UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR., EDWARD H. CRANE, III, BRAD RUSSO, and SCOTT BURKHARDT Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	)	Civil Case No. 1:08-cv-00248 (JR)

PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE OR, IN THE ALTERNATIVE, TO FILE SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S PROPOSED FINDINGS OF FACT

Plaintiffs respectfully request leave to file the attached reply memorandum in support of their First and Second Motions in Limine, filed in this court on November 24, 2008. In the alternative, because this Court's order of December 9 consolidated the FEC's response to those motions with the FEC's reply in support of its proposed findings of fact, Plaintiffs respectfully request that this Court allow Plaintiffs to file the attached memorandum as a surreply in opposition to the FEC's proposed findings of fact. A proposed order is attached to this motion.

In support of this motion, Plaintiffs state the following:

1. The attached reply memorandum, supporting Plaintiffs' motions in limine, focuses on a single issue: the FEC's sweeping reliance on the concept of "legislative facts" as a means of avoiding the requirements of the Federal Rules of Evidence and the Federal Rules of Civil

Procedure. Plaintiffs have not had an opportunity to contest the FEC's arguments on the issue of legislative fact-finding, and the admissibility of literally hundreds of the FEC's proposed facts turns on a proper understanding of the concept of legislative facts. Accordingly, Plaintiffs believe that the attached reply memorandum—which demonstrates that the case law cited by the FEC does not support its all-inclusive and all-purpose use of so-called "legislative facts"—will assist the Court in entering findings of fact consistent with its duties under 2 U.S.C. § 437h.

2. Plaintiffs have explained why they styled their motions in limine as such, and incorporate that discussion by reference here. Pls.' Reply Mem. in Supp. Proposed Findings of Fact at 3-4 n.1. Because the FEC briefed the issues raised in Plaintiffs' motions separately from other issues, Plaintiffs believe it makes the most sense to treat those documents as responses to the original motions, and the attached memorandum as a reply memorandum under Local Rule 7(d). However, if the Court holds that its treatment of the motions as arguments in its order of December 9th precludes Plaintiffs' ability to file a reply memorandum, Plaintiffs ask that the Court treat the attached memorandum as a surreply in opposition to the FEC's proposed findings of fact and allow its filing. "The standard for granting a leave to file a surreply is whether the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party's reply." *Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001). The FEC first raised its arguments as to why the concept of legislative facts allows it to overcome the evidentiary limitations imposed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure in its "reply" briefing on Plaintiffs' motions in limine, which the FEC presented as part of its reply briefing in support of its proposed findings of fact. Further, Plaintiffs, who have limited their memorandum to addressing those arguments, will not have another forum in which to address them if they cannot file the attached memorandum.

3. Pursuant to Local Rule 7(m), counsel for Plaintiffs has conferred with counsel for the FEC concerning this motion. The FEC opposes the motion; its position is as follows: The Commission opposes Plaintiffs' motion for leave to file another brief because it believes the brief is foreclosed by the Court's order of December 9, 2008.

Dated: December 22, 2008.

Respectfully submitted,

/s/ Steven M. Simpson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd Day of December 2008, a true and correct copy of Plaintiffs' MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE OR, IN THE ALTERNATIVE, TO FILE SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S PROPOSED FINDINGS OF FACT FOR CERTIFICATION with accompanying REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE was filed electronically using the court's ECF system and sent via the ECF electronic notification system to the following counsel of record:

Robert W. Bonham, III
David B. Kolker
Steve N. Hajjar
Kevin Deeley
FEDERAL ELECTION COMMISSION
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/s/ Steven M. Simpson

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR., EDWARD H. CRANE, III, BRAD RUSSO, and SCOTT BURKHARDT Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	)	Civil Case No. 1:08-cv-00248 (JR)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE

Plaintiffs by and through their attorneys hereby reply in support of their motions in limine on the limited issue of the FEC's arguments concerning the use of legislative facts.

