ORAL ARGUMENT SCHEDULED FOR JANUARY 27, 2010

Nos. 08-5223; 09-5342

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 Questions Certified by the United States District Court
for the District of Columbia; No. 08-cv-00248 (JR)

BRIEF OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 SUPPORTING THE FEDERAL ELECTION COMMISSION

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

Pursuant to Rules 28(a)(1) and 26.1 of this Court and FRAP 26.1, *amici curiae* Campaign Legal Center and Democracy 21 certify as follows:

A. Parties and *Amici*

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

B. Corporate Disclosure Statement

The 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.

C. Rulings Under Review

The rulings under review are the findings of fact and certified questions issued by the Hon. James Robertson on October 7, 2009. The certified questions for review by this Court are set forth in the Joint Appendix (J.A.) at pp. 372-99.

D. Related Cases

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

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INTEREST OF *AMICI CURIAE*

The Campaign Legal Center and Democracy 21 are nonpartisan, 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 have frequently participated as parties or *amici* in litigation to defend the constitutionality of the campaign finance laws.

With the consent of the parties, *amici* previously filed a brief in No. 08-5223, the appeal to a panel of this Court from the district court's denial of preliminary injunctive relief. Subsequently, this Court granted *amici* leave to file an additional brief in No. 09-5342, addressing the district court's certification of questions to the en banc Court. *See* Order of November 5, 2009. This Order provided that *amici*'s first brief to the panel would also be submitted to the en banc Court, as part of the consolidation of the preliminary injunction appeal with the certified questions.

Therefore, this brief does not repeat arguments *amici* have already made in their brief in the preliminary injunction appeal, but focuses on an issue that will necessarily be before the en banc Court as it considers the constitutional issues presented by this case—namely, whether the opinion of a panel of this Court in *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), represents a correct discussion and application of the principles governing the constitutionality of contribution

limits applicable to political committees that engage in independent campaign expenditures. Indeed, that issue is particularly appropriate for consideration by the en banc Court because the panel opinion in *EMILY's List* must currently be treated as authoritative by other panels of this Court, but need not be so regarded by the Court sitting en banc.

SUMMARY OF ARGUMENT

In arguing that individual contributions to organizations engaged in independent electoral advocacy cannot constitutionally be subjected to *any* limitation, SpeechNow.org understandably relies heavily on the panel opinion in *EMILY's List*.[1] That case involved a challenge to FEC regulations that required political committees not connected to particular candidates or parties to allocate certain political expenditures between their "hard-money" and "soft-money" accounts—hard-money accounts being those containing funds donated within the contribution limits established by the Federal Election Campaign Act (FECA), 2 U.S.C. §§ 431 *et seq.*, and soft-money accounts being those containing funds not subject to FECA limitations. *See* 11 C.F.R. §§ 106.6(c), (f).

[1] The plaintiffs in this case included SpeechNow.org and individuals who desire to contribute to that organization. Although SpeechNow.org is a party to the companion appeal from the denial of a preliminary injunction (No. 08-5223), it is not technically a party to the en banc Court's consideration of the questions certified by the district court. For convenience, however, we refer to the plaintiffs collectively as "SpeechNow.org."

The panel in *EMILY's List* struck down the challenged regulations, and did so on the broadest possible basis: the panel held that a political committee may not be required to allocate *any* portion of *any* of its independent political expenditures to a hard-money account because, in the panel's view, it is always unconstitutional to limit individual contributions to nonprofit organizations (other than political parties and candidate campaign committees) for use in independent political advocacy. The panel summed up its holding in these words:

> Under the Supreme Court's precedents, non-profit entities may be required to use their hard-money accounts for their own contributions to candidates and parties and for an appropriately tailored share of administrative expenses associated with such contributions. But … non-profits may not be forced to use their hard-money accounts for expenditures such as advertisements, get-out-the-vote efforts, and voter registration drives. Non-profits—like individual citizens—are entitled to spend and raise unlimited money for those activities.

