ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5223

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG, **et al.**
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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CERTIFICATE OF COUNSEL FOR *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS TO PARTIES, CORPORATE DISCLOSURE, RULINGS AND RELATED CASES

I. Parties and *Amici*

The parties in the district court were plaintiffs SpeechNow.org, David Keating, Fred M. Young, Jr., Edward H. Crane, III, Brad Russo, and Scott Burkhardt, and defendant Federal Election Commission. All parties below are parties before this Court in this appeal. The FEC was the defendant below and is the appellee in this Court. *Amici curiae* in the district court were Democracy 21 and the Campaign Legal Center (CLC). *Amici curiae* in this Court are Democracy 21 and the CLC, as well as the Goldwater Institute's Scharf-Norton Center for Constitutional Litigation, FRC Action, Concerned Women for America Legislative Action Committee and 1851Center for Constitutional Law of the Buckeye Institute for Public Policy Solutions.

II. Corporate Disclosure Statement

The CLC is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC. Democracy 21 is a nonprofit, nonpartisan corporation. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

III. Ruling Under Review

The ruling under review is the opinion and order issued July 1, 2008, by the Hon. James Robertson, denying Plaintiffs' Motion for Preliminary Injunction. The district court's opinion is reported as *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70 (D.D.C. 2008).

IV. Related Cases

Apart from the original proceeding in the district court, there are no related cases pending in this Court or in any other court of which counsel to *amici* are aware.

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STATEMENT OF INTEREST

The Campaign Legal Center and Democracy 21 are non-profit organizations with a long history of supporting the Nation's campaign finance laws as an important bulwark against corruption and the appearance of corruption in the political process. Both groups also have frequently participated as parties or *amici* in litigation to defend the constitutionality of the campaign finance laws. They participate in this case with the consent of the parties.

SUMMARY OF ARGUMENT

This case is not about whether SpeechNow.org, or similar groups, can make expenditures in unlimited amounts to expressly advocate on behalf of their preferred federal candidates. That right, long since established in *Buckley v. Valeo,* 424 U.S. 1 (1976), is not in dispute here. Nor is this case about whether individuals can associate in order to pool resources and amplify their collective voice. That right is also protected by the campaign finance laws, which allow individuals to pool resources for campaign-related speech by contributing to political committees in amounts of *up to $10,000* per donor in each two-year election cycle.

Instead, this case is about whether wealthy donors can each contribute hundreds of thousands, or indeed, millions of dollars to sophisticated committees, often closely associated with parties and candidates, in order to finance campaign

advocacy that takes place wholly outside of federal campaign finance rules. Just seven years ago, Congress, with Supreme Court approval, passed the Bipartisan Campaign Reform Act (BCRA) of 2002, Pub. L. No. 107–155, 116 Stat. 81 (2002), to end a system of "soft money," *i.e*. funds raised outside federal contribution limits and source prohibitions, that flowed through political party committees into federal elections. Appellants now argue that the Constitution requires the creation of a new soft money system – this time with soft money flowing through "section 527" groups, such as SpeechNow.org.

The Constitution does not require this result, and the district court below correctly denied appellants' motion for a preliminary injunction seeking such relief.

A limit on contributions – the only type of limit at issue here – warrants a "less rigorous degree of scrutiny" and is valid if it "satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell v. FEC,* 540 U.S. 93, 136-37 (2003) (internal quotations omitted). Here, that level of scrutiny is satisfied because the limits on contributions to even nominally "independent" 527 groups, like SpeechNow.org, serve to prevent the circumvention of the contribution limits that were enacted to shut down the corrupt party soft money system.

In the last three federal elections, independent 527 groups had a track record of serving as conduits for donors seeking to route large soft money contributions to political parties and candidates in circumvention of BCRA. These groups were often set up by political party operatives who, with the blessing of both parties, encouraged the parties' former soft money donors to simply shift their large contributions to these new vehicles. As noted by the district court, "legally independent 527 groups can and do bear seals of approval from political parties," and "have the kind of 'close ties' to federal parties and officeholders that render them 'uniquely positioned to serve as conduits for corruption,' both in terms of the sale of access and the circumvention of the soft money ban." *SpeechNow.org v. FEC*, 567 F. Supp. 2d 70, 79-80 (D.D.C. 2008).

The limits on contributions to "independent expenditure committees" at issue here directly prevent this circumvention of the federal contribution limits and are therefore a permissible means to advance the government's vital interest in preventing corruption and the appearance of corruption in federal elections.

ARGUMENT

I. Statutory and Factual Background

A. Political Committees.

The legal framework for the regulation of "political committees" was established in 1974 with the enactment of the Federal Election Campaign Act (FECA), and has applied without significant revision since then.

FECA defines "political committee" to mean "any committee, club, association or other group of persons" which "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). In *Buckley*, the Supreme Court resolved constitutional concerns that this statutory definition of "political committee" was overbroad by construing the term narrowly to "only encompass organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*" 424 U.S. at 79 (emphasis added). *See also McConnell,* 540 U.S. at 170 n.64. Only an organization that meets both the "major purpose" test and the statutory definition is deemed a "political committee" subject to FECA.