INTRODUCTION

The FEC is playing a massive game of "heads I win, tails you lose." Thus, the FEC relies on hundreds of proposed findings allegedly demonstrating the illicit motives of donors to other groups, but if Plaintiffs rely on a few simple points about their own motives in creating and associating with SpeechNow.org, the FEC claims that that information is irrelevant. Similarly, the FEC contends that Fred Young is not harmed, because he has a lot of money and can finance ads on his own. At the same time, the FEC argues that Brad Russo and Scott Burkhardt are *not* harmed because they *do not* have a lot of money and cannot afford to spend more than the

contribution limits allow anyway. The FEC claims that large contributions allow donors to use groups as conduits to funnel money to candidates, but at the same time argues that the fact that donations to SpeechNow.org will be spent in its sole discretion means that only David Keating is speaking, and not any of its donors. The FEC claims it can rely on evidence that candidates feel gratitude toward those who make independent expenditures, but argues that Plaintiffs cannot rely on evidence that candidates feel gratitude toward those who endorse candidates, who vote for them, and the like. Indeed, according to the FEC, it can attempt to show that independent expenditures cause corruption, but Plaintiffs cannot respond by pointing out that that argument is an attack on the very notion of independence. Heads, the FEC wins; tails, everyone else loses.

The FEC has now informed this Court that the trick up its sleeve that allows it to play this game is the magic wand of "legislative facts." According to the FEC, "legislative facts" allows it to ignore the rules of evidence and rely on hundreds of exhibits that are inadmissible on hearsay and other grounds. "Legislative facts" allows the FEC to ignore the rules of relevance and focus on the actions and motives of virtually everyone other than the Plaintiffs, thus treating an as-applied challenge as though it were facial. "Legislative facts" allows the FEC to ignore its own rules concerning coordination and the statute that defines independent expenditures and to argue that those concepts are meaningless, because independent expenditures are corrupting regardless of whether the Supreme Court, Congress, or even the FEC has concluded as much. And "legislative facts" even allows the FEC to ignore the parties' schedule in the case and rely on witnesses and documents that were not produced or disclosed on time. It is not clear why the FEC has chosen to follow some of the rules of evidence but not others, some parts of the parties' schedule but not others, and some of the rules of civil procedure but not others, but apparently

the broad concept of "legislative facts" even allows the FEC itself to decide when it will follow the rules and when it will pronounce itself exempt.

The FEC's view of the concept of legislative facts vastly exceeds any rational application of that concept. While there is much to which the Plaintiffs take issue in the FEC's responses to Plaintiffs' motions in limine, because the Court has interpreted those motions as arguments rather than separate motions to which Plaintiffs would typically have a right of reply, Plaintiffs will limit this brief only to the FEC's extremely broad—indeed, unlimited—view of legislative facts.

ARGUMENT

The FEC ignores the proper context in which legislative facts have been used in other cases and interprets the concept as an open invitation to suspend the rules of evidence and civil procedure in any constitutional challenge. As the term implies, "legislative facts" are typically relied on to inform legislative or agency judgments made in the course of taking actions such as passing laws or issuing rules. *See, e.g., Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995). Thus, courts often turn to legislative facts to determine what a legislature was thinking when it passed a law, what problems it was seeking to solve, and what its interests were in legislating in a particular area. *See, e.g., United States v. Shannon*, 110 F.3d 382, 387-88 (7th Cir. 1997) (relying on legislative facts to establish original purpose of statutory rape laws). Similarly, courts look to legislative facts to form judgments about societal views on certain topics like the death penalty, race-based admission policies, and abortion or about the views of those within a particular area—industry and educational institutions' views of affirmative action, for example, or views within the medical profession about the point at which a fetus becomes viable. *See,*

e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330-33 (2003); *Roe v. Wade*, 410 U.S. 113, 160 (1973). Used in this way, legislative facts are typically not at odds with the rules of evidence, because they are not being used to prove the truth of particular facts, but are being introduced to show that a legislative body or some other group thought something to be true.

The FEC's approach to legislative facts goes well beyond these limited circumstances. The FEC is not, for example, attempting to introduce evidence about Congress's intent in passing FECA or the FEC's own intent in issuing a particular rule. Nor is the FEC simply limiting itself to trying to show what candidates or consultants in general think about independent expenditures or how groups that create independent ads typically fund and produce them. The FEC wants to introduce thousands of pages of inadmissible evidence to prove the truth of a number of specific claims along with the motives and the behavior of all individuals who engage in particular activities. For example, the FEC is not seeking to show that groups that run independent expenditures *think* they are effective, but that the vast majority of independent expenditures are, in fact, "effective" in influencing the outcome of elections. *See* FEC's Proposed Findings of Fact, Section IV.A. Likewise, the FEC is not claiming that many candidates are grateful for independent expenditures made on their behalf, but that candidates are *always* grateful, and that a large independent expenditure is *always* more valuable to a candidate than a direct contribution. *See id*. at ¶ 222. The FEC is not claiming that some donors are so-called "investors" who have business interests at heart, but that the vast majority of donors who fund groups who make independent expenditures seek access to and influence over candidates. *See id*. at ¶¶ 137-38.