581 F.3d at 16.

The en banc Court in this case should not follow the reasoning of the panel opinion in *EMILY's List*—and, indeed, should affirmatively repudiate it—because that reasoning is fundamentally at odds with the Supreme Court's campaign finance jurisprudence from *Buckley v. Valeo*, 424 U.S. 1 (1976), down to the present. The principal, and pervasive, flaw in the constitutional analysis of the *EMILY's List* panel is that it conflates contributions with expenditures. In so doing, it misinterprets precedents to hold that if an organization is entitled to *spend* money on electoral advocacy without limitation, it must therefore also be entitled

to *raise* money without any limitation on either the total amount it may raise, or on the amount that may be raised from any given contributor.

EMILY's List reaches its result by misreading or disregarding the holdings of numerous Supreme Court opinions, including not only *Buckley*, but also *California Medical Association v. FEC*, 453 U.S. 182 (1981), *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (*NCPAC*), *FEC v. Beaumont*, 539 U.S. 146 (2003), and *McConnell v. FEC*, 540 U.S. 93 (2003). The failure of the *EMILY's List*'s panel to follow those precedents extends not only to its disregard of the consistent distinction they draw between the differing constitutional protections afforded to contributions and expenditures, but also to an unduly narrow view of the governmental interests that can justify limits on political contributions.

In considering the validity of the basic provisions of FECA at issue here, which limit individual contributions to political committees that make independent expenditures in connection with federal elections, the en banc Court should disregard the misguided constitutional analysis of *EMILY's List*. Under a proper application of the controlling constitutional standards, in contrast to those set out in *EMILY's List*, the contribution limits at issue here do not violate the First Amendment.

ARGUMENT

I. The *EMILY's List* Opinion Wrongly Equates Contribution Limits with Expenditure Limits.

A. Contributions Are Not Fully Protected Speech.

The panel opinion in *EMILY's List* fundamentally erred in equating a person's First Amendment interest in directly engaging in his own political speech with the very different interest in contributing money to finance speech by others. This error infected most of the Court's analysis, especially its consistent misinterpretation of opinions that recognize that a group's expenditures may not be limited as also implying that the group must therefore be permitted to accept contributions of unlimited amounts from others.

The *EMILY's List* opinion goes off-track at the very beginning of its constitutional analysis, when it asserts as the first of the "overarching principles" governing the case that "the [Supreme] Court has held that campaign contributions and expenditures constitute 'speech' within the protection of the First Amendment." 581 F.3d at 5. In support, the opinion cites language from "*Buckley*, the foundational case," *id.*, but the quoted passage in fact says something quite different – that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14.

Establishing that contribution and expenditure limitations have First Amendment implications, however, only poses, and does not itself answer, the

question of what those implications are. And on that question, the *Buckley* Court gave quite different answers for expenditures and contributions. As for the former, the Court held that expenditure limitations "impose direct and substantial restraints on the quantity of political speech," *id.* at 39, and the level of scrutiny the Court imposed on such restrictions—which it described as "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," *id*. at 44-45—effectively equated direct political expenditures with speech.

As to contributions, however, the *Buckley* Court took a different approach altogether. The Court emphasized fundamental differences between contribution and expenditure limitations and rejected a direct equation of contributions and speech:

> By contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of

> contributions into political debate involves speech by someone other than the contributor.

Id. at 20-21 (footnote omitted) (emphasis added). In short, *Buckley* recognized that contributions are not themselves speech by the contributor, though they "facilitate speech by their recipients." *McConnell*, 540 U.S. at 135.

Moreover, *Buckley* emphasized that the principal effect of contribution limitations was not to restrict speech by contributors, but to "limit one important means of associating with a candidate or [political] committee," 424 U.S. at 22, and thus that the primary First Amendment issue posed by contribution limitations is the limited restriction they impose on "one aspect of the contributor's freedom of political association." *Id*. at 24. Accordingly, *Buckley* subjected contribution limitations to a significantly less stringent standard of scrutiny than that applicable to direct restraints on speech. *Id.* at 25.