FECA imposes two contribution limits on political committees: a $5,000 limit on contributions by individuals to a political committee per calendar year, *see* 2 U.S.C. § 441a(a)(1)(C), and an aggregate cap of $42,700, indexed for inflation,

on the total contributions that an individual can make to all political committees in a two-year election cycle, *see* 2 U.S.C. § 441a(a)(3).

Committees that engage in only independent spending are not exempt from these limits. 2 U.S.C. § 441a(a)(1); 11 C.F.R. §§ 110.1(n), 110.5(d).[1] The Supreme Court has not restricted political committee status to only those organizations that make contributions or coordinate activities with candidates. To the contrary, the Court stated in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), that a non-profit group "would be classified as a political committee" if its "*independent spending* becomes so extensive that the organization's major purpose may be regarded as campaign activity." *Id*. at 262 (emphasis added).

B. Section 527 Groups.

Section 527 of the Internal Revenue Code grants non-profit tax status to "political organizations," defined to mean groups "organized and operated primarily for the purpose of" "influencing or attempting to influence the selection, nomination, election or appointment of any individual" to public office. 26 U.S.C.

[1] The D.C. Circuit Court of Appeals, in a recent decision reviewing two FEC regulations, *see* 11 C.F.R. §§ 100.57, 106.6(c), (f), discussed whether limits on contributions to committees making independent expenditures are constitutionally permissible. *EMILY's List v. FEC*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009). However, because EMILY's List did not challenge the constitutionality of the statutory contribution limits at 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3), but rather only the FEC regulations interpreting the statutory limits, the Court's discussion was merely *dictum*, and therefore not binding.

§§ 527(e)(1), (e)(2). As the *McConnell* Court explained, "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 540 U.S. at 174 n.67.

All FECA political committees are 527 groups – they register as such with the IRS for purposes of establishing their non-profit tax status. But not all 527 groups are FECA political committees. Those involved solely with state campaigns, for instance, are not required to register with the FEC or to abide by FECA.

Following the enactment of BCRA, a broader chasm opened between FECA "political committees" and section 527 "political organizations." BCRA halted the flow of soft money into federal elections through political parties by prohibiting the national party committees from raising or spending any soft money, 2 U.S.C. § 441i(a), and prohibiting state party committees from spending soft money for certain defined "federal election activities," *id*. § 441i(b). In response, a number of 527 groups, such as The Media Fund, America Coming Together, Progress for America Voter Fund, and Swift Boat Veterans for Truth began overtly spending money to influence federal elections, particularly the 2004 presidential campaign. These groups, however, took the position they were not making "expenditures" or receiving "contributions" under FECA, and thus did not have to register as FECA "political committees" or abide by the contribution limits that apply to such

committees. Section 527 groups ultimately spent hundreds of millions of dollars of unregulated money, primarily on television advertising campaigns and on partisan voter mobilization activities.

Soft money donations that had previously flowed through the political parties were channeled instead to these 527 groups, which became the new conduits for illegal soft money in federal elections. In the 2004 election, 527 groups raised more than $405 million in soft money and spent more than $398 million, almost half of which was spent just by the four groups mentioned above. *See* Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT (Michael J. Malbin ed., 2005) (hereinafter "Weissman & Hassan") at 105 (Table 5.4).[2]

Further, these section 527 groups were largely funded by just a handful of wealthy individuals. *Just 24 individual donors* gave a total of *$142 million* in contributions to 527 groups in 2004, which represented more than half of all money raised from individuals by these groups. *Id.* at 92. One donor, George Soros, gave $24 million to 527 groups; another, Peter Lewis, gave $22.5 million.

[2] A copy of the Weissman and Hassan chapter was attached to the Brief of the Federal Election Commission (filed Sept. 23, 2009) as Addendum 5.

Id. at 94 (Table 5.2). In total, 52 individual donors each gave $1 million or more to 527 groups in 2004, and 265 gave $100,000 or more. *Id.* at 92 (Table 5.1).

Section 527 groups continued to "play[] a significant role in federal congressional elections during the 2005-06 cycle, raising $117 million and spending $143 million." Steve Weissman & Kara D. Ryan, "Soft Money in the 2006 Election and the Outlook for 2008" (hereinafter "Weissman & Ryan") at 1, *available at* http://www.cfinst.org/books_reports/pdf/NP_Softmoney_06-08.pdf. A single donor, Bob Perry (who, in 2004, had given $4.45 million to Swift Boat Veterans and $3 million to Progress for America) gave a total of $9.75 million to 527 groups in 2006, while other large donors included Jerry Perenchio ($6 million), George Soros ($3.9 million) and Linda Pritzker ($2.3 million). Weissman & Ryan at 22 (Table 2). "Nearly half of total contributions [to 527 groups] – $53 million – came from 104 individual $100,000+ donors, mainly from 15 individuals who gave between $600,000 and $9.75 million." *Id.* at 2.

