. Cir. Sept. 23, 2009) ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as political activity, the corporation would be classified as a political committee." (quoting *MCFL*, 479 U.S. at 262)). But *MCFL* issued no such holding—indeed, it could not have, as the FEC never argued that MCFL had a "major purpose" of federal campaign activity that triggered political-committee status. *MCFL*, 479 U.S. at 252 n.6; *see also Akins v. FEC*, 101 F.3d 731, 741 (D.C. Cir. 1996) (en banc) (recognizing *MCFL*'s discussion of "major purpose" to be dicta), *vacated on other grounds*, 524 U.S. 11 (1998).

MCFL's dicta about "major purpose" cannot be read as expanding the reach of political-committee regulation to any group simply because it spends the majority of its funds on independent expenditures. In arguing to the contrary, the FEC treats the term "major purpose" in much the same way that it treats the term "contribution"—as a formalistic bright line that obviates the need for any constitutional analysis whatsoever.

MCFL itself demonstrates the folly of the FEC's approach. In that case, the FEC argued for a bright-line rule that *all* corporations, even ideological nonprofits like MCFL, must speak only through a separate segregated fund that is regulated as a political committee. *See* 479 U.S. at 256-57. In other words, according to the FEC, groups could necessarily be treated as political committees simply because they carried the label "corporation," regardless of whether they posed a threat of corruption. *See id*.

The Court refused to allow the FEC's desire for a bright line to serve as a permissible rationale for restricting MCFL's speech. Instead, it took a functional approach that focused on MCFL's specific characteristics in order to determine whether it raised concerns about corruption. *Id*. at 259. "It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming

the corporate form." *Id*. at 263. Finding that MCFL posed no threat of corruption, the Court rejected the FEC's exaltation of form over substance. *Id*. ("[T]he [FEC's] rationale for restricting core political speech in this case is simply the desire for a bright-line rule.").

The FEC's reliance on the *MCFL* dicta as controlling in this case treats that dicta as though it established yet another bright-line rule of precisely the sort that the Court rejected in *MCFL*. In short, having failed in its attempt to establish the term "corporation" as a substitute for constitutional analysis in *MCFL*, the FEC now attempts to have the term "major purpose" replace the constitutional analysis that the Court applied in *MCFL*.

The FEC's approach completely ignores the fact that laws that burden First Amendment rights must pass strict scrutiny. *See WRTL II*, 551 U.S. at 464. As shown above, the FEC cannot meet its burden here because SpeechNow.org will disclose in the same narrowly tailored manner as any individual or group that makes independent expenditures. The FEC's approach also flies in the face of the Court's most recent campaign-finance jurisprudence on as-applied challenges, because it would eliminate as-applied challenges to political-committee burdens that restrict the exercise of First Amendment rights. *See WRTL II*, 551 U.S. at 478 ("A court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech.").

The Supreme Court's reference to "major purpose" in *MCFL* cannot be interpreted to lead to that absurd result. The Court in *MCFL* relied on its previous use of the term "major purpose" in *Buckley*. 479 U.S. at 262. But *Buckley* did not hold that any group with a "major purpose" of campaign activity could constitutionally be required to become a political committee. Indeed, *Buckley* did not issue a *constitutional* holding with respect to that question at all. *Buckley*'s discussion of "major purpose" was designed to do the opposite—to narrow the definition of political committee so that it did not reach groups unless they were "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Indeed, the Court relied on the narrow construction that lower courts had given the definition of "political committee" precisely to avoid creating constitutional problems with that definition that would have resulted from applying it to "nonpartisan organizations." *Id*. at 79 n.106.[21] The Court's purpose in this discussion was *avoiding* constitutional problems, not

[21] The FEC itself recognizes that *Buckley*'s major-purpose test resulted from a statutory analysis intended "to avoid constitutional vagueness concerns." *See* Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

resolving them.[22] Thus, by citing to this discussion later in dicta in *MCFL*, the Court simply indicated that MCFL would meet the statutory definition of "political committee," as narrowly construed by *Buckley*, if it had the major purpose of federal campaign activity. Accordingly, it was not holding that it would be constitutional to impose political-committee burdens on it and every other group with such a major purpose.

Buckley's approach to the constitutional questions it did resolve further demonstrates that the FEC's use of "major purpose" is wrong. In *Buckley*, the Court engaged in a two-step process with respect to several of the challenges to FECA's provisions. Thus, for instance, in addressing the challenge to expenditure limits and the disclosure provisions that applied to independent expenditures, the Court first narrowed the reach of the statutory provisions and then it determined whether, as construed, they were constitutional. *See* 424 U.S. at 39-51, 74-82.