Although the *EMILY's List* opinion correctly observes that the Supreme Court "has never strayed" from the "cardinal tenet" of *Buckley*, *see* 581 F.3d at 5, it is dead wrong in suggesting that *Buckley*'s tenet is the simplistic and undifferentiated slogan that "money is speech." *See id.* Rather, the "cardinal tenet" that has remained unchanged through the Court's otherwise evolving campaign finance jurisprudence is the principle that contribution limits do not restrict speech in the same way or to the same degree that the Court has held expenditure limits do.

Thus, in *FEC v. Beaumont*, the Court reiterated that "[g]oing back to *Buckley v. Valeo*, 424 U.S. 1 (1976), restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." 539 U.S. at 161. The Court made exactly the same point in *McConnell*, 540 U.S. at 134-36, again emphasizing "the limited burdens [contribution restrictions] impose on First Amendment freedoms," *id*. at 136, as well as the weighty considerations of stare decisis that support "adhering to the analysis of contribution limits that the Court has consistently followed since *Buckley* was decided." *Id.* at 137-38. Most recently, in *Randall v. Sorrell*, 548 U.S. 230 (2006), the Court again adhered to *Buckley*'s holding that contribution limits do not directly restrict contributors' speech. *See id.* at 246-48 (plurality opinion); *see also id*. at 284 (Souter, J., dissenting).

B. The Lesser Protection Afforded to Contributions Is Not Limited to Contributions to Candidates and Parties.

EMILY's List attempts to sidestep the long line of precedents distinguishing contributions from expenditures, by suggesting that the Supreme Court has recognized a lesser degree of protection only for contributions "to candidates or parties." 581 F.3d at 6, 7, 10 n.9. But nothing in *Buckley* or its progeny suggests that this is correct.

Indeed, *Buckley* itself says quite explicitly that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20 (emphasis added).[2] And *Buckley*'s reasoning—that the communicative content of a contribution is limited to the "general expression of support" for the views of the recipient, that the "quantity of communication" in this "symbolic act" does not "increase perceptibly" based on the amount contributed, and that the contribution only facilitates "speech by someone other than the contributor," *id*. at 20-21—is equally applicable to contributions to organizations other than parties and candidate committees.

Similarly, *Buckley*'s description of the associational interests affected by contribution limits explicitly states that the Court's analysis applies to contributions to political organizations, as well as to candidates and parties:

> [Making a contribution] enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates. And the Act's contribution

[2] A "political committee" is any group which makes $1,000 in expenditures or contributions and has a "major purpose" to influence federal elections. 2 U.S.C. § 431(4); *Buckley,* 424 U.S. at 79. This definition goes well beyond candidate and party committees to include separate segregated funds of corporations and labor organizations, and a range of "unaffiliated" political committees that are not controlled by candidates or parties.

limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy.

Id. at 22 (emphasis added).[3]

C. The Right to Spend Does Not Imply a Right to Raise Money Through Unlimited Individual Contributions.

Similarly unfounded are *EMILY's List*'s repeated attempts to perform an end-run around the contribution-expenditure distinction by asserting that the decisions which hold that political committees and other organizations have a right to spend unlimited amounts on political advocacy necessarily also imply that they therefore have a right to raise funds through unlimited contributions from individuals. Thus, the opinion in *EMILY's List* repeatedly asserts that the Supreme Court has recognized that "nonprofit entities, like individual citizens, are constitutionally entitled to raise and spend unlimited money in support of candidates for elected office." 581 F.3d at 9 (citing *Cal. Med. Ass'n.*, 453 U.S. at 202-03 (Blackmun, J., concurring in the judgment), *MCFL*, 479 U.S. at 259-65,

[3] *See also Cal. Med. Ass'n.*, 453 U.S. at 197 ("If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates.") (plurality opinion).