Following the 2004 and 2006 elections, the FEC initiated a series of investigations into the major 527 groups active in these elections. The FEC ultimately concluded that a number of these groups had violated FECA by refusing to register as political committees and abide by the contribution limits that apply to political committees – the same limits at issue here. To date, the Commission has entered into settlement agreements with at least ten 527 groups that had been active

in past elections, and has collected, in aggregate, more than two million dollars of civil penalties for these violations.[3]

The enforcement actions undertaken by the FEC served as a partial check on the growth of 527 groups in the 2008 elections. In 2008, 527 groups raised a total of $251 million, a significant sum, but far short of the $400 plus million raised in 2004. Center for Responsive Politics (CRP), *527s: Advocacy Group Spending in the 2010 Elections*, *at* http://www.opensecrets.org/527s/index.php (last visited Sept. 21, 2009). Again the receipts of the 527 groups came overwhelmingly from large donors – *e.g.*, Fred Eshelman ($5.5 million), Sheldon & Miriam Adelson ($5 million) and George Soros ($5 million). CRP, *Top Individual Contributors to 527 Organizations*, *at* http://www.opensecrets.org/527s/527indivs.php?cycle=2008 (last visited Sept. 21, 2009).

Were this Court to invalidate the challenged contribution limit, however, there is little doubt that 527 organizations would rapidly multiply and again function as conduits for hundreds of millions of unregulated dollars to flow into federal elections. The remedy appellants seek would, in practical import, enshrine

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[3] *See, e.g.*, FEC Conciliation Agreement With Progress For America Voter Fund (MUR 5487) (Feb. 2007) (civil penalty of $750,000), *available at* http://eqs.nictusa.com/eqsdocs/00005AA7.pdf; FEC Conciliation Agreement With The Media Fund (MUR 5440) (Nov. 2007) (civil penalty of $580,000), *available at* http://eqs.nictusa.com/eqsdocs/000066D5.pdf; FEC Conciliation Agreement With America Coming Together (MUR 5403 and 5466) (Aug. 2007) (civil penalty of $775,000), *available at* http://eqs.nictusa.com/eqsdocs/000061A1.pdf.

the ability of 527 groups – like Progress for America or The Media Fund – to raise multi-million dollar donations for the purpose of influencing federal campaigns, much as such groups did in the 2004 and 2006 campaigns, and notwithstanding the FEC's subsequent determination that these groups acted illegally by failing to comply with federal campaign finance laws.

II. The District Court Decision Denying Appellants' Motion for a Preliminary Injunction Should Be Affirmed.

A preliminary injunction is "an extraordinary remedy," *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004), and SpeechNow.org has failed to show a substantial likelihood of success on the merits of its challenge.

A. Contribution Limits Are Subject to "Less Rigorous" Review.

Beginning with *Buckley*, the Court has held that expenditure limits represent "substantial … restraints on the quantity and diversity of political speech," *Buckley,* 424 U.S. at 19, and consequently, must satisfy strict scrutiny review. *Id*. at 44-45. By contrast, a contribution limit "entails only a marginal restriction upon [one's] ability to engage in free communication," *id*. at 20, and thus is constitutionally "valid" if it "satisfies the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136 (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted)).

This "less rigorous" standard, *id.* at 137, reflects that a contribution represents merely a "*symbolic* expression of support" because it "serves as a

general expression of support … but does not communicate the underlying basis for the support." *Buckley,* 424 U.S. at 21 (emphasis added). Further, a contribution represents only *indirect* speech, or "speech by proxy," *California Medical Ass'n. v. FEC,* 453 U.S. 182, 196 (1981) (*CalMed*), because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Beaumont*, 539 U.S. at 161-62 (quoting *Buckley,* 424 U.S. at 21).

This case concerns limits on "contributions" by individual donors to SpeechNow.org, not limits on "expenditures" by SpeechNow.org, and thus "intermediate scrutiny is appropriate." *Speechnow.org*, 567 F. Supp. 2d at 76. This standard is fitting because a contribution to SpeechNow.org represents only a symbolic communication of a donor's support that "bears little relation to its size…." *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (*Colorado I*). Further, SpeechNow.org's donors are engaged only in indirect speech by making contributions, because it is SpeechNow.org that uses the money to speak, not the donor.