The FEC's approach to "major purpose" focuses only on the first part of this analysis, the statutory construction, but entirely ignores the second, the

[22] Of course, merely because a court interprets a statute narrowly to avoid constitutional concerns does not mean that that court has concluded that the statute, so narrowed, is constitutional in every application. To the contrary, courts create such saving constructions specifically "to avoid decision of constitutional questions." *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 373 (1971); *see also Nw. Austin Mun. Util. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2516 (2009) (applying saving construction and concluding that the validity of the challenged legislation "is a difficult constitutional question we do not answer today").

constitutional analysis. But in neither *Buckley* nor *MCFL* did the Court resolve the second question—whether political-committee burdens can be imposed on groups like SpeechNow.org that make only independent expenditures and create no concerns about corruption. This is a narrow as-applied question that turns on the particular facts of this case and the burdens that political-committee status imposes on groups like SpeechNow.org. *Cf. WRTL II*, 551 U.S. at 469-77. It is absurd to suggest that the Court, having never faced this question, has preemptively decided it. *Cf. McConnell*, 540 U.S. at 192 ("We have long rigidly adhered to the tenet never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, for the nature of judicial review constrains us to consider the case that is actually before us." (internal quotation marks and citation omitted)).

As Plaintiffs have shown above, the burdens of political-committee status are severe and a narrowly tailored alternative already exists. As a result, Plaintiffs should be entitled to satisfy any government interests in disclosure by reporting under § 434(c) and § 441d.

3. The FEC's "major purpose" argument conflicts with *Davis v. FEC*

Requiring SpeechNow.org to become a political committee merely because it spends all of its funds on express advocacy, rather than a portion, would also run afoul of *Davis v. FEC*. In *Davis*, the Supreme Court made clear that the

government may not burden First Amendment rights merely because those rights are exercised robustly. *See* 128 S. Ct. at 2772. *Davis* involved a challenge to BCRA's so-called "Millionaire's Amendment," which imposed lower contribution limits on candidates who financed their own campaigns than on their opponents. 128 S. Ct. at 2766-67. As the Supreme Court recognized, the amendment's discriminatory fundraising limits effectively punished candidates for spending their own money on their own campaign speech. *Davis*, 128 S. Ct. at 2771-72. The Court thus held the provision unconstitutional because it "[did] not provide any way in which a candidate [could] exercise [the] right [to make unlimited personal expenditures] without abridgement." *Id.* at 2772.

The political-committee burdens that apply to SpeechNow.org are directly analogous. As with the right in *Davis*, the Supreme Court has held that individuals and groups have an unlimited right to make independent expenditures that support or oppose candidates. *See*, *e.g.*, *NCPAC*, 470 U.S. at 493-96. But if Plaintiffs exercise that right by spending most of their collective funds on express advocacy, they will trigger political-committee status, because their major purpose will at that point become campaign advocacy.

Just as the candidate in *Davis* was put to an unconstitutional choice, so SpeechNow.org must either spend less than half of its funds on independent expenditures or it must endure the burdens of political-committee status. The FEC

must leave open a path for Plaintiffs to exercise their rights without suffering this burden. That less burdensome path is § 434(c) and § 441d.

III. If Plaintiffs Are Compelled to Register As a Political Committee, They Should Be Made to Do So Only After Making Independent Expenditures

Plaintiffs' fifth certified question asks when SpeechNow.org must register as a political committee if it must register. The FEC requires groups to register as political committees even before they make any expenditures for express advocacy. *See* J.A. 573-74. Thus, before they take any action whatsoever that could influence the outcome of an election, the FEC requires them to register as political committees and be subjected to the onerous regulatory requirements for political committees.

For SpeechNow.org, that would mean David Keating would have to begin complying with the political-committee regulations as soon as he received more than $1,000 in contributions but before he even knew if he would have sufficient funds to run the ads the group would like to run. For the reasons explained above, this requirement imposes a pointless burden on groups like SpeechNow.org that serves no legitimate purpose. Accordingly, even if SpeechNow.org is required to register as a political committee, it should be required to do so only when it makes more than $1,000 in independent expenditures.

CONCLUSION

This Court should hold that the First Amendment prohibits the government from imposing contribution limits and the burdens of political-committee status on individuals who merely wish to pool their money to fund independent speech about political candidates. In short, the Plaintiffs should be permitted to do collectively what they are undoubtedly entitled to do individually. Accordingly, the Court should answer the first four of Plaintiffs' certified questions in the affirmative and the fifth in the affirmative only if it is necessary to reach that question.

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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 13,909 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of November, 2009, I caused this Brief of Appellants, Statutory Addendum and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System.

I further certify that on this 16th day of November, 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, Statutory Addendum and Joint Appendix, and further certify that I served, via UPS Ground Transportation, the required number of said Brief to the following:

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