NCPAC, 470 U.S. at 501, *Buckley*, 424 U.S. at 47, and *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296-99 (1981)).[4]

It is certainly true that the Supreme Court has struck down limits on the amounts of independent expenditures that political committees may make. *See NCPAC*, 470 U.S. at 501. And, though the Court has never addressed the point, logic would suggest that a law that attempted to impose an overall cap on the amount a political committee could raise in aggregate would be no more defensible than a law that capped spending at that level, because the effect would be exactly the same. But it does not follow, and the Court has never held, that the right to spend in unlimited amounts is equivalent to a right to raise money without any limitation on the individual contributions through which an organization obtains its funding. None of the cases cited in *EMILY's List* has invalidated individual contribution limits for an organization that expends funds to support political candidates.[5]

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[4] The assertion that the Supreme Court has held that individual citizens are entitled to "raise" money for political purposes free from any restrictions is particularly baffling, as none of the Supreme Court's cases has considered regulation of the manner in which an individual citizen may "raise" money for political spending by that individual.

[5] Although *Citizens Against Rent Control*, 454 U.S. at 294, struck down limits on contributions to ballot measure advocacy groups, that decision does not reflect a general principle that the right to spend carries with it a right to receive unlimited individual contributions. Rather, it reflects the complete absence of any arguable anti-corruption justification for such limits in the context of ballot measure

Indeed, if it were the case that a right to make unlimited expenditures implied a right to raise funds free from limits on individual contributions, then limits on contributions to candidates and political parties would be equally vulnerable to attack, because the Supreme Court has repeatedly upheld the right of candidates and parties to make expenditures in unlimited amounts. *See Buckley*, 424 U.S. at 51-58; *see also Randall v. Sorrell*, 548 U.S. at 242-46 (plurality opinion); *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*). But the Court has consistently held that a candidate or party's right to spend unlimited amounts is not abridged by contribution limits as long as they do not limit the total amount the candidate or party may raise and do not unduly restrict them from raising funds necessary for effective campaigning. *See McConnell*, 540 U.S. at 135; *Randall*, 540 U.S. at 253 (plurality opinion). And, as the Supreme Court noted in *McConnell*, *Buckley* expressly indicated that the same principle applies to political committees: "[W]e have said that contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t]

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advocacy. The Court has long recognized that candidate elections present an entirely different context than ballot measure campaigns. *See, e.g., First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue.") (internal citations omitted); *see also id.* at 788 n.26; *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999) (noting that "ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates").

candidates and political committees from amassing the resources necessary for effective advocacy.'" *McConnell*, 540 U.S. at 135 (quoting *Buckley*, 424 U.S. at 21) (emphasis added).

EMILY's List's reliance on *California Medical Association* to establish the supposed right to raise funds for independent expenditures from unlimited individual contributions is particularly unwarranted. The actual holding of the Court in *California Medical Association* was that the imposition of contribution limits on a political committee that made contributions to candidates was constitutional. *See* 453 U.S. at 201 ("[W]e conclude that the $5,000 limitation on the amount that persons may contribute to multicandidate political committees violates neither the First nor the Fifth Amendment.") (majority opinion). Justice Blackmun, concurring in the judgment on the First Amendment point, stated that his own analysis "suggest[ed] that a different result would follow" if contribution limits "were applied to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates." *Id.* at 203 (emphasis added).

EMILY's List, citing *Marks v. United States*, 430 U.S. 188, 193 (1977), suggests that Justice Blackmun's statement on this point is "controlling" and "binding." 581 F.3d at 9 & n.8. But the only respect in which *Marks* would make Justice Blackmun's opinion controlling is in what it held on the question presented,

which was that FECA's contribution limits were constitutional as applied to a political committee that made candidate contributions, not in what Justice Blackmun said on an issue not before the Court, views which are no more than *dicta*. *See EMILY's List,* 581 F.3d at 37 n.14 (Brown, J. concurring in judgment) (noting that under the *Marks* doctrine, the "controlling part of Justice Blackmun's opinion is the holding that the FEC may constitutionally regulate contributions to fund independent political expenditures without contravening the First Amendment—no more and no less.").