Appellants attempt to confuse the issue by claiming that limits on contributions to "independent expenditure committees" nevertheless warrant strict scrutiny because they "can also be characterized as a limit on expenditures." Brief of Appellants (Br.) at 29. This argument, however, collapses "the fundamental

constitutional difference," *Colorado I*, 518 U.S. at 614 (internal quotations omitted), between limits on contributions and limits on expenditures. *All* limits on contributions necessarily also limit the funds which the recipient has available to make expenditures – whether independent or coordinated – and in that sense, limit the recipient's expenditures. But the Supreme Court has never held that this alone transforms a contribution limit into an expenditure limit. As the *Buckley* Court noted, the "overall effect" of a contribution limit "is merely to require candidates and political committees to raise funds from a greater number of persons…." 424 U.S. at 21-22. This point was echoed by the *McConnell* Court, which held that that BCRA's soft money provisions do not "in any way limit[] the total amount of money parties can spend," but only restrict the "source and individual amount" of donations. 540 U.S. at 139. That "does not render them expenditure limitations." *Id*.

Appellants also raise the novel theory that strict scrutiny is appropriate here because "contribution limits force [Speechnow.org supporters] to choose between exercising their First Amendment right to make unlimited independent expenditures and exercising their right to associate with others." Br. at 23-24. But this too could be said of *all* contribution limits in *all* contexts. Individuals may make unlimited independent expenditures, or, if they wish to associate with a federal candidate, political party or political committee, may make contributions in

amounts that do not exceed the applicable federal contribution limits. That individuals must "choose" between making unlimited expenditures or limited contributions has never been grounds for the application of strict scrutiny to contribution limits. To the contrary, the fact that contribution limits leave open alternate avenues of expression, such as independent spending, reduces the First Amendment burden and further supports the application of "less rigorous" scrutiny to contribution limits. *Buckley*, 424 U.S. at 28 (noting that contribution limits leave donors "free" to "engage in independent political expression" and "associate actively through volunteering their services").

Thus, appellants' arguments are no more than complaints about contribution limits in general, and are not unique to limits on contributions to independent expenditure committees. As such, their arguments have already been specifically rejected by the Supreme Court, and thus provide no basis for an unprecedented application of strict scrutiny to the contribution limits challenged here.

B. The Limits Imposed On Contributions to Independent Expenditure Political Committees Are Constitutional and Justified by Vital Governmental Interests.

The regulation of contributions to committees making independent expenditures meets the applicable standard of review, because it serves the governmental interests in preventing corruption and the appearance of corruption, as well as blocking circumvention of the campaign finance laws.

1. The McConnell Court's Decision to Uphold BCRA's Soft Money Provisions Affirms the Constitutionality of Limits on Contributions to Independent Expenditure Committees.

If contributions that were used to fund independent expenditures were always and necessarily constitutionally protected, then the Supreme Court would have had to strike down many of the soft money limits at issue in *McConnell*. Instead, the Court found that the soft money provisions were justified by the state's important interest in preventing actual and apparent corruption.

The "core" soft money provision considered in *McConnell*, Section 323(a), codified at 2 U.S.C. § 441i(a), subjects all funds received or spent by the national parties to federal contribution limits, "regardless of how those funds are ultimately used," including for independent expenditures. 540 U.S. at 155. Section 323(b) imposes federal contribution limits on donations to state and local party committees which are used to finance "federal election activity," including for independent public communications that promote or oppose a clearly identified federal candidate. *See* 2 U.S.C. § 441i(b).

McConnell approved these provisions of BCRA, even though they subject to contribution limits those funds ultimately used by parties for independent expenditures. In so holding, the *McConnell* majority construed the state's anti-corruption interest broadly, and expressly rejected the reasoning of Justice Kennedy's dissenting opinion, which asserted that only contributions "made

directly to" or expenditures made "in *coordination with*" a federal candidate are potentially corrupting. 540 U.S. at 152 (emphasis added); *see also id*. at 286-341 (Kennedy, J., concurring in judgment in part, and dissenting in part). The *McConnell* majority instead determined that large contributions to political parties, even those used for independent expenditures, threaten the integrity of the political system, because they allow contributors to gain access and influence over federal candidates. *See id.* at 146-48 (influence), 149-51 (access and influence).

In upholding BCRA's soft money provisions, then, the Court's key observation was that the ultimate use of a contribution is not the basis for identifying its corruptive potential. Rather, the potential for corruption stems from the ability of donors to gain undue access to and influence over candidates and officeholders as a result of their contributions.

2. McConnell Makes Clear that CalMed Necessarily Applies to Political Committees Making Independent Expenditures.

The Supreme Court's plurality opinion in *CalMed* provides further support for the constitutionality of the contribution limit challenged here. The *CalMed* Court found that the $5,000 limit on contributions, 2 U.S.C. § 441a(a)(1)(C), to political committees was facially constitutional, because it served the government's interest in preventing actual or apparent corruption, and also in

preventing circumvention of FECA's other contribution restrictions. 453 U.S. at 195-98 (plurality op.).[4]

In *McConnell*, the Court clarified that its decision in *CalMed* had necessarily upheld limits on contributions to committees that were then used to make independent expenditures. It explained:

> [In *CalMed*], we upheld FECA's $5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 … limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage *in express advocacy and numerous other noncoordinated expenditures*.

