UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S
REPLY REGARDING PROPOSED FINDINGS OF FACT

Respectfully submitted,

Thomasenia P. Duncan
(D.C. Bar No. 424222)
General Counsel

David Kolker
(D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Robert Bonham
(D.C. Bar No. 397859)
Senior Attorney

Steve Hajjar
Graham M. Wilson
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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GLOSSARY

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FEC Facts	=	FEC's Proposed Findings of Fact, Oct. 28, 2008 (Dkt. # 45)
FEC Resp. Mem.	=	FEC's Memorandum in Support of Response to Plaintiffs' Proposed Findings of Fact, Nov. 24, 2008 (Dkt. # 57-2)
FEC Resp. to SN Facts	=	FEC's Response to Plaintiffs' Proposed Findings of Fact, Nov. 21, 2008 (Dkt # 55)
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 08-248 (JR) REPLY REGARDING PROPOSED FINDINGS OF FACT

FEDERAL ELECTION COMMISSION'S
REPLY REGARDING PROPOSED FINDINGS OF FACT

Defendant Federal Election Commission ("Commission" or "FEC") hereby responds to plaintiffs' paragraph-by-paragraph response to the Commission's proposed findings of fact (Plaintiffs' Brief in Response to the FEC's Proposed Findings of Fact (Doc. No. 54) ("SN Resp. to FEC Facts")). The Commission in most cases only provides replies regarding facts to which plaintiffs provided responses and omits reference to a number of individual paragraphs to which plaintiffs had no response or which plaintiffs admitted.

I. The Parties

A. Defendant Federal Election Commission (FEC Facts ¶ 1).

Plaintiffs had no objection to FEC Facts ¶ 1.

B. Plaintiffs (FEC Facts ¶¶ 2-19).

Plaintiffs had no objection to FEC Facts ¶¶ 2-19.

II. SpeechNow Was Formed to Serve as a "Test Case" (FEC Facts ¶¶ 20-40).

FEC Response to Plaintiffs' General Objections:

Plaintiffs argue that all the facts in this section, including thirteen paragraphs which they admit "are true" (FEC Facts ¶¶ 21, 24-26, 28-29, 31-32, 35 and 37-40), are "pointless" and "entirely irrelevant," and therefore should not be included in the Court's findings (Plaintiffs' Brief at 41, 43.) However, this section includes facts summarizing the legislative and legal history of the challenged provisions (FEC Facts ¶¶ 21-23), describes steps David Keating took to create SpeechNow, such as recruiting both voting "members" and other potential contributors ("supporters"), including plaintiff Fred Young (FEC Facts ¶¶ 28-30, 34, 38-39), and recites that SpeechNow requested an advisory opinion from the Commission, but the Commission was unable to issue such an opinion because it lacked a quorum (FEC Facts ¶¶ 35, 37). These largely undisputed facts (*see infra*) clearly are relevant, and should be included in the Court's findings.[1]

This section also establishes that "[t]he idea to bring a new challenge to the statutory limits and other requirements at issue in this suit originated with plaintiff David Keating and/or counsel at the Center for Competitive Politics or the Institute for Justice" (FEC Facts ¶ 32), describes the political and financial connections between Mr. Keating, Fred Young, and those two public interest law firms (FEC Facts ¶¶ 24-27, 33), explains how those firms were involved in recruiting plaintiffs Fred Young and Brad Russo (FEC Facts ¶¶ 33, 38), and points out that the two public interest law firms, not plaintiffs, are paying the legal fees for this litigation (FEC Facts ¶ 40). In addition, this section establishes that when Mr. Keating created SpeechNow, it was already contemplated that

[1] SpeechNow's proposed facts contain a description of the advisory opinion request and the Commission's inability to render an opinion containing more detail than the Commission's (*see* SN Facts ¶¶ 47-52), but plaintiffs nevertheless object to the streamlined description of the relevant facts in the Commission's facts. SpeechNow's description includes additional, irrelevant details about the views of the Commission's General Counsel and individual Commissioners.

SpeechNow would pursue legal action to challenge the application of the Act's contribution limits and disclosure provisions (FEC Facts ¶¶ 31-34), that SpeechNow considered creating a radio advertisement to lend "credence" to the group's "initiative" (FEC Facts ¶ 36), and notes that, when potential large donor Fred Young was recruited to become a plaintiff, Mr. Young himself understood that this was to be a "test case" (FEC Facts ¶ 33). Again, these facts are clearly relevant to establish the test case nature of this litigation.[2]

Plaintiffs make various arguments about why they believe it is irrelevant that this is a "test case," but these arguments are either incorrect or miss the point. It is simply not true that the Commission is challenging plaintiffs' motives in bringing this action; those motives are irrelevant. While it is true that the Commission does not contest SpeechNow's standing under 2 U.S.C. § 437h, we have not argued that the test case facts are relevant to standing. Rather, the test case facts are important because they cast doubt on a number of plaintiffs' claims and confirm that the particular conduct (or lack thereof) of SpeechNow is not probative of whether there is a danger of corruption from allowing the kind of unlimited contributions it seeks. Despite SpeechNow's attempt to describe this action as a limited as-applied challenge, the ruling SpeechNow is seeking would have broad ramifications beyond its own very limited activity to date.

In addition, even though the Court has certified all of plaintiffs' proposed constitutional questions, implicitly rejecting the Commission's arguments that the claims by plaintiffs Russo and Burkhardt are not substantial, the facts relating specifically to plaintiffs Russo and Burkhardt nevertheless will be relevant to the *en banc* Court of Appeals as it determines whether they are harmed in any way by the challenged statutory provisions. This Court therefore should include findings about those plaintiffs in the factual record.

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[2] Plaintiffs' proposed facts acknowledge that when Mr. Keating created SpeechNow, he "recognized that it might be necessary to challenge the application of [the statutory] provisions to SpeechNow in court." SN Facts ¶ 46 (citation omitted).

FEC Response to Plaintiffs' Specific Objections:

20. To aid the Court, Paragraph 20 summarizes all of the evidence put forth in paragraphs 21-40 and should be adopted as it is supported by the more specific evidence presented below. While plaintiff David Keating may have provided additional reasons for creating SpeechNow, those reasons are not inconsistent with the reasons described by the Commission in this section.

22. The legal backdrop is relevant to plaintiffs' test case. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

23. The legal backdrop is relevant to plaintiffs' test case. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

27. Mr. Young testified that he "offered financial support" to the Center for Competitive Politics "when it first started" (Young Dep. at 39, FEC Exh. 19), but even if the law reform group formed sometime earlier than "the spring of 2007" (SN Resp. to FEC Facts ¶ 27), such a distinction would be immaterial.

30. As David Keating has explained, "'members' are really to be thought of as directors of regular incorporated groups." (FEC Facts ¶73.) Usage of the word "members" can inaccurately leave the impression that contributors to SpeechNow have a role in its governance or the authority to exercise control over its advertising. "Board members" thus more accurately describes the persons who govern SpeechNow.

31. Plaintiffs have not identified anything in this proposed fact that is inconsistent with either plaintiffs' proposed facts or the declaration of David Keating attached thereto.

32. Since nearly thirty years have passed since the statutory provisions were challenged in *Mott*, it is not incorrect to describe plaintiffs' lawsuit as a "new challenge." This is not the first challenge to the application of those provisions as applied to contributions made by individuals to political committees exclusively for independent expenditures, but it is the first in some time.

33. The description of David Keating's conversation with Fred Young is based upon Mr. Young's email quoted and cited in this paragraph. (Young Exh. 4 at YOU0007, FEC Exh. 24.) The email message explicitly references "McCain-Feingold," and the inference that his belief was mistaken is unavoidable. While plaintiffs are correct that David Keating did not confirm Fred Young's characterization of this litigation as a "test case," Mr. Keating objected that the words were "vague and undefined," but did not dispute that characterization in the deposition testimony cited by plaintiffs. (Keating Dep, at 120-121, FEC Exh. 11.)

Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

34. The Commission's description in the second sentence is not inconsistent with the testimony cited by plaintiffs, but the Commission would not object if the second sentence were replaced by the statement "Mr. Coupal testified that" followed by the portion of SpeechNow's response beginning with "David Keating mentioned that litigation was 'a possibility' when he asked Mr. Coupal to become a member of SpeechNow.org . . ." Plaintiffs' Brief at 45 ¶ 34.

36. The Commission would not object if the first word "SpeechNow" were replaced with the words "Edward Crane, a board member of SpeechNow."

III. SpeechNow's Advertisements Constitute the Speech of David Keating – Who Is Solely Responsible for Its Activities, and Not the Speech of Its Contributors (FEC Facts ¶¶ 41-77)

FEC Response to Plaintiffs' General Objections:

While plaintiffs concede that "many of the facts on which the FEC's claims are based in this section are true" — indeed, plaintiffs admit that half of the Commission's thirty-seven facts are true (SN Resp. to FEC Facts at 47 and 49 (admitting FEC Facts ¶¶ 42, 45, 46, 48-51, 56, 59, 65, 68-69, 71-72 and 76-77) — plaintiffs again argue that they are all irrelevant. The facts demonstrating that SpeechNow's advertisements are David Keating's speech are not a "legal conclusion" as plaintiffs contend. The Commission will of course use these facts to support the legal conclusion that the contribution limits are constitutional because they are a more marginal restriction on speech than expenditure limits, but they are indisputably *facts*. Plaintiffs inaccurately characterize Supreme Court precedent, glossing over the distinction between contributions and expenditures. (*See* FEC Reply Mem. Section II.)

FEC Response to Plaintiffs' Specific Objections:

41. To aid the Court, Paragraph 41 summarizes all of the evidence put forth in paragraphs 42-77 and should be adopted as it is supported by the more specific evidence presented below.

44. Plaintiffs contend that the second sentence is not true, but they do not contest the important point of the second sentence: Other than serving as plaintiffs in this litigation, the involvement of plaintiffs Young, Russo and Burkhardt is limited to making contributions. Plaintiffs' disagreement with the second sentence fails to acknowledge that the individual plaintiffs already are "legally able" to make donations up to the contribution limits to SpeechNow, particularly plaintiffs Brad Russo and Scott Burkhardt who only intend to make

$100 contributions. Their contributions are below the contribution limit and even below the $1,000 threshold for political committee status.

47. Plaintiffs add the additional fact that sometime in the future SpeechNow would like to hire a staff, but do not contest that there are no present plans for anyone other than David Keating to conduct these activities or oversee paid staff in the future. Plaintiffs' explanation of David Keating's testimony also overstates the extent to which resolution of this case has prevented SpeechNow from planning. To the contrary, when asked if he had a "timeline in mind if you are granted your relief," Mr. Keating, as plaintiffs note, refused to speculate:

> Again, it's all speculative about the future. * * * Well, I have some ideas, but it's hard to make a plan until I know whether we're able to pursue our plan in the way that we've got it or there are other things that I need to do. I don't know what's going to happen. I know what I'd like to do. And that may — but that changes depending what the circumstances are. I mean, who could have predicted all the events we've seen happen in the last year. Just in the last few days. You never know what's going to happen next. We've got a plan. We'd love to start tomorrow. If we can work that out, it would be great.

Keating Dep. at 149-150, FEC Exh. 11. When Commission counsel followed up by asking "Is there any — there's nothing planned that would depart from you being responsible for the day-to-day activities, nothing that far in advance," Mr. Keating stated "Nothing — no. Nothing right now. Obviously, I'd like to have enough of a budget so we can hire staff and set up an office and have people work full time on this sort of thing." Keating Dep. at 150, FEC Exh. 11.

52. Plaintiffs' failure to raise contributions of up to $5,000 from each individual during the pendency of the case was a product of its choice rather than any legal impediment. Plaintiffs did not challenge political committee reporting requirements in their preliminary injunction motion. In addition, plaintiffs' response does not refute that SpeechNow can accept contributions totaling less than $1,000 without SpeechNow becoming a political committee under the Act.

53. To aid the Court, Paragraph 53 summarizes all of the evidence put forth in paragraphs 54-77 and should be adopted as it is supported by the more specific evidence presented below.

54. Plaintiffs' response is not supported by the testimony plaintiffs cite. Mr. Keating testified that he made the decisions to pick the candidates and expects to similarly pick the candidates in the future. Keating Dep. at 162, FEC Exh. 11. While Mr. Keating testified that he hoped to someday hire a staff and/or get political consultants more involved in the "creative process," there is no testimony that others would be involved in selecting candidates or races and no testimony that anyone other than Mr. Keating will be involved in overseeing any paid staff in the future.

55. It is undisputed that the candidates considered for targeting by SpeechNow changed due to the passage of time. (*See, e.g.*, SNI0237, FEC Exh. 20 ("Given how long this has taken, I need to redirect the ad. Instead of Clinton, let's have one at Mary Landrieu (Lousiana)"); Keating Dep. at 150-155, FEC Exh. 11.) Contrary to plaintiffs' response, this fact does provide one of the reasons why SpeechNow decided to run advertisements against Congressman Burton and Senator Landrieu: because of the timing of the group's advisory opinion request.

57. David Keating did testify that Mary Landrieu's opponent was not "clear," (Keating Dep. at 158, FEC Exh. 11), which only further highlights the somewhat haphazard manner in which SpeechNow picked the candidates for its test case facts; it planned an ad purchase of over $100,000 without being aware of the views of one of the affected candidates on SpeechNow's sole issue.

60. Plaintiffs do not dispute that Fred Young was added to messages sent to SpeechNow's founders and five voting members (the so-called "insiders"). The important point

is that this was special treatment not granted all SpeechNow "supporters." While news reports and SpeechNow press releases sometimes were sent to both SpeechNow's insiders and supporters (or posted on SpeechNow's web site), other messages and enclosures were only sent to SpeechNow's "insiders" and Mr. Young. *See, e.g.*, FEC Exh. 20 at SNK0110-0112 (message text and accompanying blog post and article), SNK0173-0174 (two news articles), SNK0181 (message text), SNK0182 (same), SNK0183-0185 (same), SNK0186-187 (same), SNK0198-0202 (same), SNK0203-0205 (message text and article). Even when the same or similar information was sent to both groups, the information was sent in separate messages. Therefore, unlike Mr. Young, other "supporters" did not have the same opportunity to reply to the insiders.

61. Plaintiffs do not dispute that the inclusion of Fred Young on email messages sent to SpeechNow's voting members was a courtesy accorded to Mr. Young because he was a prospective large contributor to SpeechNow. *See also supra* ¶ 60.

62. The Commission incorporates its responses to the cited paragraphs.

63. Plaintiffs' response is contradicted by Fred Young's testimony quoted in this paragraph, including Mr. Young's own use of the phrase "completely passive."
Young Dep. at 50-51, FEC Exh. 19.

64. Other than objecting to the words "ostensibly desired" as "meaningless and argumentative," plaintiffs do not contest this proposed fact.

66. The parties agree that Mr. Young wants to contribute money to a group rather than pay a consultant himself to create and air advertisements. It is clear from the cited deposition page and the preceding page that he has not contemplated the latter course. (See Young Dep. at 92-93, FEC Exh. 19.)

67. To aid the Court, Paragraph 67 summarizes all of the evidence put forth in paragraphs 68-70 and should be adopted as it is supported by the more specific evidence presented below.

73. The Commission incorporates its reply to plaintiffs' response to FEC Facts ¶ 30. It is undisputed that SpeechNow has chosen to vest governing responsibility in five people in a manner akin to board directors, and its contributors have no role in governance.

74. The Commission incorporates its reply to plaintiffs' response to FEC Facts ¶¶ 30 & 73.

IV. Unlimited Contributions to an Association Devoted to Independent Candidate Expenditures Pose a Danger of Corruption or Its Appearance

A. Independent Expenditures Are Effective in Determining the Outcome of Elections and Have Gotten More Effective Over Time, Even Though They are Not Coordinated with a Campaign.

1. Reply to Plaintiffs' General Objections

In Section VI(A) of its Proposed Findings of Fact (¶¶ 78-131), the Commission sets forth evidence illustrating the effectiveness of independent expenditures at influencing elections. Tellingly, plaintiffs make several general objections to the *relevancy* of these proposed findings of fact, but not the overall *accuracy*. Indeed, plaintiffs state that they are "willing to stipulate that many independent expenditure ads are effective at influencing the views of voters, candidates, and the public in general, that many candidates appreciate them, and that the groups that produce and broadcast such ads think that they are effective at influencing the outcome of elections" apparently on the condition that the "FEC stipulates that independent expenditure ads are effective at conveying the views and messages of the individuals and groups that produce and broadcast them." (*See* SN Resp. to FEC Facts at 54). While the Commission has put forth substantial evidence showing that independent expenditures are effective at influencing the

outcome of elections, plaintiffs point to no evidence in support of their proposition. Furthermore, despite plaintiffs' claims to the contrary, the Commission's evidence is clearly relevant to the questions before the Court.

The plaintiffs seek to roll back contribution limits that have been in place for over thirty years. As we explain in more detail (FEC Reply Mem. Section II), the Supreme Court found that while in 1976 there did not "presently appear" to be enough danger of corruption to justify placing caps on independent expenditures, contribution limits were upheld. *Buckley*, 424 U.S. at 46-47. In making this determination the Supreme Court supposed that "unlike contributions, such independent expenditures *may well* provide little assistance to the candidate's campaign and indeed *may* prove counterproductive." *Id.* (emphases added). The facts proposed by the Commission in this section are relevant because they provide evidence that independent expenditures are effective in assisting campaigns; thus, there is no reason to strike down limits on *contributions* to groups that make independent expenditures. That independent expenditures are effective and, thus, valued by elected officials, is directly related to the likelihood that elected officials will trade political favors for independent expenditures made on their behalf and that independent expenditures can otherwise lead to corruption or the appearance thereof.

Plaintiffs also fail to cite any precedent or standards for "relevance." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. (*See generally* FEC Reply Mem. Section IV.) The facts that the Commission has proposed regarding the effectiveness of independent expenditures tend to make the existence of corruption or appearance of corruption arising from contributions to fund independent expenditures more probable.

Plaintiffs also attempt to minimize the Commission's proposed facts by apparently arguing that an independent expenditure can only be deemed effective if its beneficiary wins the relevant election. (SN Resp. to FEC Facts at 53). Plaintiffs tried to pursue this flawed claim at the deposition of Ross Johnson, Chairman of the California Fair Political Practices Commission ("FPPC"). Chairman Johnson quickly pointed out the fallacy of this argument in relation to a race in California where the beneficiary of a large amount of independent expenditures had lost an election by a narrow margin:

> But I can speculate, and if you were fair, you could speculate that she might have lost dramatically absent those independent expenditures. And we're certainly reasonable to speculate that had she won, she would have been very grateful for those independent expenditures.

(Johnson Dep. at 106:5-11, FEC Exh. 10). The result of an effective independent expenditure may be that a candidate loses by less than she would have, or wins by more than she would have, absent the independent expenditure. Chairman Johnson also pointed out that an independent expenditure could also have an undue influence on a candidate whether or not she wins her election, as losing candidates are often already serving as elected officials in a different capacity. (Johnson Dep. at 78:22-79:11.)[3] Finally, plaintiffs themselves assert that there are many different ways that an independent expenditure can be effective at influencing an election (*see* SN Resp. to FEC Facts ¶ 79); this applies regardless of whether or not the targeted candidate actually wins or loses.

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[3] Johnson explained as follows: "I'll also point out that influencing a — or having the possibility of unduly influencing a candidate or officeholder is not dependent on that candidate winning that particular election. I used the example earlier of the million dollars in an independent expenditure for Jack O'Connell. That has the potential for unduly influencing him even if he never runs for governor. He holds public office now. And in many of these instances, legislative candidates who are the beneficiaries of these huge independent expenditures are in office when those expenditures are made." *Id.*

2. Specific Replies to Plaintiffs' Responses to Proposed Findings of Facts in Section IV.A.

1. Independent Expenditures Can Have a Significant Impact on Elections Generally

78. Paragraph 78 consolidates all of the evidence put forth in Section IV for the aid of the Court, and should be entered as it is supported by the more specific evidence presented below.

79. In response to Paragraph 79, plaintiffs concede that "independent expenditure ads are designed to get specific candidates elected" and that "those who produce and broadcast those ads believe them to be effective in some sense." (SN Resp. to FEC Facts ¶ 79.) Plaintiffs argue that advertisers may in some circumstances have additional reasons for purchasing advertisements but do not meaningfully controvert the Commission's demonstration that independent ads are designed to help candidates win and are effective in that goal. Plaintiffs also repeat their irrelevant claim that there are examples of elections where a candidate benefits from a large amount of independent expenditures but does not win the election. As discussed above, independent expenditures can dramatically influence the outcome of an election or benefit a candidate even if that candidate does not actually win. (*See supra* Reply to Plaintiffs' General Objections to Section IV(A)).