The FEC attempts to support its extraordinarily liberal use of "legislative facts" by arguing that the Supreme Court has sanctioned their use in constitutional cases such as this one. But a closer examination of the cases on which the FEC relies—in particular, the campaign

finance cases—indicates that the opposite is true. While the Supreme Court often relies on legislative facts in campaign finance cases, it does not do so—at least to the extent attempted by the FEC here—in as-applied cases. The reason is simple: As-applied challenges, as Plaintiffs pointed out in their response briefs, are limited to the facts of the case in which the law is being applied, not the facts concerning any party to whom the law could be applied. The other cases on which the FEC relies are either not to the contrary, or are clearly distinguishable for a variety of reasons, as Plaintiffs demonstrate below.

Indeed, if the FEC's approach to legislative facts were correct, there would be no limit to the admissibility of "legislative facts" in constitutional cases, and they would be the exception that would swallow the rules of evidence and the rules of civil procedure. While it is true that the Supreme Court has on occasion relied heavily on so-called legislative facts—in cases such as *Muller v. Oregon* and *Roe v. Wade*, for example—these cases were not an open invitation to the lower courts to suspend the rules of evidence and allow entire cases to be litigated outside the rules. Thus, while Plaintiffs do not believe that any of the FEC's arguments concerning legislative facts are valid, if the Court decides to admit into the record some or all of the FEC's evidence to which Plaintiffs object, it should simply make that information available to the Court of Appeals so the Court of Appeals can decide on what "legislative facts" to rely or not rely as it decides the merits of this case. The FEC's argument is primarily that appellate courts, and, in particular, the Supreme Court, have on occasion relied on legislative facts despite the rules of evidence and civil procedure. If that is so, then the most this Court should do is offer a documentary record to the Court of Appeals from which it can draw legislative facts as appropriate. But if would be inappropriate for this Court to decided hotly contested questions of

fact in the FEC's favor and enter as factual findings the FEC's broad claims on the grounds that they are based on "legislative facts."

I. The Supreme Court Has Not Relied Extensively On Legislative Facts In As-Applied Challenges To Campaign Finance Laws Such As This Case.

The starting point for the Court in determining the proper scope of its findings of fact is not the general concept "legislative facts" as the FEC sees it, but the case from this circuit that set the standard for certification under 2 U.S.C. § 437h: *Buckley v. Valeo*. In *Buckley*, the D.C. Circuit stated that beyond the evidence submitted by the parties, district courts can rely on "submissions that may suitably be handled through judicial notice, as of legislative facts, supported by legislative history or works reasonably available, to the extent not controverted in material and substantial degree." 519 F.2d 817, 818 (D.C. Cir. 1975). The court's statement is entirely consistent with Federal Rule of Evidence 201, under which judicial notice may be taken only of facts that are "not subject to reasonable dispute." Facts concerning legislative history and the intent of Congress in passing a law are consistent with this approach in that such facts are typically used to show the reasons that a law was passed, the problems sought to be addressed, and the legislature's interest in legislating in a given area. *See, e.g., Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1161-62 (D.C. Cir. 1979) (describing legislative facts as facts that help courts "determine the content of law and of policy" and allow them to exercise the "judgment or discretion in determining what course of action to take"); Fed. R. Evid. 201 advisory committee's note (stating that legislative facts are facts that "have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body").

Contrary to the FEC's claim, the Supreme Court has not thrown the door open to any evidence offered in the form of "legislative facts" in campaign finance cases. Two examples of past cases illustrate this point. First, *McConnell v. FEC*, on which the FEC relies, shows the typical use of legislative facts. *McConnell* is a classic example of a facial challenge in which Congress's reasons for passing the law and the problems it sought to address were at issue and thus necessitated the Court's reliance on facts that informed broad policy issues and the legislative judgment. Indeed, Congress had just relied on many of the precise facts at issue in *McConnell* a scant few years earlier in considering BCRA, 540 U.S. at 129-32, and the parties agreed on the basic approach to discovery in the case and the types of information on which the lower courts should rely. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 206 n.32 (D.D.C. 2003). Thus, the Court's reliance on legislative facts was appropriate.