540 U.S. at 152 n.48 (emphasis added). As the last sentence makes clear, in the view of the *McConnell* Court, *CalMed* held that Congress could limit contributions to entities that would use those funds for independent expenditures.

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[4] In *CalMed*, the Court reviewed the constitutionality of the contribution limit as applied to a committee making both contributions and independent expenditures. The plurality opinion, however, avoided considering "the hypothetical application" of FECA to political committees that make *only* independent expenditures. 453 U.S. at 197 n.17. In a separate opinion, Justice Blackmun, whose fifth vote was necessary for the decision, suggested that FECA's $5,000 limit could not apply to such committees. *Id*. at 203 (Blackmun, J., concurring in judgment). However, Justice Blackmun's reservation was only *dictum* regarding a hypothetical situation, because the committee at issue in the case did not make only independent expenditures.

The *McConnell* Court continued by noting that *CalMed* could not have upheld FECA's broad limit on contributions to multicandidate political committees without necessarily deciding this point. With respect to party committees, the type of committee at issue in this portion of *McConnell*, the Court wrote in the very next sentence after the passage quoted above:

> If indeed the First Amendment prohibited Congress from regulating contributions to fund [numerous non-coordinated expenditures], the otherwise-easy-to-remedy exploitation of parties as pass-throughs (e.g., a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation.

Id. In other words, if donations given to a committee that were ultimately used to make independent expenditures had no corruptive potential, the overall limit on all contributions to multicandidate committees would have been unsustainably overbroad. Congress could have justified the limit only insofar as it limited funds given to a committee that the committee then donated to or spent in coordination with candidates – and thereby remedied so-called "pass-through" corruption. In that case, much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have addressed such pass-through corruption concerns. Thus, as *McConnell* makes clear, *CalMed* necessarily stands for the proposition that the state may limit contributions to political committees even if such contributions are used for independent expenditures.

C. Limits on Contributions to Independent Expenditure Committees Are Necessary to Avoid Circumvention of the Limits Enacted by BCRA to End the Corrupt Soft Money System.

The activities of 527 organizations in recent elections confirm the concern of the *McConnell* Court that even committees making independent expenditures pose a threat of corruption to the political system because they facilitate the circumvention of the limits on contributions to candidates and parties.

1. Anti-circumvention Measures Serve Important Governmental Interests.

The Supreme Court has repeatedly affirmed that "Congress has a strong interest in preventing the circumvention of otherwise valid contribution limits." *SpeechNow.org*, 567 F. Supp. 2d at 78.

In *McConnell*, the Court held that "because the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law,'" the governmental interest in deterring corruption and the appearance of corruption "justif[ies] not only contribution limits themselves, but laws preventing the circumvention of such limits." *McConnell,* 540 U.S. at 144 (quoting *FEC v. Colorado Republican Federal Campaign Comm.* (*Colorado II*), 533 U.S. 431, 457 (2001)).

Similarly, in its earlier *Colorado II* decision, the Court upheld limits on party coordinated expenditures in order to prevent the "exploitation" of parties "as channels for circumventing contribution and coordinated spending limits binding

on other political players." 533 U.S. at 455. Likewise, in *CalMed,* the Court upheld the limit on contributions to political committees in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley.*" 453 U.S. at 197-98. And in *Buckley,* the Court sustained the aggregate annual limit on contributions by individuals because it "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through … huge contributions to the candidate's political party." 424 U.S. at 38.

In short, as the Court noted in *Colorado II,* "all Members of the Court agree that circumvention is a valid theory of corruption." 533 U.S. at 456.

2. 527 Groups Serve as Vehicles to Circumvent the BCRA Limits on Soft Money.

527 groups that seek to influence federal elections, such as SpeechNow.org, undermine the campaign finance system because they provide a route for large donors to circumvent the federal contribution limits, and in particular, to evade BCRA's ban on party soft money.

(a) The post-BCRA soft money donors to 527 groups were pre-BCRA soft money donors to the parties.

As a leading study of the role played by 527 groups in post-BCRA elections noted: "Analysis of the donors who provided the bulk of individual contributions [to 527 groups] in the last two election cycles reveals that they were mainly drawn

from the ranks of individual soft money donors to parties." *See* Weissman & Hassan at 80.

Of the 113 individuals who contributed at least $250,000 to 527 groups in the 2004 cycle, *73 of them* (or 65 percent) had been soft money donors to the political parties in the 2000 and 2002 election cycles and had given, in aggregate, $50 million of soft money to the national party committees in that period. *Id.* at 93. This group of 73 former party soft money donors turned to 527 groups in 2004, giving *$157 million* to 527 groups – almost 40 percent of all of the money received by such groups in that election. *Id.* The donors included George Soros (who gave $24 million to 527 groups), Peter Lewis ($22.5 million), Stephen Bing ($13.9 million), Bob Perry ($8 million), Dawn Arnall ($5 million), Alex Spanos ($5 million), Ted Waitt ($5 million) and T. Boone Pickens ($4.6 million). *See id.* at 94-96 (Table 5.2). It is fair to say that these party soft money donors, now blocked by BCRA, simply shifted their soft money contributions to 527 groups in order to sidestep the limitations imposed by BCRA. *Id.* at 96.