Plaintiffs also make the bald assertion that the underlying conclusions of Professor Wilcox are "baseless" and "lack[] any support at all." The Commission's ¶ 79, however, is supported by statements in Wilcox's expert report which encapsulate the current state of scholarship on political spending and conclude that independent expenditures are generally designed to help candidates win elections, that they are effective in this goal, and that they influence voters and hurt or help the targeted candidate. Wilcox provides significant evidence to

justify his conclusions, citing several academic studies and numerous statements by political insiders throughout Section B(1) of his report. (*See* Wilcox Report at 13-14; FEC Reply Mem. Section III.)

80. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, plaintiffs provide no legitimate reason to question the findings by political scientists Richard Engstrom and Christopher Kenny or Professor Wilcox's discussion of their study. Wilcox makes a statement based on his expertise as a political scientist and cites an academic study to provide an example supporting his conclusion. Neither plaintiffs nor their expert cites to any contradictory academic studies or other evidence.

81. The Commission asserts and plaintiffs admit that "money spent outside the regular campaigns on 'voter education' can have an impact on election results." (FEC Facts ¶ 81; SN Resp. to FEC Facts ¶ 81). This is the heart of the Commission's proposed fact and it should accordingly be entered by the Court. The Commission does not assert in Paragraph 81 or elsewhere that the amount of independent expenditures are the only factor that determine the outcome of elections, and accordingly, the majority of plaintiffs' response to this paragraph is irrelevant and misplaced. (See Reply re 2nd Mot. at Section II.C.)

82. Based on his expertise as a political scientist, years studying campaign spending, interviews with consultants, candidates, and party officials, and knowledge of the relevant academic literature, Professor Wilcox offers a general conclusion about independent advertising and provides several examples to illustrate his point. Plaintiffs' apparent critique that Professor Wilcox did not offer even more examples or discuss every instance of independent spending is misplaced.

83. Plaintiffs contend that the testimony of Elaine Bloom is "without any support" for the claim that interest group advertising in her Congressional race was the deciding factor. Her declaration provides ample support. As she states in the cited paragraph, for example:

> We did extensive polling in the race, including daily tracking polls over the final few weeks. As I recall, this polling indicated that the ads run in the last few weeks by these interest groups and the NRCC (through the Florida Republican Party) caused my numbers to decline substantially, from well over 50% to essentially a dead heat at the end.

(Bloom Decl. ¶ 6, *McConnell*, FEC Exh. 36.) Her testimony is not hearsay for it is offered in support of legislative facts and it is a sworn statement of her personal knowledge. (*See* Reply re 1st Mot. Section IV.)

84. Plaintiffs do not contest the substance of former Senator Daschle's statement to Professor Wilcox and it should therefore be adopted by the Court. Furthermore, the Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) The view of Senate Daschle is exactly the kind of legislative fact that has been relied upon routinely by courts. Senator Daschle served in the U.S. House of Representatives from 1978 to 1986 and in the Senate from 1987 to 2005. He has decades of insider experience with federal elections and campaigns and provides the Court with evidence to conclude that independent expenditures can, in fact, provide huge benefits to candidates.

85. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) The fact that Professor Wilcox bases some of his expert conclusions on academic work he has conducted in the past in no way undermines the findings in his report. Rather, his past academic experience strengthens the legitimacy of his opinions. Moreover, the fact that Senator Feingold may have criticized *some* of the ads run on his behalf does not give reason to question the validity of Allen Raymond's

observations. As Professor Wilcox discusses elsewhere in his report, independent expenditures can be valuable and effective precisely because candidates can distance themselves from negative ads and create an air of "plausible deniability." (*See* FEC Facts ¶ 93.) Finally, plaintiffs critique Paragraph 85, as well as a number of other facts, on the basis that they represent what one political insider thinks or believes rather than what "is true." However, in this case, the beliefs of political insiders and candidates are exceedingly relevant. If these individuals believe that independent expenditures are effective and can help candidates win elections, then it is more likely that independent expenditures can pave the road to *quid pro quo* arrangements and other types of corruption. Furthermore, the appearance of corruption is directly based on what people believe to be the case. The Court should consider the views of political insiders and elected officials as evidence of the observations that they make in this legislative fact arena. In addition, even if this were an adjudicative fact case, the Court may consider the statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that Mr. Raymond holds this view is admissible under Federal Rule of Evidence 803(3) as reflecting his state of mind.

86. Plaintiffs admit that "independent expenditures are produced similarly to candidate ads" apparently conceding that Chairman Johnson is correct in asserting that independent ads are "just as professional and persuasive as those that come from candidates themselves." Accordingly, the Court should, at a minimum, adopt this portion of Paragraph 86. Plaintiffs also reference their response to Paragraph 81 in an attempt to question the general effectiveness of independent expenditures — and now apparently candidate advertising as well. Yet their previous argument only goes to show that many factors can determine the outcome of an election, which the Commission does not contest. This tangential discussion should not

distract from the point that independent expenditures are of a similar quality and effectiveness as candidate advertising.

87. Plaintiffs make a bald assertion that a general conclusion offered by Professor Wilcox is "baseless" and does not have "supporting evidence," apparently ignoring Professor Wilcox's actual report. Professor Wilcox's statement that independent expenditures and issue advocacy almost always help candidates appears at the beginning of Section B(2) of his report. (*See* Wilcox Rept. at 14, FEC Exh. 1.) Professor Wilcox then spends the rest of this section providing substantial evidence for his conclusion, including research interviews with political insiders, academic papers, and several examples from recent elections. (*Id.* at 14-16.) Plaintiffs' superficial objection to Paragraph 87 should be disregarded.

88. The Pennington Declaration supports the proposition that interest group broadcast advertising has a very significant effect on elections. (Pennington Decl. ¶ 16, *McConnell,* FEC Exh. 33.) The Court may consider the testimony in this fact in support of legislative facts. (*See* FEC Reply Mem. Section I.) In particular, the Court may consider this evidence — concerning Pennington's observation regarding interest group advertising and its effect on elections — to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) Plaintiffs' claim that the statement is unsupported is mistaken; Pennington's declaration describes in detail the personal knowledge upon which his statements are based, including his experience as a Republican general political consultant and experience in the 2000 Congressional race in Florida's Eighth District. Other courts have relied on this testimony as well. In *McConnell*, one judge relied on the Pennington declaration for this very point, concluding that interest group advertising effected elections. 251 F. Supp. 2d at 518, 550, 558, 581 (Kollar-Kotelly J.). The Supreme Court also relied upon portions of the district court opinion that were supported by Pennington's testimony

on numerous occasions. *See, e.g.*, 540 U.S. at 126 n.16, 127-28. Plaintiffs' suggestion that this evidence regarding pre-BCRA, candidate-focused issue advertising is irrelevant to consideration of advertising funded by independent expenditures is also unsupported. In *McConnell* the court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

90. Joe Lamson's declaration supports the proposition that advertising run by a group called Citizens for Reform was a "big factor" in the election's outcome. (Lamson Decl. ¶ 11, *McConnell*, FEC Exh. 34.) Plaintiffs contend that the "general views" of Joe Lamson are insufficient to establish the fact claimed, but the fact is supported by Mr. Lamson's recounting of polling data, not just Mr. Lamson's view. His testimony is not hearsay for it is offered in support of legislative facts and it is a sworn statement of his personal knowledge. (*See* Reply re 1st Mot. Section IV.)

91. Terri Beckett's testimony supports the fact that certain independent "ads affected the outcome of the Republican primary and run-off and the general elections" in the 2000 congressional race in the 8th District of Florida. (Beckett Decl. ¶ 12, *McConnell*, FEC Exh. 35.) Plaintiffs object to this evidence as hearsay, but her testimony is not hearsay for it is offered in support of legislative facts and it is a sworn statement of her personal knowledge. (*See* Reply re 1st Mot. Section IV.) Plaintiffs contend that Beckett's opinion is insufficient to establish the claim, but her factual statement is buttressed by a host of supporting detail in her declaration. (Beckett Decl. ¶ 12, *McConnell*, FEC Exh. 35.)

92. The Commission asserts and the plaintiffs admit that the amount of money groups spend on independent ads indicates that groups believe that they are effective. This is the core of Paragraph 92, and accordingly, the Court should adopt this proposed finding of fact. The remainder of plaintiffs' response to Paragraph 92 is legal argument, concerns a separate issue, and mischaracterizes the Commission's position. The Commission has never contended that ads are unnecessary for groups to exercise their First Amendment rights. The cited Commission facts instead show that large sums can be raised for independent expenditures within the contribution limits.[4]

93. The evidence presented in support of this proposed finding of fact is the expert opinion of Professor Wilcox, who relies on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and knowledge of the relevant academic literature. Furthermore, in support of parts of Paragraph 93, Professor Wilcox provides several examples in his report to illustrate his point, including the observations of Terry Dolan, director of the National Conservative Political Action Committee, and a scholarly article: "Magleby, David B., and J. Quin Monson, "The Consequences of Noncandidate Spending, and a Look to the Future" in *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections* (D.B. Magleby and J.Q. Monson, (2004). (*See* Wilcox Rept. at 15, FEC Exh. 1.) Plaintiffs' assertion that this proposed finding of fact is "baseless" is incorrect.

[4] The Commission inadvertently included a cross reference in its Proposed Finding of Fact to a numbering system not appearing in the final draft of its proposed facts. Instead of directing the Court to "section 4.3", the reference should state (*See infra* Sections IV(A)(2)-(3), ¶¶ 116-131).

94. Plaintiffs do not deny or contest any aspect of this proposed finding of fact and generally appear to admit its contents.

95. Plaintiffs admit half of this proposed finding of fact and those portions should be accepted by the Court. The other portions are not "baseless" as asserted by plaintiffs, but supported by the expert opinion of Professor Wilcox and his expertise as a political scientist, years studying campaign spending, interviews with knowledgeable insiders, and mastery of the relevant academic literature. Plaintiffs also claim that this proposed finding of fact is "irrelevant for the reasons stated at the beginning of this section" but do not discuss "issue advocacy" or the other particulars of this paragraph in the general objections to Section VI(A). (*See* SN Resp. to FEC Facts at 53-54). Furthermore, the proposed finding of fact clearly satisfies the relevance requirement; whether donors will channel their funds into independent spending as a way of circumventing campaign finance regulations is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; (FEC Reply Mem. Section IV). Plaintiffs provide no contrary evidence or legitimate conflict with this proposed finding of fact.

2. There Are Many Specific Examples of Independent Expenditures Having a Significant Impact on an Election

96. Paragraph 96 consolidates all of the evidence put forth in this subsection (FEC Facts ¶¶ 96-115) for the aid of the Court, and should be adopted as it is supported by the more specific evidence presented there.

Plaintiffs also quarrel with the Commission's use of the word "many" to refer to the number of examples presented. Plaintiffs contradict themselves, however, critiquing this same evidence earlier as being "vast overkill," "cumulative" and "redundant." (*See* SN Resp. to FEC Facts at 53). More generally, plaintiffs earlier admit the effectiveness of independent

expenditures, but then contend here there are too few examples to support this point. Contrary to SpeechNow's heated accusations, there is nothing untrusthworty about the Commission's proposed fact.

97. Rather than admit the assertion that the "Willie Horton" ad is widely believed to have had a great impact on the presidential election of 1988, plaintiffs assert that they "have to no reason to believe it is false." Regardless, as plaintiffs provide no evidence to the contrary or give any reason to question the reliability of the Commission's evidence, the proposed finding of fact should be adopted by the Court. Additionally, plaintiffs' rhetorical questions regarding the description of the ad, included by Professor Wilcox to give appropriate context, do not call into question the accuracy of this proposed finding of fact and are irrelevant.

98-105. Plaintiffs attempt to minimize the Commission's proposed findings of fact regarding the effectiveness, nature, and impact of the independent ads run by the Swift Boat Veterans and P.O.W.s for Truth ("Swift Boat Vets") in the 2004 presidential election by offering to admit a watered-down version of what the evidence actually shows. Nevertheless, this tacit admission illustrates that the FEC's proposed findings of fact ¶¶ 98-105 are accurate and should be adopted by the Court in their entirety in order to depict correctly one of the most effective independent expenditure campaigns in recent elections.

Plaintiffs' bald claims that the proposed findings of fact are "baseless," "hearsay," "cumulative," "redundant," and "irrelevant" are not justified, supported, or explained. The Court may consider the alleged hearsay in these facts as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) The support for these facts comes from one of the founders of the Swift Boat Vets, Professor Wilcox, other political scientists, renowned political pollsters, surveys conducted by a nonpartisan academic research center, and the chief strategist of the

Swift Boat Vets. (FEC Facts ¶¶ 98-105.) Furthermore, these facts clearly meet the standard for relevancy in that they make it more probable that independent expenditures are effective, which as discussed above (*see supra* Reply to Plaintiffs' General Objections to Section IV(A)), is of consequence to the Court's determination, because effectiveness is tied to issues of corruption, undue influence, and the appearance thereof. Finally, these facts are not unduly redundant or cumulative as they discuss different indicators that the ads were effective and different kinds of effects that the ads had. Accordingly, plaintiffs offer no legitimate reason not to adopt the Commission's proposed findings of fact ¶¶ 98-105.

106. Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about the effectiveness of the Swift Boat Vets' ads. Plaintiffs' flawed criticism that Professor Wilcox should have offered even more evidence does not undercut the proposed fact.

107. Plaintiffs admit the heart of Paragraph ¶ 107, and accordingly, the Court should adopt the proposed finding of fact in its entirety. Plaintiffs' only objections to any portion of this proposed finding of fact are hearsay, inapplicable given the nature of the legislative facts presented here, and relevance, which similarly does not hold water. This fact demonstrates that independent expenditures are effective, which as discussed above (*see supra* Reply to Plaintiffs' General Objections to Section IV(A)) is directly tied to issues of corruption, undue influence, and the appearance thereof, and plainly satisfies the requirements of Fed. R. Evid. 401.

108. The core of this proposed finding of fact is that "[i]ndependent ads run by the group Club for Growth, of which SpeechNow founder David Keating is executive director, have

also effectively influenced the outcome of candidate races." (FEC Facts ¶ 108). As plaintiffs admit that "the ads run by Club for Growth are effective," there is really nothing of substance in dispute here, and the Court should adopt the relevant portions of ¶ 108.

However, plaintiffs, both in response to this proposed fact and in the introductory section of their brief, try to impugn the Commission by focusing on an inadvertent misquotation. The Commission regrets that the quotation which appears in its ¶ 108 failed to include the phrase "of direct campaign contributions" from FEC Exh. 50, as noted by plaintiffs. However, there was no intent on the part of the Commission to misguide the Court or distort the comments of then-Club for Growth President, Stephen Moore. When the Commission was first drafting ¶ 108, it relied on a transcript of Mr. Moore's remarks at a panel discussion hosted by the Annenberg Public Policy Center in 2004, produced to it in an earlier Matter Under Review ("MUR"). (*See* Declaration of Peter G. Blumberg ("Blumberg Decl.") Exh. 1, FEC Exh. 164 (attaching "Tape Log - '527s in 2004: Did They Make a Difference? Republican Spenders Annenberg Public Policy Center/National Press Building, Washington DC, December 6, 2004" ("Tape Log")).) The full paragraph from which the Commission quoted is as follows (with sections quoted in the Commission's proposed finding of fact underlined):

> The Club for Growth also actually intervenes quite heavily in primary races. We think that's where our money can be best spent. In the presidential race and some of these battleground senate races, millions and millions and millions of dollars were being spent. So coming in with say an extra half million dollars in a race where 25-million dollars is being spent, [will produce] minimal impact. But in the primaries [where] the amount of money that's being spent tends to be a quarter or a fifth, in some cases a tenth of what's spent in the general election races [we can make a difference?]. Our most important impact in 2004 was that in virtually every primary that we intervened in, and these were Republican primaries and our idea is to try to elect the most free market, conservative person in every Republican primary around the country, we were able to have great success, party because if you put half a million dollars into a primary race, you could have a very dramatic impact in the outcome of that election.

Id. As a comparison illustrates, the Commission did not misquote Mr. Moore or twist the meaning of his words as they appeared in this source. Mr. Moore refers to "our money" and the phrase "direct campaign contributions" does not appear in the text. Furthermore, the implication of plaintiffs' objection is misplaced. Mr. Moore's comments during his appearance at the Annenberg Public Policy Center's panel discussion *are* generally about the Club for Growth's independent ads and their effectiveness. During the course of his comments, he shows videos of five different ads aired by the Club for Growth in the 2004 election and discusses their impact. (*See id;* Annenberg Public Policy Center, *Electing the President, 2004: The Insiders' View*, (Kathleen Hall Jamieson ed., 2005), FEC Exh. 50, at 198-201.) Theses ads are the focus of the panel discussion and of Mr. Moore's comments specifically. The allegation that the Commission twisted a speech that was really about direct contributions is false. Furthermore, Mr. Moore does discuss independent expenditures run by the Club for Growth at length during his appearance at the Annenberg Public Policy Center's panel discussion. (*See id;* Annenberg Public Policy Center, *Electing the President, 2004: The Insiders' View*, (Kathleen Hall Jamieson ed., 2005), FEC Exh. 50, at 198-201.) However, in an effort to produce the published version of Mr. Moore's comments, the Commission obtained what now appears as FEC Exh. 50 just before submitting its proposed findings of fact, and regrettably did not catch certain changes between the two transcripts. It is unclear why the phrase "direct campaign contributions" suddenly appeared in this later source, and the Commission retracts that portion of the quotation attributed to Mr. Moore from its proposed finding of fact ¶ 108.

109. As with the quotation attributed to Mr. Moore in ¶ 108, there is some confusion here as the Commission used the pre-publication transcript of Stephen Moore's comments to

draft its proposed finding of fact ¶ 109, but included the published version from the Annenberg Center as the cited source. The relevant sections from the two sources are as follows:

Tape Log at 18-19 (Blumberg Decl. Exh. 1, FEC Exh. 164):

> This was an ad that we ran in the first two weeks in January, the week or so before the Iowa caucus. After the Iowa primary was over, there was a political roundtable of reporters who were in Iowa. One of the questions they asked was what do you think was the most effective and memorable ad of the political season there. This was the ad that almost everyone remembered, which was remarkable because it ran probably one-tenth as many times as many of the ads that Kerry and Dean ran. When we ran this ad, Dean was up by 15 points in the primary. We made a bit of a miscalculation, we actually at this point thought that Howard Dean was going to be the Democratic candidate. We wanted to take the first punch at him. Inadvertently, I think this ad did wound him, but we ended up with Kerry as a candidate, which wasn't half bad either.

Annenberg Transcript at 199 (FEC Exh. 50):

> This was an ad that we ran in the first two weeks in January, the week or so before the Iowa caucus. After the Iowa primary was over, there was a political roundtable of reporters who were in Iowa. One of the questions they asked was what do you think was the most effective and memorable ad of the political season there. This was the ad that almost everyone remembered, which was remarkable because it ran probably one-tenth as many times as many of the ads that Kerry and Dean ran.

The comments may simply have been condensed for publication, but the reason for the discrepancy is unclear. The Commission regrets any confusion it might have caused plaintiffs or the Court. That being said, Mr. Moore is clearly referring to independent ads when he uses the word "effective" in this paragraph. The substance of the Commission's proposed finding of fact is accurate and should be adopted by the Court.

Plaintiffs also appear to claim that evidence regarding candidate-focused issue advertising is irrelevant to consideration of independent expenditures, but that assertion lacks merit. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads

eschewed the use of magic words." *Id.* In addition, the Commission found some of the advertising by 527 organizations in 2004 to in fact be express advocacy. (*See* FEC Facts ¶ 162.)

110. As with proposed finding of fact ¶ 109, there is some discrepancy regarding the quotation forwarded by the Commission, but the substance of this fact is accurate and should be adopted by the Court. Again, the Commission relied on the pre-publication transcript of Mr. Moore's comments when drafting ¶ 110, but cited to the Annenberg version. The relevant sections from both sources are as follows:

Tape Log at 18-19 (Blumberg Decl. Exh. 1, FEC Exh. 164):

> This was a highly effective ad in the Thune-Daschle Race. Daschle did everything he could to get the ad taken off the air. And in fact this issue was very, very damaging to Daschle. People were saying there's two Tom Daschles. There's the Daschle in Washington who's a liberal and there's the Daschle in South Dakota who portrays himself as a Prairie State populist.

Annenberg Transcript at 199 (FEC Exh. 50):

> This was a highly effective issue ad in South Dakota. Daschle did everything he could to get the ad taken off the air. People were saying there's two Tom Daschles. There's the Daschle in Washington who's a liberal and there's the Daschle in South Dakota who portrays himself as a Prairie State Populist.

Again, the Commission regrets any confusion it caused plaintiffs or the Court.

111. Plaintiffs' only opposition to this proposed fact is to claim that Mr. Keating's employment at the Club for Growth is irrelevant. However, this fact clearly satisfies the relevance standard in Fed. R. Evid 401. The fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Mr. Keating's past involvement with effective independent advertising makes it more probable that SpeechNow's independent expenditures will be effective, the relevancy of which is described above. (*See supra* Reply to Plaintiffs' General Objections to Section IV(A).) Mr. Keating's relationship with Club for Growth is also, among other things, related to SpeechNow's ability to

comply with the applicable disclosure requirements (*See* FEC Facts ¶¶ 451-452), and suggests that SpeechNow may offer donors access to candidates in the same manner as Club for Growth (*See* FEC Facts ¶¶ 282-286.)