In contrast, in *FEC. v. Wisconsin Right to Life, Inc.*, an as-applied challenge to the electioneering communications ban upheld in *McConnell*, the Court did not rely on legislative facts, and instead almost exclusively focused on evidence concerning WRTL's ads. *See FEC v. Wisconsin Right to Life, Inc.* (*WRTL II*), 127 S.Ct. 2652 (2007); s*ee also* Pls.' Reply in Supp. Proposed Findings of Fact at 7-8. The fact that Chief Justice Roberts relied on a survey to rebut a point made by Justice Souter does not mean that extensive use of legislative facts is appropriate in as-applied challenges. Justice Roberts devoted much of his opinion in the case to the point that the as-applied challenge was narrow and limited to the facts concerning WRTL's ads. *See id*. at 2666-73. The notion that he was reversing course because of a statement in a footnote is absurd. Moreover, Chief Justice Roberts's point in footnote 6 was in response to an unsupported claim made by Justice Souter—that Wisconsin voters knew of Senator Feingold's position on judicial filibusters. *See id*. at 2698 (Souter J., dissenting). Justice Souter cited the Congressional

Record to show that Senator Feingold had stated his views on the record and a newspaper article stating that Republicans had criticized the Senator, and then drew the inference that Wisconsin voters knew the Senator's views. *Id*. at 2698 & nn.14-15 (Souter J., dissenting). Chief Justice Roberts responded in kind, relying on a survey to argue that many Wisconsin voters most likely did not know the Senator's views. *Id*. at 2667 n.6 (citing Inter-university Consortium for Political and Social Research, American National Election Study, 2000: Pre- and Post-Election Survey 243 (N. Burns et al. eds. 2002)). Turnabout is perhaps fair play in Supreme Court opinions, but it does not establish broad new rules of evidence.

Second, in *FEC v. Colorado Republican Federal Campaign Committee* (*Colorado II*), 533 U.S. 431 (2001), the Court again relied on legislative facts in its decision on a facial challenge brought by the Colorado Republican Party to a provision in FECA that limited the amount of expenditures a political party could coordinate with a candidate. *Id* at 451-52. However, in the Colorado Republican Party's earlier as-applied challenge, other than one reference to a source showing that political parties represent differing interests, the Court's analysis was limited to facts concerning the parties themselves. *See Colo. Republican Fed. Campaign Comm. v. FEC* (*Colorado I*), 518 U.S. 604, 622-23 (1996).

These cases demonstrate the contrasting use of legislative facts in facial challenges versus as-applied challenges. Facial challenges target both Congress's interests and intentions in passing a law, and thus make inquiry into legislative facts appropriate and necessary. As-applied challenges involve the laws as they apply to the rights of the parties at hand; the proper focus is thus on the parties themselves, and use of legislative facts is appropriately limited to legislative history and facts on which the legislature or an agency actually relied.

The other campaign finance cases on which the FEC relies are all facial challenges and thus are entirely consistent with this approach. Thus, in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), a facial challenge to a new campaign finance law in Vermont, the courts relied on, among other items, newspaper articles that the Vermont legislature had considered in passing the law. *Id.* at 123. Similarly, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), was a facial challenge to a Missouri law limiting contributions to state electoral candidates. In determining whether the law was constitutional, the primary question for the Supreme Court was whether the limits were similar to those upheld in *Buckley*. Thus, the Court examined contemporaneous newspaper articles and similar evidence showing that the legislature and the public were concerned about the same issues of corruption that prompted the passage of FECA. *Id*. at 393-94. Finally, in *Daggett v. Commission on Governmental Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000), the court considered a facial challenge to a Maine referendum that limited contributions and created a system of public financing for state legislative and gubernatorial candidates. In upholding the law, the First Circuit considered contemporaneous newspaper reports and other information showing public perceptions of corruption. *Id*. at 457.

None of these cases support the FEC's broad interpretation of legislative facts as a blanket exemption to the rules of evidence. Legislative facts are appropriate to inform what legislatures have actually done and their reasons for doing so, and they are appropriate to make broad and typically unconstestable points, but they are not admissible to prove the actions and motives of specific individuals. The FEC has not cited any campaign finance cases in which legislative facts were used as the FEC proposes in as-applied challenges.