If independent expenditure committees, such as SpeechNow.org, remain unregulated by FECA, they will continue to serve as the principal vehicle for soft money donors seeking to bypass federal contribution limits on candidates and parties in order to gain political influence. What the Supreme Court said of multi-million dollar soft money donations to the political parties is true here as well: "It

is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *McConnell,* 540 U.S. at 145.

(b) The 527 groups, even if nominally "independent," are closely tied to parties and candidates.

The potential for corruption is not hedged simply by the fact that 527 groups purport to be independent of candidates and the major political parties. The evidence is strongly to the contrary. Political parties and their key operatives played a central role in the formation and operation of the major 527 groups active in the 2004 presidential campaign. Indeed, after chronicling the relationship between the political parties and several of the largest 527 groups in the 2004 election, Weisman and Hassan concluded that "[d]uring the 2004 cycle, the two major parties, including their leading paid consultants and active notables, were involved, in varying degrees, in the creation, operation, or funding of several prominent 527 groups." Weissman & Hassan at 84.

Although these 527 groups were careful to avoid formally "coordinating" their expenditures with candidates or party committees as defined by FECA, *see, e.g.*, 2 U.S.C. §§ 441a(a)(7)(B)(i), (ii), their close relationship with the parties and their overlapping leadership signaled to donors that large contributions to these 527 groups could purchase access and influence over candidates and officeholders, just as their previous donations to the political parties had done prior to BCRA. As the

district court noted below, these "organization[s] may be legally independent under FEC rules while nonetheless functioning as a fully integrated arm of a major political party." *SpeechNow.org*, 567 F. Supp. 2d at 80.

Three of the major 527 groups active in the 2004 presidential election, The Media Fund (TMF) and America Coming Together (ACT) (aligned with Democrats), and Progress for America Voter Fund (PFA-VF) (aligned with Republicans), demonstrate the close ties between these supposedly "independent" 527 groups and the national parties. These three groups alone spent a total of $166 million in soft money in 2004, or over 40 percent of all expenditures by 527 groups that year. Weissman & Hassan at 104-05 (Table 5.4). The FEC subsequently concluded that the soft money spending by these groups was illegal. *See* n.3, *supra*.

TMF was founded to run political advertising to aid the 2004 Democratic presidential nominee. Weissman & Hassan at 85. It was the product of a task force established in 2002 by the then-chairman of the Democratic National Committee (DNC), Terry McAuliffe, and was created to offset the loss of soft money outlawed by BCRA, as Chairman McAuliffe informed Democratic Party donors two years before the 2004 election. *Id*.

Named to head TMF was Harold Ickes, the White House Deputy Chief of Staff to former President Clinton, and a member of the DNC's Executive

Committee. *Id*. at 85. Ickes' leadership of TMF, given his extensive ties to the Democratic Party and to former President Clinton, established a reliable connection between TMF and the Democratic Party in the eyes of many donors. *Id.* at 86. He served as a DNC delegate to the party's national convention, and visibly made the rounds at the convention soliciting party donors for TMF and circulating with party officials. He ran TMF's convention activities from an office in the Four Seasons Hotel in Boston, just down the hall from the DNC's finance division, which focused on large Democratic donors. *Id*. at 87. This "conspicuous cohabitation undoubtedly burnished the groups' perceived identification with the party and presidential campaign." *Id.*

Former President Clinton personally did fundraising for the group, which sent a clear signal to donors as to TMF's legitimacy. *Id*. "He koshered us," one of TMF's leaders said of Clinton's involvement. *Id.* Clinton was also "extremely active in DNC fundraising and spoke 'frequently' to McAuliffe…." *Id.* Thus, while nominally independent from the DNC, TMF was very much allied with it, and these ties were made abundantly clear to potential large donors. *Id*. at 86-87. TMF ultimately raised over $59.4 million, of which over $46 million was in soft money contributions from individuals in excess of the $5,000 limit. TMF Conciliation Agreement, *supra* n.3, at 5, 8. It spent $57.6 million, over 90 percent of which was for advertisements and direct mail that "attacked the character,

qualifications and fitness for office of George Bush, or supported the character, qualifications, and fitness for office of John Kerry." *Id.* at 6, 9. TMF was subsequently found by the FEC to have violated the law because it did not register as a political committee and abide by the applicable contribution limits. *Id*. at 1.

Closely aligned with TMF was its sister 527 group, ACT, which originated from the same DNC taskforce that produced TMF. Weissman & Hassan at 86. ACT focused on voter mobilization efforts to complement TMF's political advertising, and raised over $103 million dollars in soft money which it spent for activities in "17 'battleground' states" for the purpose of "defeating President George W. Bush in his bid for re-election." ACT Conciliation Agreement, *supra* n.3 at 3.