Moreover, the entire premise of Justice Blackmun's opinion regarding independent expenditures—that contributions are entitled to the same constitutional protection as expenditures—was subsequently, and repeatedly, rejected by majorities of the Court. *See McConnell*, 540 U.S. at 137-38 & n.40. It is simply incorrect to conclude that Justice Blackmun's "suggest[ion]" about what his views would be if the case had involved a different issue is a binding holding of the Court.[6]

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[6] *EMILY's List*'s further assertion that "subsequent decisions such as *Citizens Against Rent Control*" followed the principles of Justice Blackmun's opinion, 581 F.3d at 9 n.8, is equally wrong. *Citizens Against Rent Control* did not even cite Justice Blackmun's opinion, and as Justice Marshall noted in his opinion concurring in the judgment, nothing in the majority opinion was contrary to the Court's "consistent position" that contribution limits are "subject to less rigorous scrutiny than a direct restriction on expenditures." 454 U.S. at 301 (Marshall, J., concurring in the judgment).

Equally unfounded is *EMILY's List*'s reliance on *MCFL* as support for the notion that political committees and other nonprofit groups have a right both to spend money without limitation on electoral advocacy and to raise money through unlimited individual contributions. In *MCFL*, the Court held that an ideological nonprofit corporation that raised money solely from individuals and whose primary purpose was not electoral activity had a right to spend its corporate treasury funds on express candidate advocacy. But the Court said nothing about the extent to which contributions to such groups could, or could not, be limited. That question was not before the Court, as there was no law imposing such limits on nonprofit corporations, and hence no constitutional challenge to such a law. Nonetheless, the Court noted that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. 479 U.S. at 262 (citing *Buckley*, 424 U.S. at 79). As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id.* Those restrictions, of course, include the contribution limits applicable to political committees, yet *MCFL* says nothing to suggest that the Court would be troubled by their application to a nonprofit entity, like SpeechNow.org, whose major purpose is electoral advocacy. *MCFL* is thus a particularly weak reed on which to rely for the notion that political committees

cannot be subject to contribution limits when they raise funds for express candidate advocacy.

D. Limits on the Amounts Individuals May Contribute to Political Committees to Support Campaign Expenditures Are Contribution Limits, Not Spending Limits.

EMILY's List compounds its consistent failure to respect the distinction drawn by the Supreme Court in *Buckley* and its progeny between the First Amendment interests affected by contribution and expenditure limits by, finally, seeking to deny that limits on the amounts individuals may contribute to political committees (or requirements that political committees use hard money for their expenditures) are contribution limits at all. *See* 581 F.3d at 15 n.14. According to the *EMILY's List* panel, by "forc[ing] non-profit entities to pay for a large percentage of their varied political activities out of hard-money accounts subject to source and amount ($5000) limits rather than out of soft-money accounts that may receive unlimited donations," such requirements "limit how much non-profits ultimately can spend" and "therefore 'reduce[] the quantity of expression'" the organizations may engage in. *Id*. (quoting *Buckley*, 424 U.S. at 19). Thus, according to *EMILY's List*, such requirements "are best considered spending restrictions." *Id*.

EMILY's List's assertion that a contribution limit must be analyzed as an expenditure limit is perhaps the most radical and erroneous proposition advanced

in the opinion. The idea that limiting spenders to reliance on hard money must be considered a spending limit because it limits "how much [they] ultimately can spend" was directly rejected in *Buckley*, where the Court noted that 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. Further, this approach could not logically be limited to non-profit organizations; it would apply equally to candidates and parties, whose ability to spend in unlimited amounts is similarly constrained by their need to rely on hard-money donors. Thus, if *EMILY's List*'s reasoning were correct, contribution limits for candidates and parties would be subject to the same strict scrutiny that, in *Buckley*, *Randall*, and *Colorado I*, invalidated limits on expenditures by candidates and parties. That result, of course, would be wholly at odds with the Supreme Court's consistent application of a more relaxed scrutiny to uphold such contribution limits.

