ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5223

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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September 23, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties and Amici.*** SpeechNow.org and five individual plaintiffs (David Keating, Fred M. Young, Edward H. Crane III, Brad Russo, and Scott Burkhardt) were the preliminary injunction movants in the district court and are the appellants in this Court. The Commission was the defendant below and is the appellee in this Court.

The Campaign Legal Center and Democracy 21 were amici curiae in the district court. There were no intervenors. Buckeye Institute's 1851 Center for Constitutional Law, Concerned Women for America Legislative Action Committee, FRC Action, and Goldwater Institute's Scharf-Norton Center for Constitutional Litigation are amici curiae in this Court.

(B) ***Rulings Under Review.*** SpeechNow.org and the five individual plaintiffs appeal the July 1, 2008, order of the United States District Court for the District of Columbia (Robertson, J.) denying their motion for a preliminary injunction. The district court's opinion is published at 567 F. Supp. 2d 70 (D.D.C. 2008). The slip copy of the opinion is included in the Joint Appendix ("J.A.") at 372-399.

(C) ***Related Cases.*** Appellants filed a notice of appeal of the denial of their preliminary injunction motion on July 23, 2008. (J.A. 9, Entry 38.) This Court

assigned a docket number (08-5223) and issued scheduling orders. On November 7, 2008, appellants successfully moved to hold their appeal in abeyance. On June 23, 2009, appellants revived their appeal. Other than those proceedings, this case has not been before any court other than the district court below, and the Commission knows of no "related cases" as that term is defined in D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

BCRA	=	**Bipartisan Campaign Reform Act**
FEC	=	**Federal Election Commission**
FECA	=	**Federal Election Campaign Act**
MCFL	=	**Massachusetts Citizens for Life**
NCPAC	=	**National Conservative Political Action Committee**
PAC	=	**Political action committee**
WRTL	=	**Wisconsin Right to Life**

COUNTERSTATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 over the motion for a preliminary injunction by SpeechNow.org ("SpeechNow") and five individuals. A special provision, 2 U.S.C. § 437h, granted the district court jurisdiction over the individual plaintiffs' underlying constitutional challenges. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) to review the district court's denial of injunctive relief.

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the district court abused its discretion in refusing to preliminarily enjoin the Commission from enforcing against appellants longstanding statutory contribution limits on the amounts an individual may contribute to political committees.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set out in an addendum to this brief.

COUNTERSTATEMENT OF THE FACTS

I. BACKGROUND

A. The Parties

The Federal Election Commission ("Commission" or "FEC") is the independent agency of the United States with exclusive jurisdiction over the

administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 2 U.S.C. §§ 431-455 ("Act" or "FECA"), and other statutes. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. § 437c(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [the] Act," 2 U.S.C. §§ 437d(a)(8), 438(a)(8),(d); and to issue written advisory opinions, 2 U.S.C. §§ 437d(a)(7), 437f.

SpeechNow is an unincorporated nonprofit association organized under the District of Columbia Uniform Unincorporated Nonprofit Associations Act, D.C. Code § 29-971.01, and section 527 of the Internal Revenue Code. (J.A. 17, 75-76.)[1] David Keating is the founder and a "member" of SpeechNow and serves as its president and treasurer. (J.A. 17 ¶ 8.) He is also the executive director of Club for Growth (J.A. 58-59 ¶ 27), an advocacy group with a well-financed affiliated political committee. *See* http://www.clubforgrowth.org/keating.php (visited Mar. 1, 2008). Edward H. Crane III is a "member" of SpeechNow and also the founder and longtime president of the Cato Institute, a nonprofit advocacy group. (J.A. 102 ¶ 2; J.A. 104 ¶ 8.) Fred M. Young, Jr., Brad Russo, and Scott Burkhardt, as well as Keating and Crane, are prospective donors to SpeechNow. (J.A. 17-19 ¶¶ 8-12.)

[1] "J.A. __" references are to the Joint Appendix filed with appellants' brief.

SpeechNow's stated purpose is to "expressly advocate[e] the election of candidates who favor free speech and the defeat of candidates who favor free speech restrictions in the name of campaign finance reform." (J.A. 17 ¶ 7; *see also* J.A. 19 ¶ 14.) The organization was also formed in part to create a test case for challenging certain provisions of FECA. Susan Crabtree, *New 527 Group Takes Aim At Campaign Contribution Limits*, The Hill, Dec. 3, 2007. It seeks to accept contributions from individuals in unlimited amounts to pay for its candidate advocacy and administrative costs. (J.A. 20 ¶ 17; J.A. 32 ¶ 82.)