ACT's leadership, like that of TMF, consisted of power players in the Democratic Party: for instance, Ellen Malcolm, a member of the DNC's Executive Committee and president of EMILY's List, served as ACT's president; Harold Ickes served as ACT's chief of staff. *Id*. at 2. In their fundraising activities for ACT, Ickes and Malcolm: "assured many donors of their relationship to the party and the campaigns. Their message was, 'We don't talk to the campaigns, are not connected with them, but they know and appreciate us and contributions are part of the public record and they are aware.'" Weissman & Hassan at 86.

ACT was also found by the FEC to have violated the law because it impermissibly spent soft money to influence federal elections. ACT Conciliation Agreement, *supra* n.3, at 1.

There was a similar close association between PFA-VF and "the Bush administration, the RNC and their consultants." Weissman & Hassan at 87. The founder of PFA-VF was Tony Feather, a partner at Feather, Larson and Synhorst-DCI (FLS-DCI), a campaign consulting firm that worked for the RNC in the 2004 campaign. Thomas Edsall & James Grimaldi, *On Nov. 2, GOP Got More Bang for its Billion, Analysis Shows*, WASH. POST, Dec. 30, 2004, A1. Tom Synhorst, another partner at FLS-DCI, served as a "strategic advisor" to PFA-VF and a leading fundraiser. Synhorst was also a Republican insider, having advised the Bush-Cheney campaign in 2000. The presence of Synhorst created a clear link between PFA-VF and the RNC, as his activities "were certainly visible to his firm's political clients and his political relationships were presumably known to many donors." Weissman & Hassan at 88.

PFA-VF also "received the ultimate wink and nod from the Republican Party and the Bush campaign." *Id.* at 89. In May of 2004, the chairman of the Bush-Cheney '04 campaign (Marc Racicot) and the RNC Chairman (Ed Gillespie) declared that the FEC's inaction regarding 527 groups "had given a green light" to 527 groups "to forge full steam ahead in their efforts to affect this year's Federal

elections." *Id*. Racicot and Gillespie then specifically named PFA-VF as a right-leaning 527 group, thus signaling to prospective contributors that the 527 group had the RNC's "official blessing." *Id*.

In 2004, PFA-VF raised $45 million in soft money, "70% of which came from just thirteen donors," and spent $26.4 million on television advertisements in key presidential battleground states, all of which "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership." PFA-VF Conciliation Agreement, *supra* n.3, at 5. PFA-VF was subsequently found by the FEC to have violated the law because it did not register as a political committee and abide by the applicable contribution limits. *Id*. at 1.

To conclude their careful study of 527 groups in the 2004 election, Weissman and Hassan noted that political parties responded to BCRA "in broadly similar ways" by "permit[ing] some of their leading political consultants, who were strongly identified with them, to serve their interests by generating new soft money pots" and "put[ting] the party imprimatur on selected 527 fundraising to reassure potential donors." Weissman & Hassan at 89. And as a coda to their study, Weissman and Hassan frame the problems caused by the soft money flowing through such groups:

> If 527 groups spend independently to support or oppose candidates in large enough amounts – and some of their donors give in the megamillions – is there a danger that candidates and parties will feel obligated?

> If individuals who are closely associated with party and campaign leaders establish, manage and fundraise for certain 527 organizations, is there a danger that these 527s will become more or less identified with the parties, recreating the corruption threat of the former party soft money system?

Id. at 98. Now that the FEC has taken the position that the major 527 groups active in the 2004 campaign should have registered as federal political committees and abided by the applicable contribution limits, these same problems are presented with full force by appellants' claim that such political committees should be free of all contribution limits.

(c) Independent expenditure committees share essential features of party committees as vehicles for circumvention.

Appellants attempt to discount the governmental interest here, claiming that "SpeechNow.org's independence severs any connection between the donations that allegedly corrupt candidates and the candidates that might be corrupted." Br. at 35. In so arguing, appellants rely upon a simplistic and naïve vision of electoral politics wherein a group's formal independence from candidates means that its contributors will be unable to peddle financial support for political influence. This view is in stark contrast to the far more realistic understanding of politics that informed the *McConnell* decision, where the Court expressly *rejected* appellants' "crabbed view of corruption" as contrary to "precedent" and "common sense." 540 U.S. at 152. The Court there recognized that large contributions to political parties – even those funding independent party expenditures – are potentially

corruptive because the contributors can leverage party power and political connections to obtain access to candidates and officeholders.

So, too, large donors to non-party committees – such as the 527 groups discussed above – can leverage the spending power of those committees to obtain access and influence with candidates and officeholders. Party committees and non-party committees share essential features that make both entities "effective conduits for donors desiring to corrupt federal candidates and officeholders." *Id.* at 156 n.51.