More specifically, the reasoning of *EMILY's List* on this point is directly at odds with the Supreme Court's square holding in *McConnell* that the hard-money requirements of Title I of the Bipartisan Campaign Reform Act (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), were subject to the less stringent standard of review applicable to contribution limits, as opposed to spending limits. Indeed, the Court in *McConnell* rejected exactly the argument accepted in *EMILY's List*. BCRA's challengers asserted that Title I's provisions should be subject to the strict

scrutiny applicable to spending limits because many of its restrictions took the form of prohibitions on the spending of soft money for particular purposes by political parties. *McConnell*, 540 U.S. at 138. The Court rejected the argument, reasoning that Title I's requirements that limited parties to the use of hard money were, functionally, contribution limits, because they did not directly "limit[] the total amount of money parties can spend," but only "the source and individual amount of donations." *Id*. at 138-39. The same was true of the regulations at issue in *EMILY's List,* as well as of the laws at issue here, which require political committees to rely on limited contributions for their political expenditures.[7]

* * *

In sum, as the en banc Court considers the constitutionality of the contribution limits at issue here, it should set aside and, indeed, expressly disapprove, the analysis of the panel in *EMILY's List*, which is grounded in a persistent refusal to recognize the fundamental differences between the First Amendment interests at issue in, and the degree of scrutiny applicable to, contribution and expenditure limitations.

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[7] *EMILY's List*'s reliance on *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (*WRTL*), for the proposition that such requirements are spending limits, not contribution limits, is also misplaced. The statute at issue in *WRTL*, as analyzed by the controlling opinion of the Court, was an outright prohibition on spending by the entity bringing the challenge, not a contribution limit.

II. *EMILY's List* Improperly Confines the Anti-Corruption Interest Supporting Contribution Limits to the Prevention of Quid Pro Quo Exchanges.

EMILY's List's errors are not confined to its characterization of the regulations at issue, the degree to which they implicate First Amendment interests, and the applicable level of scrutiny. On the other side of the ledger—the analysis of the governmental interests justifying contribution limits—*EMILY's List* rests on an error of equal magnitude: a mischaracterization of the Supreme Court's holdings about the nature of the governmental interest that suffices to justify a limit on contributions.

Specifically, although the *EMILY's List* panel correctly acknowledged that "the [Supreme] Court has recognized a strong governmental interest in combating corruption and the appearance thereof," 581 F.3d at 6, it immediately limited the scope of that interest by stating that "the anti-corruption rationale is not boundless" and that "[t]he core corruption that Government may permissibly target with campaign finance regulation 'is the financial quid pro quo: dollars for political favors.'" *Id*. (quoting *NCPAC*, 470 U.S. at 497).

It is of course true that the anti-corruption rationale—like all government interests justifying regulation in First Amendment areas—is not "boundless." But in holding that the campaign finance laws "may permissibly target" only "core corruption" in the form of "the financial quid pro quo," *EMILY's List* again flies in

the face of established Supreme Court precedent. Not only in *McConnell* but also in a string of decisions leading up to it, the Court has stated directly that it has "not limited" the interest in preventing corruption or its appearance "to the elimination of cash-for-votes arrangements." *McConnell*, 540 U.S. at 143. As the Court said in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 389 (2000), and repeated in *McConnell*:

> In speaking of 'improper influence' and 'opportunities for abuse' in addition to 'quid pro quo arrangements,' we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.

540 U.S. at 143 (emphasis added). Further, the Court has recognized that the government's compelling anti-corruption interest extends as well to measures which combat the "perception" of corruption caused by the role of money in candidate campaigns, because:

> Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.

Shrink Missouri, 528 U.S. at 390; *McConnell,* 540 U.S. at 143-44.