112. Plaintiffs do not object to the proposed finding's broad first sentence, which states that "independent spending to support Senator Kerry's campaign was effective and helpful." Rather, they object only to the narrower second sentence concerning America Coming Together (ACT) and President Clinton. That sentence, based on a scholarly study and the opinion of one experienced politician (Clinton) about one organization, supports the general legislative fact that independent expenditures can be effective and helpful to a candidate.

113. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Additionally, plaintiffs state that the proposed finding of fact does not prove anything "other than the fact that the cited letters say what they say" and that there is "nothing surprising" in what is stated. Thus, plaintiffs essentially admit the heart of ¶ 113 which shows that "[c]ommunications form independent 527 groups often highlight the organizations' electoral effectiveness."

114. In their response to ¶ 114, plaintiffs again appear to claim that independent expenditures can only be deemed effective if the candidate benefiting from such expenditures wins the election at issue. As discussed above (*see supra* Reply to Plaintiffs' General Objections to Section IV(A)), this argument ignores the effects that independent expenditures can have on an election even if they do not guarantee victory. As Chairman Johnson explained during his deposition:

> And the statement that you've quoted several times from the beginning doesn't say that in every instance the candidate with the most independent expenditures won. We don't say that, but we do say that it did have an impact.

(*See* Johnson Dep. at 106:14-19, FEC Exh. 10.) Indeed, plaintiffs' explication of Susie Swatt's alleged "bias" amounts to nothing more than the claim that things other than independent expenditures affect elections, which the Commission does not contest.

Plaintiffs also ignore the actual data contained in the FPPC report and cited by the Commission. Plaintiffs claim that "in seven out of the twelve races contained *in this section* … the candidates that received the most independent spending on their behalf lost." SN Resp. to FEC Facts ¶ 114) (emphasis added). Plaintiffs cite to pages 23-40 of the FPPC report, but in these pages the report discusses *fifteen races,* and in *eight* of those races the candidates that received the most independent spending on their behalf won the election. Chairman Johnson pointed out these contents during his deposition when he was asked how independent expenditures influenced the elections in which the candidate benefiting from the most independent expenditures lost:

> … the answer is so simple that my little grandson could offer the answer to that. If the candidates who lost were the beneficiaries of those — and you could never go back. We can never know if they would have lost even more dramatically, absent the independent expenditures. But let's go — if you want to pick and choose, let's go to page 37 in the report, where we go through three races of where beyond any reasonable doubt the independent expenditure resulted in their victory. I mentioned this earlier, the last time you took up this whole line of questioning.

(*See* Johnson Dep. at 102:6-20, FEC Exh. 10.)

Finally, plaintiffs conclusorily label the FPPC Report as "worthless propaganda." While they may dispute the report's conclusions, plaintiffs make no allegations that the data or analysis in the report is anything but accurate, nor can they. When asked about the accuracy of the report during his deposition, Chairman Johnson explained as follows:

> Yes, I believe they absolutely are. And much of this material has been out in the public realm now since the 14th of February. Not a single candidate or a single contributor nor a single representative of the media has challenged any figures in this report. And I would venture to say, sir, that's because they cannot. They're accurate.

(*See* Johnson Dep. at 110:17-25, FEC Exh. 10.)

115. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, plaintiffs' conclusory denial does not undermine the accuracy of Chairman Johnson's sworn statement based on his long career as a state legislator and experiences at the FPPC. Plaintiffs assert that the relevant portion of Johnson's declaration is not based on his personal knowledge and experience, but they have no evidence for this claim.[5]

3. Independent Expenditures Have Been More Effective Over Time.

116. SpeechNow inaccurately asserts that a conclusion reached by Professor Wilcox lacks support. Professor Wilcox supports his conclusion that independent expenditures have become more effective over time with the facts set forth in his report that go back as far as 1996. (*See* Report at 16.)

117. SpeechNow inaccurately asserts that a conclusion reached by Professor Wilcox lacks support. Professor Wilcox supports his conclusion with the facts set forth in his report (*see* Report at 16), which demonstrate that independent expenditures have become more effective over time.

118. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) Plaintiffs' suggestion that evidence regarding pre-BCRA candidate-focused issue

[5] Plaintiffs' reference to Johnson's deposition consists solely of the following testimony which in no way supports their assertions: "I don't recall any other specific examples, although I — where the example mentioned names, no, I don't. That's what I recall off the top of my head." (Johnson Dep. 22:23-24:2, FEC Exh. 10.)

advertising is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

Plaintiffs correctly point out that the parenthetical showing Professor Wilcox's source cites to the incorrect book chapter by Professor J. Quin Monson on Professor Wilcox's reference list. The article cited by Professor Wilcox (J. Quin Monson, *Get On TeleVision vs. Get On The Van: GOTV and the Ground War in 2002*, in *The Last Hurrah? Soft Money and Issue Advocacy in the 2002 Congressional Elections* (David B. Magleby et. A. eds., 2004)) is the actual source of the information referred to in the FEC's Findings of Fact. This article explores the role that "ground-war efforts" — non-broadcast communications, such as telephone calls, direct mail, and person-to-person contacts — played during the 2002 election. The "ground war" discussed in this article includes not only fieldwork and get-out-the-vote operations, but "any nonbroadcast campaign activity regardless of its primary purpose," including attempts to both persuade and mobilize potential supporters. Professor Wilcox references case studies from this article that serve as examples of independent organizations researching different communication strategies and adapting successful campaign techniques used by other groups. Based on these organizations' own research and their observations of other interest groups during previous elections, these organizations have found more effective ways to reach potential supporters and to target their messages to those individuals. The research in this article that Professor Wilcox cites, thus, pertains to the issue of independent expenditures and supports the idea that there has been a recent increase in the quality of such expenditures.

119. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about the sophistication and professionalism of independent expenditure campaigns and provides specific examples that illustrate his point. (*See* FEC Facts at 118-19; Rept. at 16, FEC Exh. 1.) Plaintiffs' flawed criticism that Professor Wilcox should have offered even more examples does not undercut the proposed fact.

120. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but the fact shows the increasing sophistication of the campaign activities of 527 organizations. This is of consequence to the Court's determination in this action; the cited evidence tends to make it more probable that independent expenditures run by similar groups have become more effective over time. *See* Fed. R. Evid. 401; FEC Reply Mem. Section IV.

121. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusion is "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable claim about the increasing value of independent expenditures based on the historical facts set forth in his report (Rept. at 16; FEC Exh. 1), including an article by scholar David Magleby as well as specific facts evincing the sophistication of recent campaign activities undertaken by organizations like the NRA, the AFL-CIO, America Coming Together, and the National Federation of Independent Business. (*See also* FEC Facts ¶¶ 116-20.)

4. Technical Coordination with a Candidate Is Unnecessary for an Independent Expenditure to Effectively Supplement a Campaign

FEC's Response to Introductory Paragraph:

As the Commission explains at greater length (FEC Reply Mem. Section II), the Commission's proposed facts to which SpeechNow object, are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. These proposed facts provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures.

122. To aid the Court, ¶ 122 summarizes all of the evidence put forth in ¶¶ 122-31 and should be adopted as it is supported by the more specific evidence presented below. *See also* FEC's Response to Introductory Paragraph.

123. *See* FEC's Response to Introductory Paragraph (above).

124. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to show the appearance of corruption (Reply re 1st Mot. Section V). The support for the substance of this proposed fact is set forth, as acknowledged by Plaintiffs in their objection, in Professor Wilcox's Report (Rept. at 17-18; FEC Exh. 1).

125. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact. A factual statement at a Congressional hearing can be relevant to matters beyond a single piece of proposed legislation that may have been the focus of the hearing.

126. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact.

127. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this were an adjudicative fact, the Court may consider the evidence to show an appearance of corruption.

128. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this were an adjudicative fact, the Court may consider the evidence to show an appearance of corruption.

129. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this were an adjudicative fact, the Court may consider the evidence to show an appearance of corruption.

130. Plaintiffs offer no support for their bald assertion that the relevant portion of Chairman Johnson's declaration is "baseless." Chairman Johnson's sworn declaration is based on his personal knowledge. Plaintiffs' response also ends with a non-sequitur; the patterns of

synchronicity observed by Chairman Johnson do not necessarily violate any regulation of the Commission.

131. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusions are "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about how groups are much more professional, raise contributions in much higher sums, and have activities of a much greater magnitude than when the Court ruled in *Buckley*; plaintiffs have pointed to no countervailing evidence.

IV.B. Independent Expenditures Lead to Gratitude, Indebtedness, and Access, Pose a Danger of Quid Pro Quo Arrangements, and Create the Appearance of Corruption

1. Reply to Plaintiffs' General Objections

Additionally, plaintiffs generally object to this section based on an unfounded and overly general attack on the Commission's expert witness, Professor Wilcox. (*See* SN Resp. to FEC Facts at 69-70.) The majority of this attack relies on Jeffrey Milyo's rebuttal to Professor Wilcox's report, which the Commission addresses in detail in its Response to Plaintiffs' Proposed Findings of Fact in Rebuttal. (FEC Resp. to SN Rebuttal Facts ¶¶ 166-195). As demonstrated there, Milyo's rebuttal should give the Court no reason to question Professor Wilcox's expert conclusions. As the Commission additionally discusses in its Reply Related to Plaintiffs' Second Motion in Limine, plaintiffs' accusations that Wilcox's report is riddled with errors, that he does not rely on empirical evidence, and that he does not apply his discussion to legal activities are simply incorrect or inapposite. (*See* Reply re 2nd Mot. 5-23. *See also*

FEC Reply Mem. Section II (explaining that the Commission's evidence is consistent with Supreme Court precedent, not precluded by it); *id.* Section V (explaining that Fed. R. Evid. 404 is irrelevant here).)

1. Large Direct Contributions Raise the Danger of Quid Pro Quo Arrangements, Undue Influence, and the Appearance of Corruption.

132. Plaintiffs object to the relevance of the evidence, but corruption associated with direct contributions is of consequence to the Court's determination in this action because it is related to the potential for corruption associated with other ways of supporting candidates and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401. The extent to which large direct contributions to candidates can lead to corruption relates to whether other forms of support similarly valued by candidates also pose a risk of corruption. Additionally, Milyo's rebuttal declaration (at ¶¶ 22 -30) provides no reason for the Court to question the expert conclusion offered by Professor Wilcox. (*See* FEC Resp. to SN Rebuttal Facts ¶¶ 178-186.) A number of the referenced rebuttal facts do not directly concern this proposed finding of fact.

133. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Also, as stated above, Milyo's rebuttal declaration (at ¶¶ 22-30) provides no reason for the Court to question the generally accepted view in the field of political science expert explained by Professor Wilcox. (*See* FEC Resp. to SN Rebuttal Facts ¶¶ 178-186.) Additionally, plaintiffs' efforts to undermine Wilcox's expert conclusions merely constitute cherry-picking and twisting quotations from some of the academic sources he cites. For example, the fact that plaintiffs can find a sentence in the 2004 Warren article that says there are certain ways to ameliorate corruption does not mean that Wilcox is incorrect for relying on this article to say that "large contributions can also lead to increased

public perceptions of corruption" at the same time. (*See* FEC Facts ¶ 133.) Finally, the fact that there is congruence between the views of the Supreme Court, most political scientists, and Professor Wilcox on the manner in which they discuss corruption bolsters rather undercuts Professor Wilcox's report.

134. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Additionally, as discussed in detail in the Commission's Reply Arguments Related to Plaintiffs' Second Motion in Limine, Wilcox legitimately relies on Malbin's article for the propositions for which it is cited and plaintiffs overstate the differences in opinion between Wilcox and Malbin. (*See* Reply re 2nd Mot. at Section II(A).)

135. Professor Wilcox's expert conclusion is a statement of fact. Corruption is obviously discussed in both matters of law and fact.

136. Professor Wilcox is permitted to summarize the literature following his review of the pertinent parts. Plaintiffs object to the relevance of the evidence, but the fact that unlimited contributions to organizations that make independent expenditures is manifestly of consequence to the Court's determination in this action and the agreement in the political science field tends to make the existence of that fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

2. Donors Are Also Willing to Make Large Indirect Contributions to Secure Access and Influence in Policymaking.

137. While they add extraneous allegations as a distraction, plaintiffs admit the factual assertions in this paragraph and it should, therefore, be adopted by the Court. Plaintiffs inaccurately characterize the evidence cited, summarizing donor motives as if they all give for only one motive.

138. Plaintiffs baldly assert that Wilcox's expert conclusions that appear in this proposed finding of fact do not have any support. Conversely, Professor Wilcox bases the statements in his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox here offers expert opinions about the nature and activities of individuals who seek to gain access and influence through their political donations and cites to an academic study illustrating his point. (Wilcox Rept. at 6, FEC Exh. 1.) Furthermore, while plaintiffs claim that Wilcox's previous scholarship undermines the statements he makes here, that is simply not the case, as discussed in the Commission's Response to Plaintiffs' Proposed Findings of Fact in Rebuttal. (*See* FEC Resp. to SN Rebuttal Facts ¶ 221.)

139. Plaintiffs' objections are meritless for the reasons discussed in ¶ 138, *supra*. It is not "a tautology" for Wilcox to elaborate on the nature of "investor" donors based on his expertise. Plaintiffs' formulation elides the important point that donors can gain access by making contributions to entities other than the candidate's campaign committee. Additionally, the nature of political donors and their reasons for making political contributions are relevant as they speak to the potential for corruption arising out of contributions to groups devoted to expressly advocating for the election or defeat of political candidates through independent expenditures, and therefore, plainly satisfy the requirements of Fed. R. Evid. 401.

3. The History of Soft Money Contributions to Party Soft Money Committees Illustrates that Donors are Willing to Invest Their Contributions Indirectly and Officeholders Seek Such Contributions.

Response to Plaintiffs' General Objections:

Plaintiffs' general objection to this section of the Commission's proposed findings of fact boils down to an issue of relevance. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. The Commission's proposed findings of fact ¶¶ 140-149 easily satisfy this requirement. The history of donors contributing to political parties, as well as to 527 and 501(c) groups, is of consequence to the Court's determination because it suggests that these donors are willing to make contributions to a variety of entities as a way to avoid contribution limits and to win the favor of policy makers. Contributing to a group like SpeechNow is another way that such donors could attempt to curry favor with officeholders. While plaintiffs selectively quote to the decision in *McConnell*, the Supreme Court made it clear that many of the dangers concerning unlimited contributions to parties apply to groups that make independent non-coordinated expenditures as well. (*McConnell*, 540 U.S. at 152 & n.148; *see also* FEC Reply Mem. Section II.) While the political parties do hold a "special relationship" with officeholders and the lack of solicitations makes the "reward" of giving somewhat "less direct," as explained in *McConnell* and the cited book chapter, the history of soft money contributions to parties is relevant because donors can

circumvent contribution limits in a manner similar to the former soft money contributions by funding independent expenditures.[6]

140. Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a conclusion about the well documented history of soft money contributions and cites numerous examples and citations throughout this section of his report to illustrate and support his statements. (*See* Wilcox Rept. at 6-8, FEC Exh. 1.)

141. As discussed in the preceding paragraph, Professor Wilcox had ample expertise and cites adequate sources to make uncontroversial statements about the history of soft money contributions. Furthermore, the history of soft money giving is of consequence to the Court's determination in this action that other forms of indirect support of candidates raise some of the same circumvention and corruption concerns, and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401.

142. The plaintiffs admit the factual assertions in this paragraph and the history of large soft money contributions is generally relevant as discussed in response to plaintiffs' general objections above.

143-49. Plaintiffs' responses to the Commission's proposed findings of fact ¶¶ 143-149 repeat a string of conclusory objections concerning hearsay, relevance, and whether Professor Wilcox's conclusions are "baseless." As discussed above in response to plaintiffs' general objections to this section, the history of contributions to party soft money committees is of

[6] The Commission does not dispute that the President of a political party typically holds sway over the Democratic National Committee or Republican National Committee, respectively, but technically the committees are headed by leaders chosen by the committees.

consequence to the Court's determination in this action and the cited evidence tends to make the existence of those relevant facts more probable. Fed. R. Evid. 401. Furthermore, the Court may consider the alleged hearsay in these facts as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the alleged hearsay to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) Finally, Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a conclusion about the well-documented history of soft money contributions and cites numerous examples and citations throughout this section of his report to illustrate and support his statements. (*See* Wilcox Rept. at 6-8, FEC Exh. 1.) Plaintiffs suggest that Professor Wilcox should have added more citations but they cite no countervailing evidence.

4. Donors Seeking Access and Influence Give to Non-Party Organizations As Well.

150-54. Plaintiffs' responses to the Commission's proposed findings of fact ¶¶ 150-157 repeat objections based on hearsay and "character evidence." The Court may consider the alleged hearsay in these facts as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to show the appearance of corruption. (*See* Reply re 1st Mot. Section IV.A.) Additionally, as argued above, plaintiffs' arguments regarding relevance and "character evidence" are without merit. (*See supra* Reply to Plaintiffs' General Objections to Section IV(B).) Courts frequently rely on individual incidents of corruption or the venal motives of specific contributors and officials to uphold prophylactic laws aimed at preventing corruption and the appearance thereof. Here, examples of donors seeking access via

unlimited contributions to non-party organizations are relevant to the risk of corruption that would arise from allowing SpeechNow to accept unlimited contributions.

155. In addition to the reasons stated regarding ¶¶ 150-54 above, the Court should adopt the proposed fact because plaintiffs admit the content of this proposed fact.

156. For the reasons stated above regarding ¶¶ 150-54, plaintiffs' objections are without merit. Additionally, plaintiffs' contention that the expert conclusions of Professor Wilcox are baseless is inaccurate. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a conclusion about independent expenditures and groups that serve as a vehicle for indirect contributions. (*See* Wilcox Rept. at 6-8, FEC Exh. 1.)

157. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they can be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V). SpeechNow objects to the Commission's proposed fact by offering additional evidence, but its supplements do not controvert the substance of the proposed fact. Indeed, "[p]laintiffs do not dispute the statistics and dollar amounts cited." Plaintiffs also object to the relevance of the evidence, but the fact that donors seeking access and influence give to non-party organizations is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401; (FEC Reply Mem. Section IV).

158. SpeechNow objects to the Commission's proposed fact with additional argument that does not controvert the substance of the proposed fact. Indeed, SpeechNow admits that "the data show that some donors give more to 527s than they can under contribution limits and it is likely that many did so to influence election outcomes."

159. Notably, SpeechNow admits that it "do[es] not dispute the accuracy of the statistics cited in this paragraph." Nonetheless, SpeechNow objects to the Commission's proposed fact with additional evidence and arguments, but its supplements do not controvert the substance of the proposed fact. (*See* Reply re 2nd Mot. Section III.A.)

161. Plaintiffs do not dispute the dollar amounts and statistics in this proposed finding based on scholars' analysis included in FEC Exh. 58. The quotations from that analysis support the legislative fact that in the 2006 midterm elections some individuals gave $100,000 or more to section 527 organizations. The quotation from Professor Wilcox's report draws on that same source to support the legislative fact that $100,000+ donors also contributed to federal political committees. Contrary to plaintiffs' objection, Professor Wilcox's statement makes no claim about the intentions of those donors; rather, it supports the legislative fact that the contributions to section 527 organizations supplemented the donors' "hard money" contributions.

162. Plaintiffs admit the substance of ¶ 162, and accordingly, the Court should enter the proposed finding of fact in its entirety.

5. Contributions to Groups that Make Independent Expenditures Can Lead to Corruption in the Same Way as Direct and Other Kinds of Indirect Contributions.

163-66. As the Commission explains (FEC Reply Mem. Section II), the Commission's proposed facts are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding

plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. These proposed facts provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures. It is unclear what plaintiffs mean when they claim that several of Professor Wilcox's statements are legally incorrect as he is offering assertions of fact.

Plaintiffs additionally object to these proposed findings of fact because Wilcox's expert observations are allegedly "baseless." Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers conclusions about the nature of large contributions to groups that make independent expenditures and proceeds to cite numerous sources to illustrate his point. (*See* Wilcox Rept. at 6-8, FEC Exh. 1; FEC Reply Mem. Section III.) Plaintiffs fail to offer any contradictory evidence.

167. The Court may consider the testimony of Michael Malbin in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to show the appearance of corruption. (*See* Reply re 1st Mot. Section IV.A.)

While Malbin's sworn testimony quoted here was at a hearing regarding a bill that was not enacted, that does not suggest that his statements of fact are irrelevant. Finally, plaintiffs repeat a quotation from Malbin discussed above at ¶ 134, but that quotation does not contravene the facts that Malbin's testimony establishes. Indeed, Malbin's testimony confirms that plaintiffs

overstate the differences in opinion between Wilcox and Malbin, as the Commission explains, (Reply re 2nd Mot. at Section II(A)).