First, both party committees and independent political committees draw political power from their narrow concentration on election-related activity. SpeechNow.org acknowledges that its major – indeed exclusive – purpose is to expressly advocate on behalf of its preferred federal candidates. FEC Advisory Opinion Request 2007-32 (Nov. 19, 2007), at 2. Because of this, non-party committees, like parties, have the "capacity to concentrate power to elect candidates." *Colorado II*, 533 U.S. at 455. By pooling individual resources, and by monitoring, rewarding, and punishing the behavior of candidates and officeholders more effectively than could any individual operating on his or her own, non-party political committees "marshal the same power and sophistication for the same electoral objectives as the political parties themselves." *Id*. What the Court said about party committees – that they speak "by aggregating contributions

and broadcasting messages more widely than individual contributors generally could afford to do" and that they "marshal[] this power with greater sophistication than individuals generally could," *id.* at 453 – applies as well to non-party committees, such as SpeechNow.org.

Second, the informational exchange documented by *McConnell* that took place between political parties, their soft money donors and candidates, *McConnell*, 540 U.S. at 145-47, can also occur between non-party committees, their donors and the candidates they support. Federal officeholders "were well aware of the identities of the donors" to their party's soft money account, for "donors themselves would report their generosity to officeholders." *Id.* at 147. Similarly, nothing prevents generous contributors to 527 groups from simply informing candidates of their largess. Indeed, even if they fail to do so, donations to 527 groups are subject to public disclosure. 26 U.S.C. § 527(j)(3)(B). In the same way that candidates noticed large soft money contributions to their party committees, and "fe[lt] grateful," so too would candidates notice large contributions to non-party committees, and "donors would seek to exploit that gratitude." *McConnell*, 540 U.S. at 145.

Further, any argument that the *McConnell* decision turned on the "special" relationship between party committees and candidates overlooks the fact, discussed above, that non-party committees have close relationships with parties and their

candidates as well, and indeed, are often founded and operated by party operatives and allies. To be sure, SpeechNow.org claims it is not established or controlled by a candidate, and that it will refrain from making expenditures in "coordination" with candidates. Br. at 8-9. However, left unacknowledged by SpeechNow.org is that FECA's narrow standard for coordinated expenditures leaves unregulated a broad range of activities that may be closely connected to the candidate who is the beneficiary of the spending.

The close connections between TMF/ACT and PFA-VF with their respective parties demonstrate how the rules leave plenty of room for *de facto* coordination between an "independent" 527 group and a candidate or his party. An independent expenditure committee may not go so far as to spend funds at the "request or suggestion" of a candidate or party. *See, e.g.,* 11 C.F.R. § 109.21(d). But just as the political parties have close ties to their candidates even when party money is spent "independently," so too, non-party committees can and do have close ties to the parties and their candidates even though their expenditures remain nominally independent. The 2004 experience confirms that the coordination laws allow a broad swath of contacts and communications between purportedly "independent" 527 groups, on the one hand, and the parties and their candidates, on the other.[5]

[5] The FEC found reason to investigate allegations of coordination between TMF, the DNC, and John Kerry's presidential campaign, based in large part on the

Because of these similarities, both party committees and 527 groups pose the potential for circumvention. *See Colorado II*, 533 U.S. at 455-56. Here, SpeechNow.org presents an attractive opportunity for wealthy donors to launder large donations through an "independent" entity to support their preferred candidates. And even if donors to independent committees such as SpeechNow.org are not actually seeking to "corrupt" candidates, this situation certainly gives rise to the appearance that donors are attempting to circumvent federal campaign finance statutes to acquire political influence over candidates and officeholders. If this Court were to strike down the contribution limits challenged here, SpeechNow.org, and other independent committees would be "uniquely positioned" to serve as "conduits for corruption," *McConnell*, 540 U.S. at 156 n.51, and to recreate the corrupt soft money regime that until so recently had made a mockery of the campaign finance laws.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

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dual roles Ickes played as both founder of TMF and as member of DNC Executive Committee. The Commission ultimately took no action. *See* FEC MUR 5440, Notification with Factual and Legal Analysis to The Media Fund (Oct. 20, 2004) at 9, *available at* http://eqs.nictusa.com/eqsdocs/ 00006671.pdf.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7) AND CIR. R. 32(a)(2)

Pursuant to Fed. R. App. P. 29(c)(5) and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing *amici* brief complies with the length requirements of Fed. R. App. P. 29(d), Fed. R. App. P. 28.1(e)(2)(A)(i) and Cir. R. 32(a)(2). I have relied on the word count feature of Microsoft Word 2000 to calculate that the brief contains 6995 words. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000 in Times New Roman font size 14.

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CERTIFICATE OF SERVICE

This is to certify that on September 30, 2009, I caused this BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE to be filed electronically with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF System.

I further certify that on September 30, 2009, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand delivery, eight (8) copies of this BRIEF *AMICI CURIAE* pursuant to Circuit Rule 31(b).

I further certify that two (2) paper copies of the brief were sent on September 30, 2009 by United States mail, first-class postage prepaid, to the following counsel:

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