McConnell emphasized that a "crabbed view of corruption, and particularly of the appearance of corruption"—the same crabbed view expressed in *EMILY's List*—"ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation." *Id*. at 152; *see also id*. at 152 n.48 (citing previous decisions taking the same broad view). The Court there said:

> [P]laintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing "undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II, supra*, at 441, 121 S.Ct. 2351.
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> Many of the "deeply disturbing examples" of corruption cited by this Court in *Buckley*, 424 U.S., at 27, 96 S.Ct. 612, to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. *See Buckley*, 519 F.2d, at 839-840, n. 36; nn. 5-6, supra. Even if that access did not secure actual influence, it certainly gave the "appearance of such influence." *Colorado II, supra*, at 441, 121 S.Ct. 2351; *see also* 519 F.2d, at 838.

Id. at 150. The First Amendment, according to the Court, "does not render Congress powerless to address more subtle but equally dispiriting forms of corruption." *Id.* at 153.

III. Analyzed Correctly, and Without Reliance on *EMILY's List*'s Erroneous Reasoning, Contribution Limits Applicable to Political Committees That Engage in Independent Expenditures Are Constitutional.

Notwithstanding the erroneous analysis of *EMILY's List*, a proper resolution of the constitutional questions at issue in this case must, as the discussion above demonstrates, involve a weighing of the marginal First Amendment interests of contributors to political committees against the substantial governmental interest in preventing the appearance of corruption of elected officeholders, an interest broadly understood to encompass "the danger that officeholders will decide issues

not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." *McConnell*, 540 U.S. at 153.

So analyzed, FECA's limits on contributions to political committees—even to those committees that promise to confine themselves to independent expenditures—are constitutional. As shown in our panel brief in SpeechNow.org's appeal from the denial of preliminary injunctive relief, the close ties between parties, candidates, and nonprofit organizations that engage in political activities strongly support the judgment that officeholders will value large contributions to politically supportive nonprofit organizations enough to pose a danger of actual or apparent corruption. This conclusion is corroborated by the evidence of substantial diversion of large contributions from the major political parties to nonprofit organizations once BCRA outlawed the receipt of soft money by the parties.[8] The relationships among candidates, parties, and political committees, and the ways in which donors to political committees get preferential access to and influence over elected officials because of independent expenditures made by the committees, are further detailed in the FEC's Proposed Findings of Fact and the supporting materials submitted to the district court in this case. *See* Dkt. No. 45, at 37-109.

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[8] *See* Brief *Amici Curiae* for Campaign Legal Center and Democracy 21 in Support of Defendant-Appellee and Urging Affirmance, No. 08-5223 ("CLC-Democracy 21 First *Amici* Br.") at 19-30.

Indeed, *McConnell* already held that concerns about the relationship of parties and candidates to "independent" nonprofit organizations and the resulting appearance of corruption were sufficient to permit regulation of fundraising by such organizations when the Supreme Court sustained BCRA's prohibitions on party solicitation of funds for tax-exempt organizations. *See* 540 U.S. at 174-77. In so holding, the Court recognized that the diversion of soft-money contributions from parties to "like-minded tax-exempt organizations that conduct activities benefiting their candidates" would give rise to "[a]ll of the corruption and appearance of corruption" of fund-raising by the parties themselves. *Id.* at 175. Similar considerations support Congress's judgment that contribution limits should be imposed on donations to support political expenditures by groups whose major purpose is engaging in election activity.