6. Unregulated Contributions to Groups that Make Independent Expenditures in California Illustrate the Potential for Corruption and Circumvention.

i. Response to Plaintiffs General Objections

There is no justification for striking the declaration of Chairman Johnson. (*See* Reply re 1st Mot. at Section II.) Accordingly, it is appropriate for the Court to enter the Commission's proposed finding of facts in this section (¶¶ 168-178) which rely on his testimony.

In addition, none of the proposed facts in this section contradict previous Supreme Court decisions. As the Commission explains (FEC Reply Mem. Section II), the Commission's proposed facts are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. The proposed facts in this section provide additional evidence about the potential for circumvention of contribution limits and other forms of corruption from groups like SpeechNow. SpeechNow's misplaced "constitutional" objection here is based on its repeated conflation of expenditures and contributions. This section of the Commission's proposed findings of facts demonstrates that unlimited *contributions* create the potential for corruption and circumvention.

Furthermore, as discussed in the Commission's Response to Plaintiffs' Proposed Findings of Fact, neither the FPPC Report nor Chairman Johnson's declaration supports the proposition that contribution limits necessarily decrease or unconstitutionally limit the amount of funds that independent groups will have to direct towards independent expenditures. (*See, e.g.,* FEC Resp. to SN Facts ¶ 113; *see also* FEC Facts Section V (Robust Fundraising Has Occurred

within Federal Contribution Limits and Large Sums Can Be Raised For Independent Expenditures Through the Aggregation of Money from A Number of Donors).) As Chairman Johnson explained in his deposition, independent expenditure groups can raise the same amount of money by seeking smaller contributions from more people. *Id.*

ii. General Response to the Plaintiffs' Objections Regarding the FPPC Report.

Plaintiffs' chief objection to the report prepared by the California Fair Political Practices Commission appears to be that the data it contains are too adverse to their case to be true. Plaintiffs first cite to the numbers illustrating the astronomical increase in independent expenditures since California most recently enacted direct contribution limits and then state that the amounts "simply cannot be true." (SN Resp. to FEC Facts at p. 83). Despite conducting a Rule 30(b)(6) deposition of the FPPC, however, the plaintiffs fail to present any evidence that the FPPC report is, in fact, inaccurate. This is not surprising. As explained by Chairman Johnson at his deposition, the numbers in the report have been in the "public realm now since the 14th of February [and] [n]ot a single candidate or a single contributor nor a single representative of the media has challenged any figures in this report. And I would venture to say, sir, that's because they cannot. They're accurate." (*See* Johnson Dep. 110:17-25, FEC Exh. 10.) Accordingly, the only attack plaintiffs are able to muster is putting together tidbits of information to show that the increase in independent expenditures in California is astounding or attacking the report's form rather than its substance (*e.g.*, some data are listed in bullet-points rather than tables, it has a picture of a gorilla on the cover). (SN Resp. to FEC Facts at pp. 83-84). Plaintiffs also attempt to impugn the credibility of Chairman Johnson by stating that he benefited from an independent expenditure but testified "that *he* was not unduly influenced." *Id.* at 84.

Significantly, however, Chairman Johnson testified, "It was perfectly fair for you or anybody else to wonder about that, and that's the point." (*See* Johnson Dep. at 89:10-12, FEC Exh. 10.)

Ultimately, as plaintiffs state, "the report shows only the amounts that some individuals and groups donated to independent expenditure committees, the amounts that some of them spent in certain elections."[7] Those facts are precisely what the Commission cites the FPPC Report for in the following paragraphs. Contributions to groups that make independent expenditures skyrocketed in California when limits were placed on direct contributions, so independent spending now trumps candidate spending in some elections. (*See* FEC Facts ¶¶ 168-178.)

Finally, labeling evidence "propaganda" does not make it false. There is no reason to question the legitimacy of the report prepared by the FPPC, a bi-partisan state regulatory agency whose mission, in the words of the Chairman, is "the fair and impartial interpretation and enforcement of the Political Reform Act in California." (*See* Johnson Dep. at 112:6-8, FEC Exh. 10). Accordingly, the Court should adopt the Commission's proposed findings of fact ¶¶ 168-78, detailing the experiences of a state where unlimited contributions to independent expenditure groups are legal.

168-78. The Court should enter these proposed findings of fact for the reasons stated in response to the plaintiffs' general objections above. The FPPC Report is not hearsay because (1) it is offered in support of legislative facts (*see* FEC Reply Mem. Section I); (2) even if offered for an adjudicative fact, the report would be admissible to show the appearance of

[7] Plaintiffs also claim here that the report shows "candidates who were supported by large amounts of independent expenditures generally lose"; however, as discussed, *supra*, regarding Paragraph 114, this claim is inaccurate and Chairman Johnson already pointed out plaintiffs' misunderstanding.

corruption (*see* Reply re 1st Mot. Section IV.A); and (3) it is a public report, Fed. R. Evid. 803(3).

179. Plaintiffs admit that "Mr. Coupal stated that city workers engage in independent expenditures so they can spend money in excess of contribution limits." (SN Resp. to FEC Facts ¶ 179). This is the core of the Commission's proposed finding of fact and it should therefore be adopted by the Court. As to the auxiliary issues that the plaintiffs raise in their response, the quotation speaks for itself and Mr. Coupal's litigation spin on his outside-of-litigation writing should not prevent the Court from adopting this statement of SpeechNow's Vice President as a finding of fact. The fact that independent expenditures were not the focus of the entire article is inapposite.

180. While the plaintiffs argue over semantics and try to recharacterize Mr. Coupal's statements, they speak for themselves and there is no dispute about their actual content. As neither he nor the plaintiffs claim that he did not make the statements quoted here or otherwise retract them, the Court should adopt this proposed finding of fact.

7. People Have Established Independent Groups Devoted to Electing or Defeating a Single Candidate.

181. Plaintiffs' conclusory objection that Professor Wilcox's expert observations have "no support" is without merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox simply observes that some independent groups are formed to support or attack a single candidate, an obvious proposition given that some such groups actually use the name of the candidate in their titles. Additionally, while plaintiffs claim that this fact is "irrelevant," the fact that there are such groups is of consequence to the Court's determination in this action because it, *inter alia*, makes it easier for investor donors to support the candidate of their choice while circumventing

direct contribution limits, and the cited evidence tends to make the existence of that fact more probable. (*See* Fed. R. Evid. 401; FEC Reply Mem. Section IV.)

182. This proposed finding of fact satisfies the "quite minimal" Rule 401 relevancy threshold for the same reasons as ¶ 181. (*See* Fed. R. Evid. 401; FEC Reply Mem. Section IV.) Additionally, the proposed finding of fact is supported by Chairman Johnson's declaration, which in turn, is based on personal knowledge derived from 26 years serving Orange County in the California State Legislature, and now as the Chairman of the California Fair Political Practices Commission.

183. This proposed finding of fact should be entered for the same reasons as ¶¶ 321 and 322, and is included in this section for the sake of organizational clarity for the Court.

184. Provisions of the conciliation agreements signed by several of the 527s establish that their major purpose was to influence the 2004 presidential election. *See, e.g.*, Conciliation Agreement with Progress for America Voter Fund, MUR 5487, Feb. 2007, ¶ 29 (Simpson PI Decl., Doc. 2-9 Exh. 4) ("The Commission concludes that PFA-VF's statements and activities demonstrate that its major purpose was to defeat John Kerry and elect George Bush."); Conciliation Agreement with The Media Fund, MUR 5440, Oct. 07, ¶ 34 (Simpson PI Decl., Doc. 2-9 Exh. 5) ("The Commission concludes that TMF's statements and activities demonstrate that its major purpose was to elect John Kerry and defeat George Bush."); Conciliation Agreement with Swift Boat Veterans and POWs for Truth, MUR 5511, Dec. 2006, ¶ 31 (Simpson PI Decl., Doc. 2-9 Exh. 6) ("The Commission concludes that SwiftVets' statements and activities demonstrate that its major purpose was to defeat John Kerry.").

IV.C. Candidates are Usually Aware of the Identity of Individuals Making Large Contributions to Fund Independent Expenditures.

As the Commission explains at greater length (FEC Reply Mem. Section II), the Commission's proposed facts to which SpeechNow object, are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. These proposed facts provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures.

185. Plaintiffs' objection that a statement from Professor Wilcox's deposition testimony is "baseless" has no merit. (*See* FEC Reply Mem. Section III). Professor Wilcox taught political science at Georgetown for over twenty years; spent years studying campaign spending; spoke with and interviewed consultants, candidates, and party officials; and spent years immersed in the relevant academic literature. From that foundation, Professor Wilcox observes that none of the pollsters, campaign managers, campaign consultants, or consultants that he has spoken with has ever expressed indifference about an independent expenditure campaign run in that person's district. SpeechNow has presented no evidence to controvert Professor' Wilcox's observation.

186. Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox generally concludes that candidates know, or are able to discover who is funding

independent spending campaigns. In his report, he supports his conclusion with at least five declarations from the *McConnell* case, 2 newspaper accounts, and with his experiences as an FEC employee in the early 1980s. (*See* Wilcox Rept. at 18-20, FEC Exh. 1.)

187. SpeechNow argues that Mr. Rozen's testimony should be disregarded because he was not named as an expert witness, but under Federal Rule of Evidence 701 what matters is whether the witness gives expert *testimony*, not whether he is an expert. As we have explained (Reply re 1st Mot. Section II.A.), Mr. Rozen has years of relevant experience, and the opinions he provides to support this fact are based on that personal experience and do not require application of the kind of technical expertise that would make his observations expert testimony. Plaintiffs suggest that Mr. Rozen's opinion is insufficient to establish that his claim is true, but point to no contrary evidence in the record. The view of a knowledgeable lobbyist and former Congressional staff person helps establish that, indeed, candidates "would be very aware of who the large contributors to independent candidate groups are."

188. Plaintiff's suggest that Mr. Johnson's opinion is entirely argument and therefore insufficient to establish that his claim is true, but point to no contrary evidence in the record. The view of a knowledgeable state official and former legislator helps establish that, indeed, candidates and other political insiders are generally aware of independent expenditures on their behalf and who is funding them. Mr. Johnson makes no legal argument.

190. SpeechNow inaccurately asserts that a conclusion reached by Professor Wilcox in this paragraph lacks support. Professor Wilcox's conclusion is supported by the historical facts contained in his report (*see* Rept. at 18), including the facts set forth in two newspaper accounts and the views of a former chairman of the National Republican Congressional Committee. (*See also* FEC Facts ¶¶ 191-95.)

191. The Court may consider the newspaper articles in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions, (FEC Reply Mem. Section VI), and to show the appearance of corruption, (Reply re 1st Mot. Section IV.A).

191. The Court may consider the newspaper articles in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to show the appearance of corruption (Reply re 1st Mot. Section IV.A).

192. The Court may consider the newspaper articles in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to show the appearance of corruption (Reply re 1st Mot. Section IV.A).

193. SpeechNow inaccurately asserts that Professor Wilcox's conclusions lack support. He supports his conclusions with, *inter alia*, the declarations from the *McConnell* case cited in his report. (*See* Wilcox Rept. at 19-20, FEC Exh. 1.)

194. The FPPC Report is not hearsay because it is offered in support of legislative facts (*see* FEC Reply Mem. Section I), and because it is a public report, Fed. R. Evid. 803(3). Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to show the appearance of corruption (Reply re 1st Mot. Section IV.A). Finally,

there is no reason to question the reliability of the FPPC Report; *see supra*, regarding ¶ 114 and in response to plaintiffs' general objections to Section IV(B)(6).

195. This paragraph explains that access-seeking donors, after they have contributed to candidates directly, have continued to be solicited by a network of activists, consultants, and lobbyists, who have directed the donors to the most effective independent groups. Plaintiffs claim, without citation to evidence, that the described activists, consultants, and lobbyists "cover[] the vast majority of people employed in Washington, D.C. and every state capital in the Union," and that this paragraph only stands for the proposition that donors are solicited by groups that want them to contribute to those groups. Plaintiffs further object on the grounds of relevance and hearsay. Since this paragraph is not controverted by evidence and plaintiffs' argument does not controvert the substance of the proposed fact, it should be adopted by the Court. Plaintiffs object to the relevance of the evidence, but the fact that access-seeking donors have continued to be solicited and directed towards the committees that will best allow them to achieve their access-seeking goals is of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

Furthermore, the expert opinion testimony of an expert witness is not hearsay. The Court may consider the out of court statements from Robert Hickmott in this fact as they are offered in support of legislative facts. (*See* FEC Reply Section I.) Even if Mr. Hickmott's declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section VI).

196. Plaintiffs' objection that Professor Wilcox's expert conclusion is "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox generally concludes (Rept. at 13; FEC Exh. 1) that if unlimited contributions are permitted to groups that make independent expenditures, access-seeking donors will be directed to make large contributions to the most effective of these groups. In his report, he supports (*see* Rept. 6-13, FEC Exh. 1) his conclusion with myriad examples of access-seeking donors making contributions to parties, issue advocacy campaigns, and independent expenditure campaigns, and with a quote from the declaration of Robert Hickmott, a declaration quoted by the Supreme Court in *McConnell*, 540 U.S. at 149. Hickmott noted that hard money contributors are often asked to help fund independent expenditure campaigns to help the same candidate.

197. To aid the Court, Paragraph 197 summarizes all of the evidence put forth in ¶¶ 198-203 and should be adopted as it is supported by the more specific evidence presented below, which demonstrates that there is indeed a dense web of relations between independent expenditure groups and candidates and parties. The Court may consider the out of court statements that support this fact as such statements are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V).

198-200. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these

statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V). Plaintiffs object to the relevance of the evidence, but facts showing links between candidates and contributors to independent spending groups are of consequence to the Court's determination in this action and the cited evidence tends to make the existence of those facts more probable. Fed. R. Evid. 401; (FEC Reply Mem. Section IV). SpeechNow suggests that the Commission's proposed fact conflicts with a conciliation agreement entered into between the Commission and Swift Boat Veterans for Truth, which did not include a finding that Swift Boat Vets had coordinated with the candidate within the meaning of the FECA and the Commission's regulations. But as the Commission explains (FEC Reply Mem. Section II), the Commission's proposed fact is entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. This proposed fact provides additional evidence about the potential for corruption from groups like SpeechNow, even if those groups meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures, nor conflict with the conciliation agreement.

201. Plaintiffs do not contest the legislative facts (*see* FEC Reply Mem. Section I) set out in this proposed finding. Plaintiffs instead object to the "innuendo" these facts supposedly insinuate, but the facts do not imply that the violations were because of the groups' strong ties to the political parties.

202. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.)

IV.D. Candidates Feel Indebted, Grateful, or Are Inappropriately Disposed to Favor Individuals Who Paid for Such Ads or Independent Expenditures

FEC's Response to General Objections

The statements in Robert Rozen's declaration may be considered by the Court in this case because they are offered to prove legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to this testimony drawn from his sworn declaration filed in the *McConnell* case based on hearsay, but the prior declaration has not been offered for the purpose of establishing any adjudicative facts. Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on his personal knowledge. (Reply re 1st Mot. Section IV.B.) SpeechNow also claims that Mr. Rozen's testimony should be disregarded because he was not named as an expert witness, but under Federal Rule of Evidence 701 what matters is whether the witness gives expert *testimony*, not whether he is an expert. Mr. Rozen has years of relevant experience, and the opinions he provides to support this fact are based on that personal experience and do not require application of the kind of technical expertise that would make his observations expert testimony. (*Id.* II.A.) Plaintiffs also contend that Mr. Rozen's opinion is insufficient to establish that his claim is true, but point to no contrary evidence in the record. The view of a knowledgeable insider such as Mr. Rozen helps establish that, indeed, large contributions that benefit candidates created a sense of obligation to the donors.

SpeechNow's arguments regarding the "principles of independence and coordination" are also unavailing and do not dispute the substance of the Commission's proposed facts. As the Commission explains (FEC Reply Mem. Section II), the Commisson's proposed facts are

entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. These proposed facts in ¶¶ 203-20 provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures, as SpeechNow suggests.

203. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusion lacks evidentiary support has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable claim that candidates will be grateful for independent expenditures that help them win election. This claim is based on multiple declarations (Wilcox Rept. at 18-20, FEC Exh. 1) that support the proposition that candidates are indeed grateful for independent expenditures that help them win. Gratitude that might be engendered by unlimited contributions to fund independent expenditures is, in fact, relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.)

204. As explained in the FEC's Response to the General Objections above, Robert Rozen's declaration is admissible. It discusses the gratitude that might be engendered by unlimited contributions to fund independent expenditures, which is indeed relevant to this case: Congress has chosen to regulate contributions to organizations that make independent

expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.)

Wilcox concludes (Wilcox Rept. at 4, FEC Exh. 1 (emphasis added)) that "unlimited contributions to groups that air independent expenditures would *frequently lead* to preferential access for donors . . . ." SpeechNow suggests that this conflicts with Professor Wilcox's conclusion in previous work quoted by SpeechNow. But this conclusion hardly conflicts with the notion that the potential reward to a candidate is less direct than situations where the candidate specifically asks for the contribution. Whether the candidate has specifically asked for a contribution or not, there is a danger of corruption and its appearance.

205. As explained in the FEC's Response to the General Objections above, Robert Rozen's declaration is admissible. He testifies regarding the gratitude that might be engendered by unlimited contributions to fund independent expenditures, which is indeed relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.)

206. As explained in the FEC's Response to the General Objections above, Robert Rozen's declaration is admissible and his testimony regarding unlimited contributions and gratitude is relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.) Moreover, the substance of Mr. Rozen's testimony, which speaks for itself, clearly suggests that the "independent groups" he is referring to are "groups that help get candidates elected," a broad category that includes groups that make independent expenditures.

207. As explained in the FEC's Response to the General Objections above, Robert Rozen's declaration is fully admissible and related to the gratitude that might be engendered by unlimited contributions to fund independent expenditures, which is indeed relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.) SpeechNow's objection further suggests that Mr. Rozen's opinion is insufficient to establish that his claim is true, but point to no contrary evidence in the record. The view of a knowledgeable insider such as Mr. Rozen helps establish that, indeed, large contributions that benefit candidates can create a sense of obligation to the donors. Finally, SpeechNow objects to the Commission's proposed fact by offering additional evidence, but its supplements do not controvert the substance of the proposed fact. A number of individuals in the article cited by plaintiffs gave substantial sums of soft money to both political parties; thus, according to plaintiffs' response, they are "access" donors.

208. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to show the appearance of corruption. (*See* Reply re 1st Mot. Section IV.A.) Gratitude that might be engendered by unlimited contributions to fund independent expenditures is relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.)

209. In her declaration, Teri Beckett states that "candidates often appreciate the help that these interest groups provide, such as running attack ads for which the candidate has no responsibility." (Beckett Decl. ¶ 16, *McConnell*, FEC Exh. 35.) SpeechNow objects on the grounds of hearsay, relevancy, and foundation. Her testimony is not hearsay for it is offered in support of legislative facts and it is a sworn statement of her personal knowledge. (*See* Reply re 1st Mot. Section IV.) The fact that candidates feel indebted or grateful to those who fund advertising is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

One of the judges in *McConnell* relied on Ms. Beckett's declaration making the same factual finding. *McConnell*, 251 F. Supp. 2d at 555 (Kollar-Kotelly, J.) (citing ¶ 16). Indeed, the Supreme Court cited portions of the district court opinion referring to her declaration on numerous occasions. *See, e.g.*, *McConnell*, 540 U.S. at 126 n.16, 193. Courts thus have found sufficient foundation for the exact testimony at issue here. Indeed, the declaration details Beckett's twenty-five years of work on political campaigns, including three presidential campaigns, three Congressional campaigns and numerous state and local campaigns. (Beckett Decl. ¶¶ 2-6, *McConnell*, FEC Exh. 35.) Her background was also explained in *McConnell*, 251 F. Supp. 2d at 446 n.16 (Kollar-Kotelly, J.). Beckett explains why candidates appreciate advertising from independent groups — because it gets a message out in a manner in which the campaign cannot be held accountable. (Beckett Decl. ¶ 16, *McConnell*, FEC Exh. 35.) Plaintiffs suggest that evidence regarding candidate-focused issue advertising is irrelevant to consideration of advertising funded by independent expenditures is unsupported. In *McConnell*, however, the court concluded that "the two categories of advertisements proved functionally identical in

important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

210. Lamson testifies that candidates usually appreciate help with broadcast "issue-ads." Plaintiffs claim this fact contains hearsay. However, the Court may consider Lamson's testimony in this fact as it is offered in support of legislative facts and it is a sworn statement of his personal knowledge. (*See* Reply re 1st Mot. Section IV.) The view of a knowledgeable political professional helps establish that, indeed, candidates appreciate assistance with broadcast ads. To the extent plaintiffs believe it is not relevant because it addresses pre-BCRA issue advertising and not independent expenditures, such a claim is unsupported. In *McConnell* the court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

211. Senator Bumpers testifies that "[c]andidates whose campaigns benefit from these ads greatly appreciate the help of these groups" and will be more favorably disposed to these groups when they later seek access to discuss pending legislation. (Bumpers Decl. ¶ 27, *McConnell*, FEC Exh. 64.) SpeechNow objects on the grounds of hearsay, relevancy, and foundation. The Court may consider the statement in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). The testimony is relevant to the

appearance of or actual corruption when candidates feel indebted or grateful to those who fund advertising. Plaintiffs' claim that such statement is "opinion lacking in foundation" lacks merit. Indeed, one judge in *McConnell* adopted the paragraph the Commission relies upon. *McConnell*, 251 F. Supp. 2d at 556, 876-77 (Kollar-Kotelly, J.). At any rate, the declaration itself provides ample foundation for Senator Bumpers' testimony, including his experience of nearly 30 years in elected office, first as Governor of Arkansas, then as a Senator for 23 years, and most recently as a lobbyist. (Bumpers Decl. ¶¶ 2-3, *McConnell,* FEC Exh. 35.) This foundational background was explicitly noted by Judge Kotelly in *McConnell,* 251 F. Supp. 2d at 821 n.155 (Kollar-Kotelly J.). Bumpers was deposed by the plaintiffs in *McConnell* who had a similar motive to examine the declarant's testimony regarding the danger of corruption related to unlimited contributions to interest groups. *McConnell v. FEC,* 02-582 (D.D.C. 2002) (Dkt. # 199).