Indeed, the FEC's argument relies on a false syllogism. As the FEC has reminded the Court repeatedly, Congress passed FECA over thirty years ago, and the Supreme Court upheld the contribution limits in *Buckley v. Valeo*. Plaintiffs are challenging only the application of those contribution limits and certain administrative and reporting requirements to the Plaintiffs. The Court in *Buckley* did not address an association even remotely like SpeechNow.org, and the Supreme Court has never upheld the application of contribution limits to a group like SpeechNow.org, a point recognized by courts and commentators alike. *See* Pls.' Resp. to FEC's Proposed Findings of Fact at 17-18. As a result, there is no relevant legislative judgment that the FEC could be offering its legislative facts to support, and, indeed almost none of the FEC's proposed findings has anything to do with Congress's reasons for passing FECA or the Supreme Court's reasons for upholding the contribution limits in any event.

Instead, the FEC is relying on legislative facts to illuminate a legislative judgment that has not been made—that is, that independent expenditures are corrupting, that they amount to "indirect contributions" to candidates, and that donors use them to gain access to and influence over candidates. The false syllogism at the heart of the FEC's argument is that because Plaintiffs are challenging a law that was passed by Congress as part of FECA, and because a significant part of Plaintiffs' argument is that independent expenditures are core political speech and do not cause corruption, it is entirely logical for the FEC to introduce so-called legislative facts allegedly demonstrating that independent expenditures *do* cause concerns about corruption. The problem with this argument, as Plaintiffs argued in their response to the FEC's proposed findings of fact, is that neither the Supreme Court, nor Congress, nor even the FEC has decided that independent expenditures cause corruption or that independence versus coordination turns on

whether the expenditures are made to gain "access" or "influence" or cause candidates to feel "gratitude." *See* Pls.' Resp. to FEC's Proposed Findings of Fact at 24-27.

The FEC cannot avoid this flaw in its argument by claiming that it is focusing only on contributions to groups that make independent expenditures, but not the independent expenditures themselves. *See* FEC Reply Memorandum at 14-15. That is both factually false and illogical. In fact, the FEC devotes most of its proposed findings of fact to the propositions that independent expenditures are highly effective, that candidates are happy when independent expenditures are made on their behalf, that independent expenditures amount to indirect contributions to candidates, and that coordination is hard to police. Logically, the FEC must make these points in order for its argument against unlimited contributions to groups that make independent expenditures to make sense. Without focusing on the independent expenditures that contributions finance, there is no point to the FEC's argument. It is only because the groups at issue make independent expenditures—rather than, say, devoting that money to policy analysis—that contributions to them are allegedly valuable to candidates. Attacking independent expenditures is thus the linchpin to the FEC's entire argument. That is the reason the FEC wishes to include a litany of so-called "legislative facts." The FEC should not be permitted to do so.

II. The Remaining Cases On Which The FEC Relies Do Not Support Its Broad Interpretation of "Legislative Facts."

The remaining cases on which the FEC relies are either facial challenges in which legislative facts were used to illustrate legislative judgments or were otherwise appropriate uses of legislative facts to demonstrate broad views of particular issues like the death penalty, or they are decisions in which the courts simply recited the general rule regarding what legislative facts

are. None of these cases support the FEC's broad interpretation of legislative facts or their applicability to as-applied challenges such as this one.

First, the FEC's reliance on *Roe v. Wade*, *Grutter v. Bollinger*, *Atkins v. Virginia* and *Muller v. Oregon* is entirely misplaced. The cases practically define the term *sui generis*, and in none of them did the Supreme Court establish a rule concerning the admissibility of legislative facts. The Court simply exercised its discretion to rely on the evidence on which it saw fit to rely. In *Roe*, the Court performed its own independent research to address general societal views on abortion and, more specifically, to attempt to determine the views within the medical profession of when a fetus becomes viable. 410 U.S. 113, 160 (1973). In *Grutter*, the Court relied on amicus briefs in making the point that many business and educational institutions rely on affirmative action and believe that it is beneficial—precisely the sort of point that legislative facts are appropriate to illustrate.[1] 539 U.S. 306, 330-33 (2003). Similarly, in *Atkins*, the Court relied on amicus briefs to assess whether there was a national consensus opposing the execution of the mentally retarded. 536 U.S. 304, 316 n.21 (2002). These cases show that the Supreme Court exercises its own discretion to rely on legislative facts on occasion. The cases do not stand for the proposition that any court or party may rely almost exclusively on legislative facts in any constitutional case. In *Muller v. Oregon*, Louis Brandeis wrote what came to define the "Brandeis Brief" to make the now anachronistic claim—which was then widely viewed as a mere truism—that woman are weak and need the protection of men and legislatures to get by in life. 208 U.S. 412, 421 (1908). The case is hardly the poster child for the admissibility of "legislative facts."