In applying the appropriate level of scrutiny to those contributions limits, moreover, the Court should give no credence to SpeechNow.org's argument that if individuals must be permitted to make independent expenditures in unlimited amounts, it follows that they similarly must be allowed to contribute unlimited amounts to organizations that will engage in such expenditures. That simplistic syllogism fails for two reasons. First, like the panel opinion in *EMILY's List*, the argument erroneously equates the weighty First Amendment interest in engaging in speech directly with the much less substantial interest in making contributions to

associate oneself with someone else's speech. That the danger of apparent corruption posed by independent expenditures is insufficient to overcome the former does not mean that it does not outweigh the latter. Similarly, just because the interest in preventing actual or apparent corruption does not outweigh the political committee's own weighty interest in making unlimited expenditures, *see NCPAC*, 470 U.S. at 497-98, does not mean that the anti-corruption interest does not outweigh the lesser interest of contributors in making unlimited contributions. Indeed, a major reason that the Court in *NCPAC* held that unlimited expenditures by political committees posed an insufficient threat of corruption to justify restricting those expenditures was that such committees "overwhelmingly" received their funding from "small contributions" of less than $1,000, *id.* at 497, which in the Court's view obviated the likelihood that their activities would give particular contributors undue influence over candidates.

Second, the syllogism argument – that if an individual has a right to make unlimited expenditures, he must therefore have a right to make unlimited contributions – ignores the likelihood that candidates will place a much greater value on large contributions made to what *McConnell* referred to as "like-minded" organizations, 540 U.S. at 175, which are likely to be much more reliable and consistent political allies and more effective and credible campaigners than individuals who may engage in independent expenditures on their own. As

Buckley observed, such individuals are more likely to be viewed as loose cannons whose episodic participation in campaign activity "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." 424 U.S. at 47. It would, therefore, be quite natural for candidates to place a much higher value on large contributions by individuals to "like-minded" organizations who engaged in sophisticated independent campaigning to benefit the candidates, than on direct expenditures made by the individuals themselves. The close ties between the national political parties and the supposedly independent section 527 groups that made expenditures to influence the 2004 election, described at length in our first brief in this case, *see* CLC-Democracy 21 First *Amici* Br. at 21-27, well illustrate why expenditures by such "like-minded" organizations would be of greater benefit to parties and candidates than expenditures by individuals acting alone.

That such large donations to independent expenditure groups may present a substantial appearance of corruption is no mere theory, but is strikingly illustrated by the facts underlying the Supreme Court's recent decision in *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009). There, an individual whose company had interests in litigation pending before the West Virginia Supreme Court made extremely large donations to a political organization, "And for the Sake of the Kids," which used the funds to make independent expenditures advocating the

election of a judicial candidate who was believed to be likely to support the donor's interest. That candidate went on to win the election and provide the decisive vote in favor of the donor's company. Essentially treating the contributions made to the political group as the equivalent of direct donations to the campaign of the winning candidate, *see, e.g.,* 129 S. Ct. at 2256 (stating that the justice casting the deciding vote "had received campaign contributions" from the donor), the Court held that the contributions created a "risk of actual bias" so "substantial" that due process required setting aside the court's decision. *Id*. at 2264-65.

Such a substantial risk of bias is at least the equivalent of the appearance of corruption that the Court held in *McConnell* was sufficient to justify limitations on contributions—that is, "the danger that officeholders will decide issues not on the merits …, but according to the wishes of those who have made large financial contributions valued by the officeholder." *See* 540 U.S. at 153. That large contributions to independent spending groups pose precisely that danger is the fundamental teaching of *Caperton*.

CONCLUSION

For the foregoing reasons, this Court should answer the certified questions in favor of the constitutionality of the challenged provisions of FECA.

Respectfully submitted,

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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 6,244 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 December 15, 2009, I caused this BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 SUPPORTING THE FEDERAL ELECTION COMMISSION to be filed electronically with the Clerk of the Court of the United States of Appeals for the District of Columbia using the CMS/ECF System.

I further certify that on December 15, 2009, I filed with the Clerk's office of the United States Court of Appeals for the District of Columbia Circuit, via hand delivery, twenty-five (25) copies of this BRIEF *AMICI CURIAE* pursuant to the Court's Order in this case of November 5, 2009.

I further certify that two (2) paper copies of the brief were sent on December 15, 2009 by United States mail, first-class postage prepaid, to the following counsel:

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