212. Senator Simpson's declaration states that "[t]hese ads are very effective in influencing the outcome of elections" and that members realize their effectiveness and express that gratitude to the groups that run them. (Simpson Decl. ¶ 13, *McConnell,* FEC Exh. 65.) Plaintiffs' claim that Senator Simpson was just speculating and offered opinion testimony without evidence is without merit. The Court may consider the statements from the Simpson declaration in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). The fact is relevant to the appearance or actual corruption when candidates feel indebted or grateful to those who fund advertising. As foundation Senator Simpson explains his 19 years of experience in the Senate legislating, fundraising, and

campaigning. (Simpson Decl., *McConnell*, ¶¶ 2-3, 8-9, 11-14, FEC Exh. 65.) He describes specific conversations with legislators regarding campaigning. *Id.* ¶¶ 10-11. He then explains, based on his experience campaigning, interacting with the public and other members of Congress, his understanding that this advertising by interest groups is effective and can influence elections and that, in his experience, members realize how effective these ads are and may express gratitude. *Id.* ¶ 13. Senator Simpson was cross-examined on his statements in this declaration in a deposition in the *McConnell* case. *McConnell v. FEC*, 02-582 (D.D.C. 2002) (Dkt. # 199). Indeed, the Supreme Court in *McConnell* relied on his testimony. 540 U.S. at 149 (citing 251 F. Supp. 2d at 481 (Kollar-Kotelly, J.) (quoting Simpson Decl. ¶ 10, App. 811)); 251 F. Supp. 2d at 851 (Leon, J.) (same).) The *McConnell* district court extensively relied upon the Simpson Declaration. *See, e.g.*, 251 F. Supp. 2d at 406-07, 471, 473 476, 481 (Kollar-Kotelly, J.).

213. Republican consultant Rocky Pennington's declaration shows that interest group advertising is helpful in supporting candidate campaigns and used to help try to create a sense of appreciation or obligation from the candidate to the group. Plaintiffs claim that Pennington's statement is hearsay, irrelevant, and lack foundation is without merit. The Court may consider the testimony in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). SpeechNow disputes the relevance of the Commission's proposed fact without explanation. The testimony is relevant to the appearance or actual corruption when candidates feel indebted or grateful to those who fund advertising. Mr. Pennington's campaign

experience provides adequate foundation for his testimony; indeed, one judge in *McConnell* relied on the Pennington declaration and his experience in the 2000 Congressional Race in Florida's Eighth Congressional District to conclude that interest group advertising affected elections. 251 F. Supp. 2d at 518, 550, 558, 581 (Kollar-Kotelly J.). The Supreme Court relied upon portions of the district court opinion that were supported by Pennington's testimony on numerous occasions. *See, e.g.*, 540 U.S. at 126 n.16, 127-28, 177.

214. Ms. Elaine Bloom testifies that she appreciated the supportive ads run by interest groups that were run in her race. Plaintiffs claim this fact contains hearsay. However, the Court may consider Bloom's testimony in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.). Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). The Court in *McConnell* extensively relied on Ms. Bloom's declaration in reaching its findings of fact. *See, e.g.*, 251 F. Supp. 2d at 533 & n.81, 546, 611, 823 & n.160. SpeechNow objects to the Commission's proposed fact with legal argument — that issue advertising is purportedly not relevant — but this argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact, which is relevant to the appearance or actual corruption when candidates feel indebted or grateful to those who fund advertising. Furthermore, to the extent plaintiffs claim that evidence regarding candidate-focused issue advertising is irrelevant to consideration of independent expenditures, the claim is unsupported. In *McConnell*, the court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly

identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

215. Former Montana Representative Pat Williams explained that interest group advertisements can be the functional equivalent of a campaign contribution. Plaintiffs claim this fact contains hearsay. However, the Court may consider Williams' testimony as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.). Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). SpeechNow objects to the Commission's proposed fact with legal argument, claiming that "under law there is no such thing as the 'functional equivalent of a campaign contribution.'" This argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact, which is relevant to the appearance or actual corruption when candidates feel indebted or grateful to those who fund advertising. Furthermore, plaintiffs' claim that evidence regarding pre-BCRA candidate-focused issue advertising is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.* Plaintiffs complain that Professor Wilcox's only support for this proposition is Representative Williams' declaration. However, Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation,

Professor Wilcox offers a general conclusion about independent ads being the equivalent of contributions.

216. SpeechNow argues that Mr. Johnson's testimony should be disregarded because he was not named as an expert witness, but under Federal Rule of Evidence 701 what matters is whether the witness gives expert *testimony*, not whether he is an expert. (*See* Reply re 1st Mot. Section II(A).) Mr. Johnson has years of relevant experience, including 26 years as a state legislator and, following that, service at the California Fair Political Practices Commission (*see id.;* Johnson Decl. ¶¶ 2-3, FEC Exh. 2.), and the opinions he provides to support this fact are based on that personal experience and do not require application of the kind of technical expertise that would make his observations expert testimony. (*Id.*) Plaintiffs also contend that Mr. Johnson's opinion is insufficient to establish that his claim is true, but point to no contrary evidence in the record. The view of a knowledgeable state official and former legislator helps establish that, indeed, candidates are grateful for independent expenditures.

217. The Chapin Declaration supports this fact regarding how federal candidates appreciate interest group advertising and how interest groups attempt to influence candidate's positions on issues with offers of support. The Court may consider the testimony in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). SpeechNow disputes the relevance of the Commission's proposed fact, but the fact is relevant to the appearance or actual corruption when candidates feel indebted or grateful to those who fund

advertising. One of the judges in the district court in *McConnell* made the same finding that the Commission seeks here, 251 F. Supp. 2d at 556 (Kollar-Kotelly, J.).

218. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow's objection to the proposed fact suggests that evidence regarding pre-BCRA candidate-focused issue advertising is irrelevant to consideration of independent expenditures. This proposition has no merit. In *McConnell* the court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

219. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Gratitude that might be engendered by unlimited contributions to fund independent expenditures is indeed relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.)

SpeechNow's assertion that there can be no corruption without coordination is incorrect as a matter of law and fact. As the Commission explains (FEC Reply Mem. Section II), the Commisson's proposed fact is entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. This proposed fact provides additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for

legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures. Finally, SpeechNow objects to the Commission's proposed fact by offering additional evidence, but its supplements do not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

220. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusion has "no factual support" is meritless. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable claim that a "careful donor could make their contribution almost always valuable to a candidate." He bases this conclusion on facts set forth in his report (Wilcox Rept. at 9-11, FEC Exh. 1), involving individuals making large contributions to 527 and 501(c)(4) organizations for the purpose of electing particular candidates. As explained by the Commission, gratitude that might be engendered by unlimited contributions to fund independent expenditures is indeed relevant to this case: Congress has chosen to regulate contributions to organizations that make independent expenditures, and the Supreme Court has specifically recognized that gratitude arising from political contributions is relevant to the issue of corruption. (*See* FEC Reply Mem. Section V.) Moreover, the Court should disregard SpeechNow's reference to the gratitude that candidates might feel for a host of other activities that might benefit them. These other activities are not relevant; the constitutionality of those activities, which Congress has not chosen to regulate, is not at issue in this case. (*See* FEC Reply Mem. Section V.)

1. Unlimited Contributions to Independent Expenditure Groups Are More Likely to Lead to Corruption than Direct Candidate Contributions Under the Legal Limit.

221. To aid the Court, Paragraph 221 summarizes all of the evidence put forth in ¶¶ 222-25 and should be adopted as it is supported by the more specific evidencepresented below.

222. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs' objection that the two statements are "conclusory" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable claim about the value of independent expenditure campaigns to candidates based on, *inter alia*, ad campaigns run by the National Security Political Action Committee and the Swift Boat Veterans, as well as testimony from the director of the National Conservative Political Action Committee, political consultant Rocky Pennington, and political scientist Michael Bailey.

224. Chairman Johnson offers factual testimony and lay opinion based on his personal knowledge and experiences drawn from his 26 years as a state legislator and, following that, his service at the California Fair Political Practices Commission. (Johnson Decl. ¶¶ 2-3, FEC Exh. 2.) His statements regarding what can unduly influence elected officials are thus founded on that personal knowledge. Chairman Johnson does not assert that there is no such thing as independence, only that funding an independent expenditure at a level "30 or 40 times" higher than the direct contribution limit caries the potential for undue influence.

Plaintiffs appear to contend that Mr. Johnson's opinion is insufficient to establish that his claim is true, but point to no contrary evidence in the record. The view of a knowledgeable state official and former legislator helps establish that, indeed, large contributions to groups that run independent expenditures create the potential for undue influence over a candidate and the appearance of corruption. SpeechNow also includes legal argument about the Commission's

proposed fact, but does not offer any factual basis that contradicts the substance of the witness's statement or its relevance.

225. Plaintiffs' objections to this proposed finding of fact should be disregarded for the same reasons as those discussed *supra* ¶ 224. While this paragraph and ¶ 176 mention "Reed Hastings," they are substantively different. Chairman Johnson is not offering expert testimony in his declaration and there is accordingly no reason to strike it. (*See* Reply re 1st Mot. Section II(A).)

2. Ad Campaigns Run By Interest Groups Allow Candidates to Conserve Resources and Keep Their Hands Clean.

226. The Court may consider the out of court statements supporting this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V). Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox makes a reasonable conclusion about the value of ads run by interest groups compared to direct contribution to candidates. Professor Wilcox cites to facts which support his conclusion, including a quote by the director of one of the first PACs to make significant independent expenditures, political consultant Rocky Pennington's declaration from McConnell, and an academic study. Plaintiffs' flawed suggestion that Professor Wilcox should have offered even more examples does not undercut the proposed fact.

227. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow suggests that

independent expenditures can never lead to corruption or its appearance. But as the Commission explains (FEC Reply Mem. Section II), the Commission's proposed fact provides additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. This is entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. In addition, the Court may consider the out of court statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that Mr. Dolan held this view is admissible under Federal Rule of Evidence 803(3).

228. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but the fact that independent expenditures can be particularly valuable to candidates is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of those facts more probable. Fed. R. Evid. 401; (FEC Reply Mem. Section IV). SpeechNow's objection that evidence regarding candidate-focused issue advertising (*i.e.*, a quote from a book it claims is about issue advocacy) is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.* In addition, the Commission found some of the advertising by 527s in 2004 to in fact be express advocacy. (*See* FEC Facts ¶ 162.)

229. To aid the Court, Paragraph 229 summarizes all of the evidence put forth in Paragraphs 229-40 and should be adopted as it is supported by the more specific evidence presented below.

230. The Pennington Declaration supports this fact, which shows that interest group advertising is helpful in supporting candidate campaigns and used to help try to create a sense of appreciation or obligation from the candidate to the group. Plaintiffs claim that Pennington's statement is hearsay, irrelevant, and lack foundation is without merit. The Court may consider the testimony in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). The fact is relevant to the appearance or actual corruption when candidates feel indebted or grateful to those who fund advertising. In *McConnell*, one judge relied on the Pennington declaration and his experience in the 2000 Congressional Race in Florida's Eighth Congressional District to conclude that interest group advertising effected elections. 251 F. Supp. 2d at 518, 550, 558, 581 (Kollar-Kotelly J.). The Supreme Court relied upon portions of the district court opinion that were supported by Pennington's testimony on numerous occasions. *See, e.g.*, 540 U.S. at 126 n.16, 127-28, 177. Plaintiffs' claim that evidence regarding candidate-focused issue advertising — or "interest group attack ads," as Pennington calls it — is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the

election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

231. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that the person holds that view is admissible under Federal Rule of Evidence 803(3).

232. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that people hold that view is admissible under Federal Rule of Evidence 803(3).

233. To aid the Court, ¶ 233 summarizes all of the evidence put forth in ¶¶ 234-36 and should be adopted as it is supported by the more specific evidence presented below. In ¶¶ 234-36, the Commission shows, contrary to SpeechNow's claim, that the Commission has not mischaracterized the evidence in those paragraphs.

234. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that the people hold the views described is admissible under Federal Rule of Evidence 803(3). The contents of both articles, which speak for themselves, support the assertion in the proposed fact that the McCain campaign eventually stopped discouraging outside 527 groups from forming and from running ads.

235. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may

consider the statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that the people hold the views described is admissible under Federal Rule of Evidence 803(3). The contents of the cited article support the assertion in the proposed fact that donors felt they had received encouraging signals from the Obama campaign: "[D]onors fears about how the Obama campaign might react to an independent media effort had faded amid what they believed to be more encouraging signals from Obama officials . . ." (Jim Rutenberg and Michael Luo, *Interest Groups Step Up Efforts in a Tight Race*, N.Y. Times, Sept. 16, 2008, FEC Exh. 70.) The content of article also supports the assertion that groups were flush with new donations: "leaders of the groups say their donors and members have stepped up their efforts" and "donations rose significantly" to Moveon. (*Id*.)

236. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that the person holds that view is admissible under Federal Rule of Evidence 803(3). Plaintiffs appear to argue coordination is necessary for there to exist the possibility of corruption. But as the Commission explains (FEC Reply Mem. Section II), the Commission's proposed fact is entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. This proposed fact provides additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures.

237. Plaintiffs' objection that Professor Wilcox's expert conclusion is "conclusory" has no merit. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox makes a conclusion about (Rept. at 13; FEC Exh. 1) how the candidate's ad benefited from the earlier independent advertising campaign. SpeechNow objects to the relevance of this evidence, but the fact that independent expenditures can be particularly valuable to candidates is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of those facts more probable. Fed. R. Evid. 401; (FEC Reply Mem. Section IV).

238. Plaintiffs' objection that Professor Wilcox's expert conclusion is unsupported has no merit. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From this foundation, Professor Wilcox makes a conclusion about the value of the Swift Boat ads relative to a direct contribution. In support of this claim, he further relies on the results of an academic study that showed that the Swift Boat ads hurt the Kerry campaign. (*See* Wilcox Rept. at 15, FEC Exh. 1.)

239. The Court may consider the statements by Mr. Moore in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Additionally, plaintiffs' dispute regarding the substance of the quotation itself is attributable to inadvertent error discussed *supra* at ¶ 108. The statements appearing in this proposed finding of fact accurately quote the transcript of the Annenberg Panel Discussion obtained by the Commission as part of its

MUR investigation, but differ from the published version of the transcript appearing at FEC Exh. 50. (Compare Blumberg Decl. Exh. 1, FEC Exh. 164 ("Tape Log") with Annenberg Public Policy Center, *Electing the President, 2004: The Insiders' View*, (Kathleen Hall Jamieson ed., 2005), FEC Exh. 50, at 198-201.)

240. Plaintiffs' objection that Professor Wilcox's expert conclusion is nothing more than a series of surmises is without merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable claim about the value of independent expenditure campaigns to candidates based on, *inter alia*, ad campaigns run by the National Security Political Action Committee and the Swift Boat Veterans, as well as testimony from the director of the National Conservative Political Action Committee, political consultant Rocky Pennington, and political scientist Michael Bailey. Plaintiffs object to the relevance of the evidence, but the value of independent expenditure campaign is of consequence to the Court's determination in this action; Professor Wilcox's opinion and the facts upon which he drew his conclusion tend to make it more probable that candidates value independent expenditure campaigns run on their behalf. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

3. The Likelihood of Candidate Indebtedness Increases When the Amounts of Independent Expenditures Are High Relative to Candidate Spending.

241. To aid the Court, Paragraph 241 summarizes all of the evidence put forth in Paragraphs 242-47 and should be adopted as it is supported by the more specific evidence presented below.

242. Plaintiffs' objection that Professor Wilcox's expert conclusion is unsupported has no merit. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature.

From this foundation, Professor Wilcox makes a conclusion about the value ascribed by candidates to independent spending campaigns run on their behalf and the likelihood that those candidates would be grateful for them.

SpeechNow's claim that this opinion of Professor Wilcox is beyond the scope of his report is without merit. Immediately after he concludes that "candidates are aware of these large indirect contributions to aid their campaigns, and . . . there is ample evidence they are grateful," he also notes: "In many California state legislative elections since the law was changed, independent expenditures by groups exceed spending by candidates." (*See* Wilcox Rept. at 12, FEC Exh. 1.) Counsel for SpeechNow quoted this entire sentence from Professor Wilcox's report and asked him about it. (*See* Wilcox Dep. at 246-47, FEC Exh. 18.) Subsequently, during re-direct examination, the Commission again directed Professor Wilcox to that sentence in his report referring to California legislative elections, and asked him if "the relative amounts of spending between the independent group and candidate affect the likelihood of gratitude by the candidate." (*See* Wilcox Dep. at 292-93, FEC Exh. 18.) Professor Wilcox responded that it did and explained that the higher the amount spent by a group on a candidate's behalf relative to the amount spent by the candidate, the more likely it is the candidate would feel grateful to the group. (*See id*. at 294.) It cannot be gainsaid that the substance of this question — relating to candidate gratitude and the potential for corruption from unlimited contributions to groups that make independent expenditures — and Professor Wilcox's response, clearly relate to his report and questions he was asked by plaintiffs during his deposition. The remaining objections to this paragraph amount to legal argument, none of which controverts the substance of the proposed fact.

243. To aid the Court, Paragraph 243 puts all of the evidence set forth in Paragraphs 245-246 in context and is supported by the more specific evidencepresented below.

244. Plaintiffs's response, *inter alia*, admits that "this proposed finding of fact proves nothing more than that seven candidates in 2006 had individuals and groups spend more than $1,000,000 in independent expenditures on their behalf." That admission describes the entire content of proposed Paragraph 244.

245. Plaintiffs provide no valid grounds to question the reliability of the FPPC Report (*see supra* Section IV(6)(ii)), nor any reason why it is inappropriate for Professor Wilcox to use his expertise to interpret the data contained therein. As plaintiffs apparently concede, much of what the report "shows" and the contents of the proposed facts consist solely of those statistics. The question of whether the number "twelve" amounts to "many" is a semantic distraction.

246. The Court should enter this proposed finding of fact for the reasons stated above concerning ¶ 245.

IV.E. Large Donations Are a Tool Used By Donors Seeking Access and Influence Over Candidates

FEC's Response to SpeechNow's General Objections:

The Commission's proposed facts in the following section are plainly relevant. The Supreme Court has explained that corruption, properly understood, includes undue influence on an officeholder's judgment, and the appearance of such influence, that might arise from contributors gaining preferential access to and influence over government officials. The Commission's proposed facts are indeed relevant insofar as they demonstrate that donors have used large donations to gain such access and influence over candidates.

SpeechNow's claim that the Commission's facts ignore "holdings, statutes, and rules" is meritless. As the Commission explains (FEC Reply Mem. Section II), the Commission's

proposed facts are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. These proposed facts provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures.

248. To aid the Court, ¶ 248 quotes from Professor Wilcox's report to summarize all of the evidence put forth in ¶¶ 249-66. The paragraph should be adopted as it is supported by the more specific evidence presented below. Plaintiffs' objection that Professor Wilcox's expert conclusions quoted in the paragraph are unsupported has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox reasonably summarizes the role that partisan activists have played in soliciting contributions to non-party groups they helped create, oftentimes by reassuring donors that their contributions would be appreciated by the candidates and their parties. He bases his conclusions on at least three academic studies and the historical facts surrounding the activities of 527 and 501(c)(4) organizations such as Progress for America, Swift Boat Veterans, Americans Coming Together, and The Media Fund. (*See* Wilcox Rept. at 8-11.)

249. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V), and for the fact that the person holds that view under Federal Rule of Evidence 803(3). Plaintiffs' objection that Professor Wilcox's conclusion in the first sentence is unsupported has no merit. (*See* FEC Reply Mem. Section III.)

Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From this foundation, Professor Wilcox makes a conclusion about the goals of many 527 groups and cites to a specific example to support his claim.

250-256. Plaintiffs object that these proposed findings concern entities other than SpeechNow and thus are irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is less probative, however, of whether allowing the kind of unlimited contributions that plaintiffs advocate would raise a danger of corruption or the appearance of corruption. The genesis and actual practices and activities of past actors are legislative facts the Court should take into account in assessing those risks. Plaintiffs also object to most of these proposed findings on hearsay grounds. But the evidentiary rule against hearsay does not apply to legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to examine the appearance of corruption (Reply re 1st Mot. Section V).

257. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to examine the appearance of corruption (Reply re 1st Mot. Section V). Plaintiffs' objection that Professor Wilcox's conclusions are unsupported has no merit. (*See* FEC Reply Mem. Section III.) Professor Wilcox based his report on his expertise as a political scientist; years studying

campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From this foundation, Professor Wilcox reasonably concludes that large donors could readily find 527s organizations part of a "loose party network" and willing to take their money. Professor Wilcox supports his conclusion with specific facts from an academic article regarding past fundraising by 527 organizations. (*See* Rept. at 10.)

258-261. Plaintiffs again raise hearsay objections, but the usual rule against hearsay does not apply to these proposed findings. (*See* FEC Reply Mem. Section I.) They state legislative facts about the genesis and activities of organizations that sought large donations in recent election cycles. In addition, Professor Wilcox's summary of part of a scholarly study and quotation from it (¶¶ 258, 259) further demonstrate his review and knowledge of the relevant academic literature. Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to examine the appearance of corruption (Reply re 1st Mot. Section V).

262. Plaintiffs assert, without offering particulars, that this proposed finding about George Soros "does not support the FEC's claims," is irrelevant, and hearsay. None of these objections has any merit. First, the entire news story (FEC Exh. 107), including the reporter's 2004 interview with Soros, on which this proposed finding rests clearly confirms that the Commission accurately summarized what Soros stated: In 2004, after years of trying to influence American policy on his own, Soros changed tactics and contributed millions to section 527 groups opposing President Bush and supporting Senator Kerry in the hope to win policy influence if Kerry won the presidency. Second, the relationship between financing section 527

groups and gaining influence over an officeholder's policy choices is highly relevant to evaluating the risks of corruption and the appearance of corruption at issue in this case. *See, e.g.*, *McConnell*, 540 U.S. at 150-54 (corruption in the campaign finance context encompasses using contributions to gain access to officeholders and influence their policies). Third, plaintiffs' hearsay objection fails because the finding is a legislative fact. (*See* FEC Reply Mem. Section I.) In the alternative, this proposed finding comes within the hearsay exceptions for existing mental states (*see* Federal Rule of Evidence 803(3)) and for out-of-court statements to show the appearance of corruption. (*See* Reply re 2nd Mot. Section V.)

263. Plaintiffs object to this proposed finding as hearsay. The finding provides legislative facts about the activities and leaders of organizations that sought large donations in recent election cycles. The usual rule against hearsay does not apply to legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to examine the appearance of corruption (Reply re 1st Mot. Section V).

264-265. Plaintiffs object to these proposed findings as "baseless assertions" by Professor Wilcox. But Professor Wilcox makes reasonable conclusions based on his expertise as a political scientist, his years studying campaign activities, and his review and knowledge of the relevant academic literature. Moreover, his conclusions challenged here are legislative facts about the "real world" relationships among some large donors, section 527 groups, and political party policymakers and consultants.

266. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if this evidence had been

submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to examine the appearance of corruption (Reply re 1st Mot. Section V). SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact.

IV.F. If Contributions to Groups Making Independent Expenditures Were No Longer Limited, Influence-Seeking Donors Would Quickly Give Massive Amounts.

267. To aid the Court, ¶ 267 summarizes all of the evidence put forth in ¶¶ 268-75 and is supported by the more specific evidence in those paragraphs.

268. The statements in Robert Rozen's declaration may be considered by the Court in this case because they are offered to prove legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to this testimony drawn from his sworn declaration filed in the *McConnell* case based on hearsay, but the prior declaration has not been offered for the purpose of establishing any adjudicative facts. Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on his personal knowledge. *Id.* SpeechNow also claims that Mr. Rozen's testimony should be disregarded because he was not named as an expert witness, but under Federal Rule of Evidence 701 what matters is whether the witness gives expert *testimony*, not whether he is an expert. Mr. Rozen has years of relevant experience, and the opinions he provides to support this fact are based on that personal experience and do not require application of the kind of technical expertise that would make his observations expert testimony. (*See* Reply re 1st Mot. Section II.A.) Moreover, his testimony is relevant to show that if contributions to groups making independent expenditures were no longer limited, influence seeking donors would attempt to

"exert influence over elected officials" and that corruption or its appearance might result. (Rozen Decl. ¶ 17, FEC Exh. 3.)

269. The plaintiffs admit the truth of the factual assertions in this paragraph. This fact demonstrates that robust fundraising by PACs has occurred within federal contribution limits and that large sums can be raised for independent expenditures through the aggregation of money from a number of donors. (*See also* FEC Facts ¶¶ 376-84.) This fact is therefore relevant because it demonstrates that the provisions at issue do not unconstitutionally burden the activities of groups like SpeechNow.

270. The plaintiffs admit the truth of the factual assertions in this paragraph. This fact is relevant because it makes it more probable that access-seeking donors would rapidly take advantage if contribution limits were lifted for entities making independent expenditures, because such donors have behaved similarly in the past.

271. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusion is "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox reasonably concludes that after BCRA banned soft money, donors gave enormous sums to 527 organizations, who assured donors that their contributions would be recognized and appreciated. Professor Wilcox's conclusion is based on facts surrounding the activities of 527 organizations in the 2004 campaign, including, for example, the reassurance provided by leaders of one such organization to donors that the party and candidates "know and appreciate us and contributions are part of the public record and they are aware." (*See* Wilcox Rept. at 8-11, FEC Exh. 1.)

272. SpeechNow objects on hearsay grounds to the Commission's proposed fact. But the Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow's only other response is to

admit that David Keating "has many responsibilities with the Club for Growth." This admission does not controvert the remaining substance of the proposed fact.

273. SpeechNow objects to this proposed fact by accusing the Commission of mischaracterizing Mr. Keating's testimony. SpeechNow does not, however, explain the basis of this accusation. The remaining portion of SpeechNow's response to this proposed fact is legal argument that does not controvert the substance of the proposed fact.

274. SpeechNow objects that Professor Wilcox's claim that "many donors would prefer to give to groups that expressly advocate the election of candidates" (Wilcox Rept. at 11) is baseless, but also admits that "many donors currently prefer to give to groups that expressly advocate the election or defeat of candidates." SpeechNow's remaining arguments do not controvert the substance of the proposed fact.

IV.G. Financers of Independent Expenditures Are Given Preferential Access to, and Have Undue Influence Over, Officeholders.

FEC's Response to SpeechNow's General Objection:

Plaintiffs object to the relevance of the evidence in Commission proposed facts 275-86, but facts which demonstrate that financiers of independent expenditures are given preferential access to, and have undue influence over officeholders, are of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. SpeechNow's remaining claim that the Commission's facts ignore "holdings, statutes, and rules" is meritless. As the Commission explains (FEC Reply Mem. Section II), the Commission's proposed facts are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues.

These proposed facts provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinated expenditures.

275. The testimony by Senator Dale Bumpers supports the proposition that members will be more favorably disposed to interest groups who have run independent ads when they later seek access to discuss pending legislation. (Bumpers Decl. ¶ 27, *McConnell,* FEC Exh. 64.) Plaintiffs object on the grounds of hearsay. However, the Court may consider Senator Bumpers' testimony as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). Plaintiffs contend that the testimony is mere speculation, but one judge in *McConnell* relied on the Bumpers Declaration for the fact that candidates appreciate help provided by interest groups. *McConnell,* 251 F. Supp. 2d at 556, 876-77 (Leon, J.). The declaration itself provides ample basis for the Senator's conclusion based on first hand knowledge, including Senator Bumpers' experience of nearly 30 years in elected office, first as Governor of Arkansas, then as a Senator for 23 years, and most recently as a lobbyist. (Bumpers Decl. ¶¶ 2-3, *McConnell,* FEC Exh. 35.) This foundational background was explicitly noted by Judge Leon in *McConnell,* 251 F. Supp. 2d at 821 n.155. Senator Bumpers was deposed by the plaintiffs in *McConnell* who had a similar motive to examine the declarant's testimony regarding the danger of corruption from unlimited contributions to interest groups. *McConnell v. FEC,* 02-582 (D.D.C. 2002) (Dkt. # 199). Plaintiffs' claim that evidence regarding pre-BCRA candidate-

focused issue advertising is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

276. Plaintiffs claim this fact contains hearsay. However, the Court may consider Pennington's testimony as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.). Furthermore, even if this declaration had been submitted in support of adjudicative facts, it can be considered by the Court because it is a sworn statement based on personal knowledge (Reply re 1st Mot. Section IV.B), and shows the appearance of corruption (*see* Reply re 1st Mot. Section V). Other courts have relied on this testimony as well. In *McConnell*, Judge Kollar-Kotelly relied on the Pennington declaration in reaching her findings of fact, 251 F. Supp. 2d at 518, 550, and the Supreme Court also relied upon portions of the district court opinion that were supported by Pennington's testimony. *See, e.g.*, 540 U.S. at 126 n.16, 127-28. Plaintiffs' claim that evidence regarding pre-BCRA candidate-focused issue advertising is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

277. To aid the Court, Paragraph 277 summarizes the evidence put forth in ¶¶ 98-106 and 278-279 and should be adopted as it is supported by the more specific evidence presented there. Additionally, plaintiffs are half-correct in their focus on the word "apparently." It is true that the Commission cannot prove, nor does it attempt to prove, that large donors to the Swift

Boat Vets actually engaged in *quid pro quo* exchanges with President Bush. However, in the context of this case, "appearances" are important. The fact that individuals who gave many thousands of dollars to an independent group to help re-elect President Bush and then received favorable treatment after the election creates the "appearance" of corruption.

278. The Court may consider the White House Press Releases and newspaper articles alleged to be hearsay in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V), and, regarding some of the statements, for the fact that the person holds that view under Federal Rule of Evidence 803(3). The plaintiffs' objections to this proposed fact are erroneous for the same reasons as stated above regarding ¶ 277. The Commission does not attempt to prove that President Bush had any improper motive in showing a large donor to the Swift Boat Vets favorable treatment, only that this treatment may have created the appearance of corruption. Moreover, the newspaper articles regarding these favors are direct evidence of a public perception of undue influence, access, and the appearance of corruption. Finally, all of the cited newspaper articles appear at the referenced exhibits provided to plaintiffs and the Court.

279. The Court may consider the White House Press Release and newspaper article alleged to be hearsay in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V). Again, the FEC does not claim the it "just has to be the case" the Mr. Fox was appointed to be the Ambassador of the Untied States to Belgium because he made a large contribution to the Swift Boat Vets, only that the appointment of such a donor may create the

appearance of corruption. The opposition to his appointment by the Senate Foreign Relations Committee was based on this apparent link to his contributions for independent spending, as noted by the plaintiffs. Finally, the Commission does not allege that SpeechNow will give money to parties or candidates; likewise, the Swift Boat Vets did not give money to parties or candidates, but its largest contributors appear to have received favorable treatment from the candidate that benefited from its independent ads. This proposed finding of fact illustrates an appearance of corruption arising from an independent ad.

280. The Court should adopt this proposed finding of fact for the reasons stated above concerning ¶ 279. In addition, even if this were an adjudicative fact case, the Court may consider the Statements of Senators Kerry and Edwards to show the appearance of corruption (*see* Reply re 1st Mot. Section V), and the fact that the Senators hold their respective views is admissible under Federal Rule of Evidence 803(3) as reflecting their states of mind.

281. The Court should enter this proposed finding of fact for the reasons stated above concerning ¶¶ 279 and 280.

282. The plaintiffs essentially do not contest the fact, admitting that the Club for Growth runs independent expenditures and holds conferences in which its members can meet with candidates.

286. Mr. Keating's deposition testimony speaks for itself and the Commission believes that the relevant portion of its proposed finding of fact is accurate. The plaintiffs admit the rest of this proposed finding of fact.

IV. H. Large Contributions for Independent Expenditures Can Influence Legislative Votes or Other Official Actions, and Thereby Pose a Danger of Actual Quid Pro Quo Arrangements.

1. Response to the Plaintiffs' General Objections

The majority of plaintiffs' general objections to the facts put forward in this section are restatements of the arguments they make in the introduction to their response. (*See* SN Resp. to SN Facts Section I(A).) However, as the Commission explains (FEC Reply Mem. Section II), the Commission's proposed facts are entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. The proposed facts in this section provide additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Contrary to the plaintiffs' assertion, the independence of an expenditure does not necessarily negate the risk of corruption or the appearance thereof. As this Court has stated,

> Plaintiffs' argument presents a false syllogism that relies on a "crabbed view of corruption, and particularly of the appearance of corruption" that is at odds with Supreme Court precedent. *McConnell*, 540 U.S. at 152, 124 S.Ct. 619. *First of all, the Supreme Court has never held that, by definition, independent expenditures pose no threat of corruption.*

SpeechNow.org v. FEC, 567 F. Supp. 2d at 78 (emphasis added).

Plaintiffs are also incorrect in arguing that the proposed findings of fact in this section necessarily involve coordinated expenditures and that if a claimed independent expenditure is coordinated with an elected official to perpetrate a *quid pro quo* transaction, that it is not relevant to this case. In the case of the Wyandotte Tribe and Congressman Snowbarger, for example, (*see* FEC Facts ¶¶ 288-297), the operative facts were that a group got a message to a candidate that they would make an independent expenditure supporting him, if that candidate were to adopt a different position on an issue that interested the group. The offered expenditures were never made, so it is speculative whether they would have technically been "independent" or

"coordinated" if they had actually taken place, and that legal conclusion would obviously depend on many hypothetical facts such as the nature and degree of assent that would have had to have been given by the candidate.[8] Counsel for the Commission are unaware of the Commission ever addressing a matter exactly like this and, as noted by this Court and in *McConnell*, the statutory and regulatory criteria for coordination simply do not reach all activity that may involve subtle forms of cooperation. *(See SpeechNow.org*, 567 F. Supp. 2d at 78; 540 U.S. at 221 ("expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'") (quoting *Colorado II*, 533 U.S. at 442).) The story of the Wyandotte Tribe's efforts appears to involve an attempt to restrict coordinated activity to just such "winks and nods." C.J. Zane, a lobbyist claims for the Wyandotte Tribe, claimed that no one actually ever made an offer to Congressman Snowbarger. (*See* Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal*, Kan. City Star, Oct. 6, 1998, FEC Exh. 89.) For the purposes of this case, this incident is instructive because it illustrates the legitimate concerns over corrupt-appearing conduct stemming from large contributions for independent expenditures that could fall outside the legal definition of coordination and bribery. The proposed findings of fact at ¶¶ 288-297 are thus relevant to this case. (*See* also FEC Reply Mem. Section II.)

In the case of Wisconsin State Senate Majority Leader Charles Chvala, the expenditures of Independent Citizens for Democracy PAC ("ICD-PAC") and Independent Citizens for

[8] Even assuming hypothetically that the expenditure had taken place and that the Congressman had changed his vote, a legal finding that the activity constituted coordination would likely require learning who paid for the poll, how it got to Snowbarger's campaign staff, who paid for the "independent" expenditure, whether the Congressman or his staff had any further communications with the proposed payor, whether the Congressman or his agent gave his "assent" to the expenditure, and whether any communications with the Snowbarger and his staff amounted to "substantial discussion" or "material involvement" about the expenditure. *See* 11 C.F.R. § 109.21 (defining coordinated communications).

Democracy-Issues ("ICD-Issues") were considered to be coordinated by the State of Wisconsin and Senator Chvala was found guilty of several crimes. However, this in no way undermines the relevancy of this evidence. First, the expenditures at issue were styled as independent. Notably, the treasurer of ICD-PAC signed a notarized oath stating that the group would not act in concert, cooperation, or consultation with any candidate or agent or authorized committee of the candidate, just like the organizers of SpeechNow in this case. (FEC Facts ¶ 303.) The proposed findings of fact regarding the Chvala matter (¶¶ 298-308) are relevant because whether contributions to independent expenditure groups can be used a vehicle for *quid pro quo* arrangements or other forms of corruption is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of that fact more probable. (*See* Fed. R. Evid. 401; FEC Reply Mem. Section IV.) High profile examples of such illegal *quid pro quo* arrangements directly speak to the appearance of corruption associated with independent expenditures. Plaintiffs' legal arguments about what constitutes corruption and the laws at issue in this case do not contest the factual nature of any of the occurrences discussed below, and the Commission's proposed findings are factually accurate.

In regards to the rest of plaintiffs' auxiliary objections, there is no cause to strike the declarations of Kevin Yowell or Michael Bright (*see* Reply re 1st Mot. at Section II(B)); the Court may consider the alleged hearsay in these facts as it is offered in support of legislative facts (*see* FEC Reply Mem. Section I); the Court may consider the out of court statements from witnesses quoted here to show the appearance of corruption (*see* Reply re 1st Mot. Section V); and plaintiffs' allegation that the following facts amount to "character evidence" has no merit. (*See supra* Reply to Plaintiffs' General Objections to Section IV(B).) Accordingly, and for the

reasons further discussed below, the Court should enter the Commission's proposed findings of fact at ¶¶ 287-314.

1. A Large Group with an Interest in Gaming Issues Attempted to Bribe Former Congressman Snowbarger by Signaling That They Would Conduct an independent Spending Campaign on his Behalf.

287. To aid the Court, ¶ 287 summarizes all of the evidence put forth in ¶¶ 288-314 and should be adopted as it is supported by the more specific evidence presented below.

288. The Court may consider the alleged hearsay in this proposed finding of fact as it is offered in support of legislative facts (*see* FEC Reply Mem. Section I). Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V). Additionally, there is no cause to strike the declaration of Kevin Yowell. (*See* Reply re 2nd Mot. at Section II(B).) Plaintiffs' remaining arguments are without merit for the reasons stated in response to their general objections above. (*See supra*, Response to the Plaintiffs' General Objections to Section IV(H); FEC Reply Mem. Section II.)

289-91. The Court should enter these proposed findings of fact for the reasons stated in response to the plaintiffs' general objections above as well as in response to ¶ 288. (*See supra*, Response to the Plaintiffs' General Objections to Section IV(H).)

292. The Court should enter this proposed finding of fact for the reasons stated in response the plaintiffs' general objections above as well as in response to ¶ 288. (*See supra*, Response to the Plaintiffs' General Objections to Section IV(H).) Also, the fact that Mr. Yowell actually received a memo and poll along with the letter from C.J. Zane, included with his declaration, is not hearsay. To the extent that the contents of the memo and poll are discussed in Mr. Yowell's declaration and the Commission's proposed findings of fact, Mr. Yowell's

testimony, and the concurrent newspaper articles and Rep. Snowbarger's press release are adequate evidence to establish the legislative facts proposed here. (*See* FEC Reply Mem. Section I.)

Finally, while offering arguments about whether the hypothetical expenditures would have been "coordinated," plaintiffs apparently concede the actual factual assertions in this paragraph regarding what happened between the Wyandotte Tribe and Rep. Snowbarger. This is all that is at issue here, and the Court should accordingly enter ¶ 292 and the other paragraphs in this section which simply recount these events.

293-95. The Court should enter this proposed finding of fact for the reasons stated in response the plaintiffs' general objections above as well as ¶ 292. (*See supra,* Response to the Plaintiffs' General Objections to Section IV(H).)

296. The Court should enter this proposed finding of fact for the reasons stated in response the plaintiffs' general objections above as well as in response to ¶ 288. (*See supra,* Response to the Plaintiffs' General Objections to Section IV(H).) Additionally, all of Mr. Yowell's testimony is founded on his personal knowledge and experience as a campaign manager and chief of staff for a congressman in the U.S. House of Representatives as well on his extensive other political positions. (*See* Declaration of Kevin Yowell ("Yowell Decl.") at ¶ 2, FEC Exh. 4.)

297. The Court should enter this proposed finding of fact for the reasons stated in response the plaintiffs' general objections above as well as in response to ¶ 288. (*See supra,* Response to the Plaintiffs' General Objections to Section IV(H).) Additionally, all of Mr. Yowell's testimony is founded on his personal knowledge and experience as a campaign manager and chief of staff for a congressman in the U.S. House of Representatives as well on his

extensive other political positions. (*See* Declaration of Kevin Yowell ("Yowell Decl.") at ¶ 2, FEC Exh. 4.) Finally, a lay witness may offer his opinion "[a]s long as [a witness] ha[s] personal knowledge of the facts[;] he [i]s entitled to draw conclusions and inferences from those facts — regardless of whether he applied any specialized experience." *Williams Enterprises, Inc. v. Sherman R. Smoot Co.*, 938 F.2d 230, 234 (D.C. Cir. 1991). (*See also* Reply re 1st Mot. at Section II(A).)