[1] *United States v. Shannon*, 110 F.3d 382 (7th Cir. 1997), is similar in that the court considered academic publications to determine the historical purpose of statutory-rape laws, *id*. at 387, and to make the point that teen pregnancy can be considered "high risk." *Id*. at 388.

Second, the FEC relies on two facial challenges in which courts relied on the legislative facts on which the legislatures or rule-making bodies themselves actually relied. Thus, in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995), the Supreme Court heard a First Amendment challenge to a rule the Bar promulgated forbidding attorneys from directly contacting accident victims. In its defense of the rule, the Bar submitted into evidence the *actual record* that it had developed in its two-year study of the issue, and the Court relied on this evidence in concluding that the Bar had acted within its constitutional discretion in passing the rule. *Id*. at 626-28. Similarly, in *Blount v. SEC*, the court rejected a challenge to an SEC regulation by relying on portions of the record that the SEC itself considered in passing the regulation. *See* 61 F.3d 938, 944-45 (D.C. Cir. 1995).

Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (5th Cir. 1983), another facial challenge, is similar in that the question at issue primarily turned on whether a state agency properly exercised its constitutional discretion to restrict alcohol advertisements. In a decision that has been superseded by the Supreme Court's later alcohol advertising cases,[2] the court simply concluded that there was a connection between alcohol advertising and consumption. *Id*. at 747-51. This "common sense" conclusion was both shared by the legislature, *see id*. at 748 n.8, and supported by the Supreme Court itself. *Id*. at 749.

Third, the FEC relies on *Indiana Democratic Party v. Rokita*, a facial challenge in which the court applied rational basis scrutiny. Under rational basis, the government need not offer any reason for its laws at all; any reason on which the legislature might have relied that is not irrational will suffice. 458 F. Supp. 2d 775, 843-45 (S.D. Ind. 2006). Under rational basis, the

[2] *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995).

admissibility of legislative facts is essentially built into the constitutional standard. *See id*. The same is simply not true in First Amendment cases.

Finally, the FEC relies on several administrative law cases that simply recite the general definition of legislative facts. These cases generally stand for the unexceptional proposition that a hearing is required when an agency is finding adjudicative facts, while no hearing is necessary when the agency is engaged in legislative fact-finding or a broad rulemaking. *See* FEC Reply Memorandum at 3-4 (citing *Alaska Airlines Inc. v. CAB*, 545 F.2d 194, 200 n.11 (D.C. Cir. 1976); *Friends of the Earth v. Reilly*, 966 F.2d 690, 694 (D.C. Cir. 1992); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296 (2d Cir. 1971); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162 (D.C. Cir. 1979)). The courts did not make use of legislative facts themselves, but merely described what legislative facts are and the procedural requirements for agencies engaged in legislative fact-finding.[3]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court exclude the evidence listed in their motions in limine.

Dated: December 22, 2008.

Respectfully submitted,

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Robert Gall (DC Bar No. 482476)
Paul M. Sherman (DC Bar No. 978663)
Robert Frommer (DC Bar No. 497308)*

[3] The FEC's reliance on *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), is similar in that the court in that facial challenge simply discussed in dicta the general rule of legislative facts, but did not actually rely on any. *Id*. at 622.

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UNITED STATES DISTRICT COURT
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SPEECHNOW.ORG, DAVID KEATING, FRED M. YOUNG, JR., EDWARD H. CRANE, III, BRAD RUSSO, and SCOTT BURKHARDT Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	)	Civil Case No. 1:08-cv-00248 (JR)

ORDER REGARDING PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF THEIR FIRST AND SECOND MOTIONS IN LIMINE OR, IN THE ALTERNATIVE, TO FILE SURREPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S PROPOSED FINDINGS OF FACT

For good cause shown, Plaintiffs' motion is GRANTED. The Clerk is directed to file the lodged reply/surreply.

SO ORDERED this ____ day of _____, 2008.

_____
James Robertson, United States District Judge