2. Former Wisconsin Senate Majority Leader Chvala Extorted Funds in Return for Legislative Action, Including Funds for Purportedly Independent Campaign Spending.

The Commission responds to the plaintiffs' general objections above, and for the reasons stated there, proposed findings of fact ¶¶ 298-308 should be entered by the Court. (*See supra,* Response to the Plaintiffs' General Objections to Section IV(H).)

298. To aid the Court, ¶ 298 summarizes all of the evidence put forth in ¶¶ 299-308 and should be adopted as it is supported by the more specific evidence presented below.

299. This proposed finding of fact should be entered for the reasons discussed in response to the Plaintiffs' General Objections to Section IV(H), above.

300. This proposed finding of fact should be entered for the reasons discussed above in response to the Plaintiffs' General Objections to Section IV(H). Additionally, as plaintiffs do not object to "the description of Senator Chvala's criminal activities in the complaint filed against him" and the description of these activities constitutes essentially the entire proposed finding of fact, it should be adopted by the Court.

301. The Court should enter this proposed finding of fact because there is no justification for striking the declaration of Michael Bright (*see* Reply re 1st Mot. at Section II(B), and because the Court may consider the alleged hearsay in this fact as it is offered in support of

legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V), and for the fact that the person holds that view under Federal Rule of Evidence 803(3).

302. While plaintiffs object on the basis of hearsay, the Court may consider the newspaper articles in this fact as it they offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs' objection to the word "independent" is baseless for the reasons discussed above in response to the Plaintiffs' General Objections to Section IV(H). Additionally, the Court should adopt the factual assertions regarding Chvala's power in the legislature admitted by plaintiffs.

303. This proposed finding of fact should be entered for the reasons discussed above in response to the Plaintiffs' General Objections to Section IV(H). Additionally, plaintiffs admit that the treasurer of ICD-PAC signed a notarized oath stating, among other things, that the group would not act in concert, cooperation or consultation with the candidates, and this fact should therefore be entered by the Court. The paragraph does not suggest any possible inferences that may be drawn from this fact, and plaintiffs' discussion of any such inferences is irrelevant.

306. For the reasons discussed above in response to the Plaintiffs' General Objections to Section IV(H) and because plaintiffs admit the factual assertions in this paragraph, it should be adopted by the Court.

307. Plaintiffs dispute the relevance of ICD-Issues candidate-focused issue advertising (that did not contain express advocacy) that was funded with unlimited contributions. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or

defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.* Plaintiffs otherwise admit to the truth of the factual assertions in this paragraph.

308. For the reasons discussed above in response to the Plaintiffs' General Objections to Section IV(H), and because plaintiffs admit the factual assertions in this paragraph, it should be adopted by the Court.

3. Additional Incidents Further Illustrate the Danger of Large Contributions for Independent Spending Influencing Official Action or Leading to Quid Pro Quos.

309. The Court may consider the newspaper articles and statements by Republican Majority Leader Mitch McConnell and Senator McCain referred to in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V), and for the fact that the person holds that view under Federal Rule of Evidence 803(3).

Plaintiffs also object to the relevance of the evidence, but the fact that the promise of support through independent spending was used to influence votes is of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of that fact more probable. (*See* Fed. R. Evid. 401; FEC Reply Mem. Section IV.)

310. Plaintiffs claim this fact contains hearsay. However, the Court may consider Ms. Chapin's testimony as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.). In addition, even if this were an adjudicative fact case, the Court may consider the sworn statement to show the appearance of corruption (*see* Reply re 1st Mot. Section V**)**, and Chapin's view is admissible under Federal Rule of Evidence 803(3). Judge Kollar-Kotelly relied upon Chapin's testimony repeatedly. *See, e.g.*, 251 F. Supp. 2d at 444 & n.15, 448, 533, 556.

Plaintiffs contend that the campaign support was not in the form of independent expenditure, but rather in the form of a contribution to the Florida State Democratic Party. As is clear from the statement quoted by plaintiffs, however, the reference to the Party involved a different interest group.

311. The Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V), and for the fact that the person holds that view under Federal Rule of Evidence 803(3). Plaintiffs' objections regarding whether or not the independent expenditure would be deemed "coordinated" are also meritless for the same reasons discussed above in response to plaintiffs' general objections. (*See supra,* Response to the Plaintiffs' General Objections to Section IV(H).) Finally, whether or not SpeechNow intends on breaking the law does not mean that the facts included here are irrelevant. The fact that other groups have attempted to use independent expenditures to unduly influence elected officials is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of that fact more probable. (Fed. R. Evid. 401; FEC Reply Mem. Section IV.)

312. Chairman Johnson's testimony does not lack foundation. Chairman Johnson offers factual testimony based on his personal knowledge and experiences drawn from his 26 years as a state legislator and, following that, his service at the California Fair Political Practices Commission. (*See* Reply re 1st Mot. Section II(A).) His statements regarding Bonnie Garcia and the independent expenditure made by the California Peace Officer Association are founded on that personal knowledge. Furthermore, for this legislative fact, it is irrelevant that Chairman Johnson cannot definitively prove that Bonnie Garcia was unduly influenced by an independent

expenditure (and, indeed, his testimony indicates that no one would be able to do so); his testimony demonstrates the relationship between independent expenditures and the appearance of corruption.

313. The Court may consider the statements of Derek Cressman in this paragraph as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption (*see* Reply re 1st Mot. Section V), and for the fact that the person holds that view under Federal Rule of Evidence 803(3). The rest of plaintiffs' objections are meritless as legislative testimony and other statements may be introduced to support legislative facts without a requirement that all such people quoted become witnesses. Plaintiffs also fail to note that the Commission produced an audio recording of Derek Cressman's February 14th FPPC testimony to plaintiffs on August 25, 2008. (*See* Reply re 1st Mot. at 13.) Plaintiffs give no reason to question the accuracy of Mr. Cressman's statements presented here.

314. The events surrounding Representative Snowbarger and Senator Chvala are relevant for the reasons discussed above. (*See supra*, Response to the Plaintiffs' General Objections to Section IV(H).) Additionally, plaintiffs' conclusory objection that Professor Wilcox's expert conclusions lack foundation has no merit. (*See* FEC Reply Mem. Section III.)

IV.I. Large Contributions for Independent Expenditures Create an Appearance of Corruption

FEC's Response to SpeechNow's General Objections:

a. The Commission's proposed facts in ¶¶ 315-32 involve a coal company executive's contributions for independent expenditures in a 2004 West Virginia Supreme Court Race. These facts demonstrate that independent expenditures in a 2004 judicial election in West Virginia created an appearance of corruption. SpeechNow's attempt to recast these facts as a

nothing more than a case of "lapsed judicial ethics" do not controvert the substance of these facts and what they demonstrate about the likely effects of large contributions to fund independent expenditures.

The Commission's proposed facts provide a specific and telling example of large contributions made to an independent group that supported a candidate for public office and the appearance of corruption that ensued. The proposed facts demonstrate that a coal company executive made large contributions to a 527 organization that helped defeat a sitting justice on the West Virginia Supreme Court. The proposed facts also demonstrate that the judicial candidate who benefited from the coal company executive's contributions voted to overturn a multi-million dollar verdict against the coal executive's company. The sworn declaration of West Virginia Supreme Court Justice Larry V. Starcher and polling data illustrate the appearance of corruption that resulted.

SpeechNow argues that because judges can recuse themselves from pending cases involving campaign contributors, the Commission's proposed facts are not relevant here. But SpeechNow's argument proves too much. It is uncommon for legislators and executives, of course, to recuse themselves from pending matters that involve the pecuniary interests of campaign contributors. SpeechNow's argument thus suggests that whatever dangers of corruption or its appearance that might result from large contributions to independent expenditure groups are, if anything, more pronounced and insoluble in the case of non-judicial elections.

SpeechNow also suggests that the facts about the 2004 West Virginia judicial election are irrelevant because they involve an appearance of impartiality, rather than corruption. Whatever distinction SpeechNow is drawing between these two concepts is not germane here. As the

Supreme Court has explained, corruption, properly understood, includes undue influence on an officeholder's judgment, and the appearance of such influence that might arise from contributors gaining preferential access to and undue influence over government officials. The Commission's proposed facts thus illustrate that appearance of corruption that can arise in judicial and other elections from large contributions to groups that make independent expenditures. They are thus consequential to the Court's determination in this action and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

SpeechNow tries to undermine the facts as set forth in the Starcher deposition by alleging that it was unrepresentative of Justice Starcher's views. But Justice Starcher repeatedly states that his declaration is "accurate," and that he had adequate time to make sure it was. (*See* Starcher Dep. at 36-37, 44, FEC Exh. 16) Contrary to their claims otherwise, plaintiffs were not entitled to any drafts of Justice Starcher's declaration. As the Commission explains (Reply re 1st Mot. at 18-20), declarations and draft declarations like the ones at issue here fall within the attorney work product privilege and are not subject to disclosure until they are filed with the court. SpeechNow's remaining objections in this section amount to legal argument that does not controvert the substance of the proposed facts.

b. The Court may consider the Zogby poll and its results and the Drake affidavit as facts, as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the poll results to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.)

c. SpeechNow objects to the Commission's proposed facts ¶¶ 342-44 as incompatible with the "concepts" of coordination and independence. As the Commission explains (FEC Reply Mem. Section II), the Commission's proposed facts are entirely consistent

with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. This proposed fact provides additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinate expenditures.

315. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) The Court may also consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) Professor Wilcox based his report on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox makes a reasonable conclusion that the appearance of corruption negatively affects the public, and cites to specific sources to support his point. Plaintiffs' flawed suggestion that Professor Wilcox should have offered even more examples does not undercut the proposed fact and the Court should adopt it.

316. The testimony quoted in this proposed finding of fact is from Chairman Johnson's deposition. (Johnson Dep. at 49:9-25, FEC Exh. 10.). Chairman Johnson is not offering expert opinions in his declaration and there is thus no reason to strike it. (*See* Reply re 1st Mot. Section II(A).) Chairman Johnson offers testimony based on his personal knowledge and experiences drawn from his 26 years representing Orange County in the state legislature and, following that, his service at the California Fair Political Practices Commission. (*See* Reply re 1st Mot. Section

II(A); Johnson Decl. ¶¶ 2-3, FEC Exh. 2.) Furthermore, Chairman Johnson is permitted to offer his opinion because "[a]s long as [a witness] ha[s] personal knowledge of the facts, he [i]s entitled to draw conclusions and inferences from those facts — regardless of whether he applied any specialized experience." *Williams Enterprises*, 938 F.2d at 234 . (*See also* Reply re 1st Mot. Section II(A).)

1. A Coal Company Executive's Contributions for Independent Expenditures In a 2004 West Virginia Supreme Court Race Illustrate the Appearance of Corruption.

317. SpeechNow's foundation objection to this proposed fact lacks merit. The foundation for Justice Starcher's statement in this proposed fact are set forth in his declaration, which details the role that large contributions that paid for independent expenditures played in the defeat of a colleague of his on the West Virginia Supreme Court and the subsequent appearance of corruption. Moreover, as explained by the Commission (*see* FEC's Response to General Objection), the fact that these independent expenditures were made in a judicial election does not controvert the substance of the proposed fact, nor diminish their relevance to demonstrating an appearance of corruption.

323. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Moreover, the plaintiffs "do not object" to the factual assertions in this paragraph and it should, therefore, be adopted by the Court.

325. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow objects to the Commission's proposed fact with additional argument, but this argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

326. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) Moreover, plaintiffs "agree with the summary of events" in this paragraph.

327. To aid the Court, ¶ 327 summarizes all of the evidence put forth in ¶¶ 328-29 and should be adopted as it is supported by the more specific evidence presented below.

328. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) The Court may also consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) As explained by the Commission (Reply re 1st Mot. at Section IV.B.6), the Drake affidavit, which is admissible to show the appearance of corruption, can be offered to support legislative facts and it is also sworn testimony that the Court may consider independently. And as explained above (*see* FEC's Response to SpeechNow's General Objection), whatever distinction SpeechNow is trying to draw between impartiality and corruption does not controvert the substance of the proposed fact. Nor does it diminish the proposed fact's relevance insofar as the fact relates to the appearance of corruption.

329. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) The additional legal argument offered by SpeechNow does not controvert the substance of the proposed fact; as the Commission has explained (see FEC's Response to SpeechNow's General Objection), the fact that judges can recuse themselves from pending

matters does not diminish the relevance of the evidence in this fact relating to the appearance of corruption.

330. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) SpeechNow objects by suggesting that this proposed fact conflicts with the law regarding independent expenditures. But as the Commission explains (FEC Reply Mem. Section II), the Commission's proposed fact is entirely consistent with Supreme Court precedent, the FECA, and its own regulations. To the extent the applicable precedent and law are not directly dispositive regarding plaintiffs' constitutional questions, the Commission is attempting to develop evidence to assist the courts in resolving those issues. This proposed fact provides additional evidence about the potential for corruption from groups like SpeechNow, even if they meet the test for legal independence. Accordingly, presenting such evidence does not in any way constitute disavowal of the existing statutory and regulatory criteria for coordinate expenditures. SpeechNow's remaining objection appears to suggest that this fact involves an appearance of impropriety rather than an appearance of corruption. As the Commission has explained (*see* FEC's Response to General Objection), whatever distinction SpeechNow is trying to draw between impartiality and corruption does not controvert the substance of the proposed fact or diminish its relevance.

331. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.)

332. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) SpeechNow objects to the Commission's proposed fact by offering additional evidence and additional legal arguments, but its supplements do not controvert the substance of the proposed fact. SpeechNow also argues that part of Justice Starcher's testimony in favor of "[r]easonable restrictions on the amounts that individuals can contribute to organizations like" "And for the Sake of Kids" should be disregarded because he is giving expert testimony. But the opinion he provides in this fact is based on his personal experience as set forth in his declaration. He is not applying his legal expertise to provide an opinion about what the law requires, or applying law to fact.

2. The Public Views Large Election-Related Contributions As Corrupting, Regardless of the Recipient.

333. Speechnow claims that the Zogby poll was not timely disclosed as expert testimony pursuant to Federal Rule of Civil Procedure 26(a)(2). But as the Commission has explained (*see* Reply re 1st Mot. Section III.A-B), Mr. Calogero's declaration consists of lay testimony, and that as lay testimony, the expert disclosure requirements are not determinative. Morover, the Court may consider the results of the Zogby poll as they are offered in support of legislative facts (*see* FEC Reply Mem. Section I) and to show the appearance of corruption (*see* Reply re 1st Mot. Section VI).

334. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) SpeechNow objects to the Commission's proposed fact with legal argument about a

hypothetical poll they believe would have been more relevant. But such argument does not controvert the substance of the proposed fact, which demonstrates, as explained by Professor Wilcox, that the "public views a contribution made to a group that's helping a candidate the same way they view a direct contribution to the candidate." (Wilcox Dep. at 303-04, FEC Exh. 18.)

335. *See supra* ¶ 334.

336. *See supra* ¶ 334. SpeechNow incorrectly claims that Professor Wilcox's testimony with respect to the Zogby survey is inadmissible because it was not part of his report. Counsel for the plaintiffs, however, introduced Professor Wilcox's opinion of the survey by asking him questions about it during his deposition (*see* Wilcox Dep. at 271-82). The Commission merely asked Professor Wilcox about the survey during its re-direct examination following the conclusion of plaintiffs' questions at the deposition. Consequently, Professor Wilcox's opinions on the survey are plainly admissible.

337. *See supra* ¶ 336. What the public views as the legal definition of "corruption" is not at issue in this case, a definition SpeechNow nowhere provides. Thus, the additional legal argument offered by SpeechNow does not controvert the substance of the proposed fact, nor its relevance.

338. To aid the Court, ¶ 338 summarizes all of the evidence put forth in ¶¶ 339-40 and should be adopted as it is supported by the more specific evidence presented below.

339. Plaintiffs object to the relevance of the evidence, but the fact that the public views preferential access or other special favors granted by a candidate to someone who contributed to an independent group that supported the candidate's campaign is of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of that fact more

probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. SpeechNow objects to the Commission's proposed fact by offering additional evidence, but its supplement does not controvert the substance of the proposed fact.

340. The Court may consider the out of court statements in this fact as they are offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) In addition, the Court may consider the out of court statement to show the appearance of corruption. (*See* Reply re 1st Mot. Section V.) SpeechNow objects to the Commission's proposed fact by proposing additional evidence, a hypothetical survey more to its liking, but this proposal does not controvert the substance of the Commission's proposed fact. SpeechNow also objects that the Commission did not file the full Mellman-Wirthlin report with the Court and therefore "its credibility cannot be fully evaluated." The Commission did, of course, provide plaintiffs with a copy of the report, and they have not filed it with the Court in spite of the need they perceive. The Commission is not required to submit copies of all authorities relied on by its expert such as this report, and many of the questions are not relevant to this action; nevertheless, to avoid any further question, the report is attached as FEC Exhibit 169.

341. Plaintiffs' objection that Professor Wilcox's expert conclusion "lack[s] foundation" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable conclusion about what the public is likely to believe about unlimited contributions through interest groups. His conclusion is based, as SpeechNow admits, on two opinion polls. SpeechNow objects to his reliance on these polls by proposing a hypothetical poll that it believes would be more relevant. But whatever this hypothetical poll might suggest in no way demonstrates that Professor Wilcox's opinion is baseless. SpeechNow's further claims regarding whether the public is aware of the "legal definition" of corruption is irrelevant. SpeechNow

nowhere offers a "legal definition" of corruption, or explains why a poll that purportedly sought to measure the public's view of that would be more relevant that the polls on which Professor Wilcox relied.

SpeechNow also objects to the Commission's proposed fact by offering additional evidence, a quote from an article by scholars Richard N. Engstrom and Christopher Kenny. But this supplement does not controvert the substance of the Commission's proposed fact regarding the appearance of corruption that might result from unlimited contribution to fund independent expenditures. In any event, as the Commission has shown (Reply re 2nd Mot. Section II.B.), the quote cited from Engstrom and Kenny's article does not conflict with any conclusions reached by Professor Wilcox, none of which relate to this proposed fact.

3. Coordination Is Inherently Very Difficult to Police and Candidate Campaigns Are Often Involved With "Independent" Spending Below the Level of Involvement That Constitutes "Coordination" Within the Meaning of the Law.

342. To aid the Court, ¶ 342 summarizes the evidence put forth in ¶¶ 343 and 344 and should be adopted as it is supported by the more specific evidence presented below.

343. As a preliminary matter, the Court may consider the alleged hearsay in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Next, plaintiffs misstate the law in claiming that there can be no corruption without coordination. (FEC Reply Mem. Section II.) Ultimately, plaintiffs object to the Commission's proposed fact by offering additional evidence and legal argument, but their supplements do not controvert the substance of the proposed fact.

344. Chairman Johnson offers testimony based on his personal knowledge and experiences drawn from his 26 years as a state legislator and, following that, his service at the California Fair Political Practices Commission. (*See* Reply re 1st Mot. Section II(A); Johnson

Decl. ¶¶ 2-3, FEC Exh. 2.) Furthermore, Chairman Johnson is entitled to offer his opinion because "[a]s long as [a witness] ha[s] personal knowledge of the facts, he [i]s entitled to draw conclusions and inferences from those facts — regardless of whether he applied any specialized experience." *Williams Enterprises,* 938 F.2d at 234. (*See also* Reply re 1st Mot. at Section II(A).) The plaintiffs also appear to object to the Commission's proposed fact by offering conjecture about potential investigations by the FPPC, but these suggestions do not controvert the substance of the proposed fact.

IV.J. Money Raised Through Associations with Many Protections of the Corporate Form Pose a Danger of 'Corrossive and Distorting Effects of Immense Aggregations of Wealth.

FEC's Response to SpeechNow's General Objection:

The Commission's proposed facts ¶¶ 345-49 demonstrate that money raised through associations with many protections of the corporate form pose a danger of "corrosive and distorting effects of immense aggregations of wealth." Although the Court did not accept an argument along these lines at the preliminary injunction stage, the proposed facts in this section remain relevant in light of Supreme Court precedent and may assist the Court of Appeal's evaluatation of the constitutional issues in this case. Under plaintiffs' theory of relevance, plaintiffs themselves would essentially be foreclosed from submitting evidence now on issues that this Court had found, at the preliminary injunction stage, did not have a likelihood of success.

345. Although the Commission admits that this proposed fact in part represents a legal conclusion, it is also a relevant fact. The protections provided by the Unincorporated Non-Profit Association under D.C. law is of consequence to the Court's determination whether groups

organzied under the provision pose a danger of distorting the election process. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

346. To aid the Court, ¶ 346 summarizes all of the evidence put forth in ¶¶ 347-49 and should be adopted as it is supported by the more specific evidence presented below.

347. Although the Commission admits that this proposed fact in part represents a legal conclusion, it is also a relevant fact. The extent to which individuals benefit from limited liability under the Uniform Unincorporated Non-Profit Association Act is of consequence to the Court's determination of the ability of non-profit associations to aggregate wealth. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

348. Although the Commission admits that this proposed fact in part represents a legal conclusion, it is also a relevant fact. The characteristics shared by corporations and non-profit associations is of consequence to the Court's determination of the ability of non-profit associations to pose a danger of corrosive and distorting effects of immense aggregations of wealth. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

349. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact. SpeechNow objects that the Commission draws an unwarranted assumption, but makes no effort to explain how it does so.

IV.K. Independent Expenditures Through Groups are Less Transparent to the Public than Independent Expenditures Made by Individuals

351. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs' unexplained objection that Professor Wilcox's expert conclusion is "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable conclusion based on specific examples

of expenditures run through less transparent groups with positive sounding names like "Citizens for Better Medicare," "And for the Sake of the Kids," and "The Foundation for Responsible Government." (*See* Wilcox Rept. at 24-25.) SpeechNow objects to the Commission"s proposed fact with additional legal argument, but this argument does not controvert the substance of the proposed fact.

352. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs' unexplained objection that Professor Wilcox's expert conclusion is "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox makes a reasonable claim that voters would have been better able to evaluate the ads run by "And for the Sake of the Kids" if the ads had indicated which individuals paid for them. SpeechNow objects to the Commission's proposed fact with additional legal argument, but this argument does not controvert the substance of the proposed fact.

353. The Court may consider the FPPC Report in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Additionally, as discussed above, plaintiffs provide no valid grounds to question the reliability of the FPPC Report. (*See supra* Section IV(6)(ii).) Finally, this proposed finding of fact does not conflict with federal law, and this paragraph does not dispute what the disclosure and reporting requirements actually are. The concealment with deceptive group names is relevant to the important, different ramifications for an advertisement's disclaimer between paying to finance independent expenditures individually and contributing to a group to finance independent expenditures.

354. As plaintiffs admit the truth of this proposed finding of fact, it should be adopted by the Court. Plaintiffs object to the relevance of the evidence, but the fact that a very small

number of people provide extremely large amounts of money when contributions are unlimited is of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of that fact more probable. (*See* Fed. R. Evid. 401; FEC Reply Mem. Section IV.)

355. Chairman Johnson offers testimony based on his personal knowledge and experiences drawn from his 26 years as a state legislator and, following that, his service at the California Fair Political Practices Commission. ((*See* Reply re 1st Mot. Section II(A).) Johnson Decl. ¶¶ 2-3, FEC Exh. 2.) Chairman Johnson may offer his opinion because "[a]s long as [a witness] ha[s] personal knowledge of the facts, he [i]s entitled to draw conclusions and inferences from those facts — regardless of whether he applied any specialized experience." *Williams Enterprises,* 938 F.2d at 234. (*See also* Reply re 1st Mot. at Section II(A).)

356. The Court should enter this proposed finding of fact for the reasons stated in regard to ¶ 355.

357. The FPPC Report is not hearsay because it is offered in support of legislative facts (*see* FEC Reply Mem. Section I), and because it is a public report, Fed. R. Evid. 803(3). Even if this evidence had been submitted in support of adjudicative facts, the Court may consider the alleged hearsay to evaluate Professor Wilcox's conclusions and opinions (FEC Reply Mem. Section VI), and to show the appearance of corruption (Reply re 1st Mot. Section IV.A). Finally, there is no reason to question the reliability of the FPPC Report; *see supr,* regarding ¶ 114 and in response to plaintiffs' general objections to Section IV(B)(6).

358. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) SpeechNow objects to the Commission's proposed fact with additional legal argument which appears to be premised on the proposition that evidence regarding candidate-focused issue advertising is irrelevant to

consideration of independent expenditures. That argument is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

359. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs' unexplained objection that Professor Wilcox's expert conclusions are "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here, Professor Wilcox bases his conclusion on past examples of individuals making independent expenditures through groups which may be little more than a front for their personal contributions, such as "And for the Sake of the Kids" and "Republicans for Clean Air." (*See* Wilcox Rept. at 24-25.)

360. Plaintiffs' claim that evidence regarding candidate-focused issue advertising (what SpeechNow refers to as "sham" issue advertising) is irrelevant to consideration of independent expenditures is unsupported. In *McConnell* the Court concluded that "the two categories of advertisements proved functionally identical in important respects." 540 U.S. at 127. "Both were used to advocate the election or defeat of clearly identified federal candidates, even though the so-called issue ads eschewed the use of magic words." *Id.*

IV.L. The Disclosure of All Receipts and Expenditures Ensures that Vital Information About Who is Supporting Candidates is made Publicly Available.

361. The additional evidence offered by SpeechNow from the Scott Deposition does not contradict the fact that information that must be reported by political committees is more extensive than what must be reported by individuals making independent expenditures. *See* FEC Fact ¶ 372. For example, persons making independent expenditures would not have to report

overhead and administrative expenses, which on average account for half of the disbursements of "major purpose" entities. *See* FEC Fact ¶ 369. Such undisputed facts support Professor Wilcox's conclusion that "[i]f interest groups whose principal purpose is electoral advocacy are allowed to accept large contributions but required only to disclose those funds which are used for the direct costs of airing independent expenditures, it will limit disclosure in harmful ways."

362. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusions are "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here Professor Wilcox reasonably concludes that there are ample ways a donor can signal their contributions to candidates based on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about how donors can claim credit for their contributions. Plaintiffs also object that the proposed finding concerns entities other than SpeechNow and thus is irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not probative, however, of the effort other organizations have undertaken to develop their advertising campaigns. The actual practices and activities of past actors are legislative facts the courts should take into account in assessing whether the disclosure of all receipts and expenditures required of political committees ensures that vital information about who is supporting candidates is made publicly available.

363. Plaintiffs' unexplained objection that Professor Wilcox's expert conclusions are "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here Professor Wilcox makes a reasonable conclusion about the effects of exempting groups that run independent expenditures from the full reporting requirements that apply to political committees. He bases his conclusion on his expertise as a political scientist; years studying campaign spending; interviews with

consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about the reduced level of disclosure that would result. Plaintiffs also object that the proposed finding concerns entities other than SpeechNow and thus is irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not probative, however, of whether other organizations would indeed disclose all donors who contribute more than $200, even though the FECA does not require it. (*See* FEC Facts ¶¶ 373-74.) Indeed, as the Commission's facts demonstrate, it is not altogether certain that SpeechNow will disclose all its donors who contribute more than $200. (*See id*.)

364. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusions are "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here Professor Wilcox reasonably concludes that there are ample ways donors can signal their contributions to candidates. He bases his conclusion on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about the gratitude that might result from unlimited contributions to groups that make independent expenditures. Plaintiffs also object that the proposed finding concerns entities other than SpeechNow and thus is irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not very probative, however, of whether voters will necessarily know who is paying for independent expenditures run by other groups. And although SpeechNow claims that voters "will be able to see" who is paying for its independent expenditures, the Commission's facts indeed demonstrate that it is not altogether certain that SpeechNow will disclose all its donors who contribute more than $200. (*See* FEC Facts ¶¶ 373-74.)

365. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Even if these statements had been submitted in support of adjudicative facts, they could be considered by the Court for the appearance of corruption. (*See* Reply re 1st Mot. Section V). Plaintiffs object to the relevance of the evidence, but the fact that disclosure of the identity of donors increases the scrutiny of the role donors might play in the formulation of public policy is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of that fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. SpeechNow objects by claiming that it will disclose all its donors. But as the Commission's facts demonstrate, it is not altogether certain that SpeechNow will disclose all its donors who contribute more than $200. (*See* FEC Facts ¶¶ 373-74.) In any event, the particular conduct (or lack thereof) of test-case entity SpeechNow is not very probative as to whether other groups that make independent expenditures would indeed disclose all donors who contribute more than $200.

366. The Court may consider the out of court statements in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but Professor Wilcox's opinion is of consequence to the Court's determination in this action; the cited evidence tends to make the existence of the facts that are the basis of his opinion more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. SpeechNow objects to the Commission's proposed fact with legal argument that does not controvert the substance of the proposed fact. Plaintiffs also object that the proposed finding concerns entities other than SpeechNow and thus is irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not probative, however, of whether voters will necessarily know who is paying for independent expenditures run by other groups. Finally, SpeechNow alleges that the FEC has

mischaracterized Mr. Keating's declaration, but does not attempt to explain how the Commission has done so.

367. Plaintiffs' conclusory objection that Professor Wilcox's expert conclusion is "baseless" has no merit. (*See* FEC Reply Mem. Section III.) Here Professor Wilcox makes a reasonable conclusion about the likely effects of exempting groups that run independent expenditures from the full reporting requirements that apply to political committees. He bases his conclusion on his expertise as a political scientist; years studying campaign spending; interviews with consultants, candidates, and party officials; and review and knowledge of the relevant academic literature. From that foundation, Professor Wilcox offers a general conclusion about the reduced level of disclosure that would result and its effects. Plaintiffs also object that the proposed finding concerns entities other than SpeechNow and thus is irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not very probative, however, of whether other organizations would indeed disclose all donors who contribute more than $200. (*See* FEC Facts ¶¶ 373-74). Indeed, as the Commission's facts demonstrate, it is not altogether certain that SpeechNow will disclose all its donors who contribute more than $200. (*See id.*)

368. To aid the Court, ¶ 368 summarizes all of the evidence put forth in ¶¶ 369-75 and should be adopted as it is supported by the more specific evidence presented below.

369. Plaintiffs do not object to the substance of the fact, only its relevance. But the evidence of what political committees spend their funds on is of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of the facts that are the basis of his opinion more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. Plaintiffs also object that the proposed fact concerns entities other than SpeechNow and thus is

irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not very probative, however, regarding for what other groups that make independent expenditures make disbursements.

370. Plaintiffs do not object to the substance of the fact, only its relevance. But the evidence of what percentage of disbursements nonconnected political committees make for independent expenditures and contributions is of consequence to the Court's determination in this action, and the cited evidence tends to make the existence of these facts more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. Plaintiffs also object that the proposed fact concerns entities other than SpeechNow and thus is irrelevant. The particular conduct (or lack thereof) of test-case entity SpeechNow is not probative, however, for what other groups that make independent expenditures will make disbursements.

371. SpeechNow does not controvert the substance of the proposed fact.

372. See FEC Reply ¶ 371.

373. The testimony from Mr. Keating is characterized in the fact as "he agreed with the position taken in a letter to the Commission from the Club for Growth, insisting that disclosure was limited to contributors who had specified that the contribution was for the purpose of furthering an independent expenditure." (Fact ¶ 373, citing Keating Dep. at 82-84, FEC Exh. 11). Mr. Keating, the founder and person currently responsible for SpeechNow's day-to-day activities, then said he personally agreed with everything in the letter. (*See id.* at 84 (Q: And do you personally agree with everything that's stated in the letter? . . . THE WITNESS: Yes.").) SpeechNow has thus taken different positions and there are no mispresentations.[9]

[9] We regret that FEC Fact ¶ 373 contains a citation error. Under a Commission regulation, 11 C.F.R. § 109.11(e)(1)(vi), a person who makes an independent expenditure must provide

374. The evidence clearly supports the fact that "[a]t his combined individual and Rule 30(b)(6) deposition, Mr. Keating took no position on whether SpeechNow would disclose its disbursements for expenses such as candidate research or public opinion polling on its independent expenditure reports. (Keating Dep. 185-186, FEC Exh. 11.)" *See id.* ("I don't think SpeechNow has taken a position on this.") Mr. Keating's present ability to be "happy" to report all donors "whether he has to or not," does not provide any assurance, so the fact contains no misrepresentations.

375. This paragraph provides an example of the danger that relevant information about election-related expenses (such as opposition research and on candidates and polling) will go unreported by a group of which David Keating is executive director. Plaintiffs object to the relevance of the evidence, but the fact illustrates how unreported information is of consequence to the Court's determination regarding adequate disclosure in this action and the cited evidence tends to make the existence of that danger more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

V. Robust Fundraising Has Occurred Within Federal Contribution Limits and Large Sums Can Be Raised For Independent Expenditures Through the Aggregation of Money From a Number of Donors (FEC Facts ¶¶ 376-437)

FEC Response to Plaintiffs' General Objections:

In this case, plaintiffs assert that the Act's contribution limits prevent SpeechNow from operating at all. The Commission has noted that SpeechNow publicized its activities, including establishing a web site, and compiled a list of potential contributors, but voluntarily chose not to accept any contributions, not even contributions under the legal limits. Thus, SpeechNow has no

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"identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure." This language was mistakenly attributed to 2 U.S.C. § 434(c)(2)(A)-(C). Section 434(c)(2)(C) states, the "identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure."

direct experience with fundraising under the Act's contribution limits. Plaintiffs' claims therefore are entirely speculative.

To further support its argument, the Commission has presented facts in this section that demonstrate that robust fundraising has occurred within the federal contribution limits and that large sums can be raised for independent expenditures through the aggregation of money from a number of sources. (*See* FEC Facts ¶¶ 376-437.) Plaintiffs acknowledge that many of these facts are "true," but argue that this entire section is irrelevant because, in their view, the "only relevant question is whether contribution limits burden their ability to speak to the extent and in the manner that they wish to speak." (SN Resp. to FEC Facts at 144-145.) The Supreme Court, however, has already explained that the "overall effect" of dollar limits on contributions is

> merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression."

Buckley, 424 U.S. at 21. *See SpeechNow.org*, 567 F. Supp. 2d at 77. For this and other reasons discussed in the Commission's briefs, plaintiffs' legal argument is without merit.

Plaintiffs also inaccurately contend that the Commission suggested that the Court interfere with SpeechNow.org's choice of "media" and "message." (*See* SN Resp. to FEC Facts at 145-46.) Instead, the Commission merely proposed facts that help establish: if plaintiffs want to support free speech issue groups, they are free to; if they want to support candidates who share their First Amendment views, they are free to; and if plaintiffs individually want to spend over $5000 on independent expenditures, they are free to.

Finally, plaintiffs attempt to distinguish the data cited by the Commission on the grounds that they include nonconnected committees that accept contributions from other political committees and that do not limit their activities to independent expenditures. Whether a nonconnected political

committee *also* chooses to make contributions to candidates is irrelevant, however, regarding whether nonconnected committee can raise sufficient funds within the $5,000 limit to operate.

A. Both the Number of Nonconnected Committees and Their Total Receipts Have Consistently Risen Since 1990 and Increased Dramatically This Decade
(FEC Facts ¶¶ 376-384)

FEC Response to Plaintiffs' Specific Objections:

384. The Court may consider the newspaper article in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.)

B. The National Political Parties Successfully Recruited New Donors When They Were No Longer Permitted to Receive Unlimited Contributions

FEC Response to Plaintiffs' Specific Objections:

385. Although plaintiffs object on the grounds that this paragraph states legal conclusions, unlike prior objections plaintiffs do not dispute the Commission's description of the cited authorities.

386. This paragraph states facts, not opinion. The Court may consider the book cited in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

387. The Court may consider the book cited in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

388. The Court may consider the book cited in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the

evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

389. The Court may consider the book cited in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

390. The Court may consider the book cited in this fact as it is offered in support of legislative facts. (*See* FEC Reply Mem. Section I.) Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

391. To aid the Court, ¶ 391 summarizes all of the evidence put forth in ¶¶ 374-390 and should be adopted as it is supported by the more specific evidence presented below.

C. SpeechNow is Capable of Raising Significant Sums Within the Contribution Limits

392. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact.

393. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact.

394. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact.

395. To aid the Court, ¶ 395 summarizes all of the evidence put forth in ¶¶ 396-401 and should be adopted as it is supported by the more specific evidence presented below.

397. Plaintiffs' relevance claim is frivolous. Plaintiffs' proposed facts contain nearly identical statements and cite David Keating's declaration, submitted with plaintiffs' proposed findings. *See* SN Facts ¶ 32 ("Since the website was created late last year, about 180 individuals have signed up to receive more information and about 75 of them have indicated that they would consider making a donation to SpeechNow.org in the future. Keating Decl. at ¶ 5.").

398. Plaintiffs do not contest the facts in this paragraph, but only the Commission's characterization. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. The Supreme Court's decision in *Wisconsin Right to Life* is inapposite.

399. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

400. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. Plaintiffs claim is directly contradicted by FEC Facts ¶ 437 regarding low cost alternatives.

401. Plaintiffs do not contest that SpeechNow could have raised more funds, but only whether the amount would have exceeded plaintiffs' fundraising goals. In part, the success of this fundraising would depend upon the time and effort expended by plaintiffs. At least one person offered to contribute $10,000, so not all of the contributions would have been "small." (*See* FEC Exh. 146 at SNK0287.)

402-09. Plaintiffs object to the relevance of the evidence, but the fact that SpeechNow's ability to raise funds is of consequence to the Court's determination in this action and the cited evidence about their receipt of free publicity tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. Although SpeechNow has voluntarily chosen not to raise funds within the limits during the pendency of the case, its clear ability to raise funds is plainly relevant to their argument that they will not be able to get off the ground without large donations.

410-412. Plaintiffs object to the relevance of the evidence, but the facts are of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the facts more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. SpeechNow also objects to the Commission's proposed facts with legal argument, but this argument does not controvert the substance of the proposed facts.

413-421. Plaintiffs object to the relevance of the evidence, but the facts are of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the facts more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

422. Plaintiffs contend that "[t]he FEC has mixed up the chronology of these emails" because they "should be read from the bottom up," but the quotations in this proposed fact are in correct chronological order (reading from bottom to top).

423-424. Plaintiffs object to the relevance of the evidence, but the facts are of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the facts more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

425. To aid the Court, ¶ 425 summarizes all of the evidence put forth in ¶¶ 426-430 and should be adopted as it is supported by the more specific evidence presented below.

426. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

427-428. SpeechNow objects to the Commission's proposed facts by offering additional evidence, but its supplements do not controvert the substance of the proposed fact. Plaintiffs object to the relevance of the evidence, but the facts are of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the facts more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

429. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

430. To aid the Court, ¶ 430 summarizes all of the evidence put forth in ¶¶ 376-429 and should be adopted as it is supported by the more specific evidence presented below.

431. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

432. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

433. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

434. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

435. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV. SpeechNow objects to the Commission's proposed fact with legal argument, but this argument does not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

436. Plaintiffs object to the relevance of the evidence, but the fact is of consequence to the Court's determination in this action and the cited evidence tends to make the existence of the fact more probable. Fed. R. Evid. 401; FEC Reply Mem. Section IV.

437. SpeechNow objects to the Commission's proposed fact with legal argument and an unsupported accusation against the Commission, but neither controverts the substance of the proposed fact.

VI. Political Committee Reporting Requirements Do Not Threaten The Survival of SpeechNow or Other Campaign Groups.

438. To aid the Court, ¶ 438 summarizes all of the evidence put forth in ¶¶ 439-452 and should be adopted as it is supported by the more specific evidence presented below.

440. Plaintiffs admit part of the fact and do not respond to part of the fact. Because they do not contest the factual assertions, it should, therefore, be adopted by the Court.

444. The fact is supported by testimony obtained by plaintiffs at their Rule 30(b)(6) deposition of the Commission. Plaintiffs contend that the opinion of only one person, a Commission employee, is insufficient to establish that the claim is true, but Mr. Scott was

speaking on behalf of the Commission under Rule 30(b)(6). Moreover, the view of a knowledgeable person helps establish that, indeed, generally the reporting requirements that apply to nonconnected political committees are not complicated.

445. SpeechNow disputes the relevance of the Commission's proposed fact, but with no explanation. Consequently, the Court should adopt the fact, which is relevant to burden associated with preparing and filing disclosure reports with the Commission.

446. To aid the Court, ¶ 446 summarizes all of the evidence put forth in ¶¶ 376-383 and should be adopted as it is supported by the more specific evidence presented below.

447. To aid the Court, ¶ 447 summarizes all of the evidence put forth in ¶¶ 448-452 and should be adopted as it is supported by the more specific evidence presented below.

448. SpeechNow objects to the Commissions proposed fact by offering additional evidence, but its supplements do not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

449. The source supports the stated fact.

450. In addition to the roles cited by plaintiffs, Mr. Keating also testified that he helps write the solicitations of members, reviews draft advertisements, and advises on which candidates are supported. (Keating Dep. at 28, FEC Exh. 11.)

451. SpeechNow objects to the Commissions proposed fact by offering additional evidence, but its supplements do not controvert the substance of the proposed fact. Accordingly, the Court should adopt the Commission's proposed fact.

Respectfully submitted,

Thomasenia P. Duncan
(D.C. Bar No. 424222)
General Counsel

David Kolker
(D.C. Bar No. 394558)
Associate General Counsel

Kevin Deeley
Assistant General Counsel

Robert Bonham
(D.C. Bar No. 397859)
Senior Attorney

__/s/ Graham M. Wilson___
Steve Hajjar
Graham M. Wilson
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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