The bylaws of SpeechNow state that it will not coordinate its expenditures with candidates or political parties. (J.A. 84 § 4 (citing 11 C.F.R. § 109.21).) The bylaws also provide that the organization will not accept any donations from candidates, political parties, political committees, corporations, labor organizations, national banks, federal government contractors, or foreign nationals. (J.A. 83 § 9.) SpeechNow will not make contributions to candidates and other political committees. (J.A. 83 § 10.)

SpeechNow alleged that it will expressly advocate the election or defeat of candidates through advertisements on television and other media in the current election cycle and in future election cycles. (J.A. 21 ¶ 20.) The record includes four video and audio political advertisement scripts (J.A. 110-14) that SpeechNow allegedly intended to use during the last election cycle at a cost of more than

$120,000. (J.A. 21-22 ¶¶ 21-25; *see also* J.A. 108.) SpeechNow plans to comply with FECA's disclaimer and reporting requirements for independent expenditures made by groups other than political committees, but does not wish to comply with the full disclosure requirements applicable to political committees. (J.A. 23 ¶¶ 28-30; J.A. 25 ¶ 46.)

SpeechNow has five "members" (J.A. 79, 88) to whom its bylaws give control over its "property, affairs, and business" (J.A. 79). The bylaws state that "[n]o person may become a Member by virtue of providing financial or other support" to the organization. (J.A. 78.) Only members may fill, by majority vote, any member vacancy or expand the number of members. (*Id.*) The bylaws do not require SpeechNow's members, in exercising their powers, to consult with nonmember contributors.[2]

The bylaws also provide for the members to delegate their powers to SpeechNow's officers. (J.A. 79.) In practice, appellant Keating runs the organization on a day-to-day basis and makes virtually all the decisions. (*See, e.g.*, J.A. 51 ¶ 4; J.A. 59 ¶ 27.)

[2] Of the five individual plaintiffs in this litigation, only Keating and Crane are "members" of SpeechNow. (J.A. 18 ¶ 9, J.A. 88.) The other three are allegedly would-be contributors. (J.A. 18-19.)

B. SpeechNow's Advisory Opinion Request

In November 2007, SpeechNow requested the Commission to issue an advisory opinion, *see* 2 U.S.C. § 437f, discussing whether the Act requires the organization to register as a political committee and to treat the donations it receives as "contributions." *See* J.A. 27 ¶ 52; http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2267. The Commission could not issue the requested opinion, however, because an advisory opinion requires the affirmative vote of at least four Commission members and the Commission then had only two members. *See* 2 U.S.C. §§ 437c(c), 437d(a)(7); J.A. 146.

C. Statutory and Regulatory Background

1. Contributions and Expenditures

The Act defines "contribution" to include "any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). "Expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

2. Political Committees

The Act defines "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). Any organization that qualifies as a political committee must register with the Commission and file periodic reports for disclosure to the public of all receipts and disbursements to or from a person in excess of $200 in a calendar year (and in some instances, of any amount). *See* 2 U.S.C. §§ 433-34. Political committees must also identify themselves through "disclaimers" on all of their general public political advertising, on their websites, and in mass emails. 11 C.F.R. § 110.11(a)(1).

In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court found that the phrase "for the purpose of . . . influencing" used in defining "contribution" and "expenditure" and thus in defining "political committee" had "vagueness problems"; the phrase had the potential to encompass "both issue discussion and advocacy of a political result." The Court therefore narrowly construed "political committee": A group will not be deemed a "political committee" under the Act unless, in addition to crossing the $1,000 statutory threshold of contributions or expenditures, the organization is "under the control of a candidate" or its "major purpose … is the nomination or election of a candidate." *Id.*

3. Contribution Limits

In addition to limiting the amount a person may contribute to a candidate, a candidate's authorized committee, or a political party committee, FECA limits the amount that a person may contribute to "any other political committee." 2 U.S.C. § 441a(a)(1)(A)-(D). Persons, including individuals, may not contribute more than $5,000 per calendar year to such "other" political committees. *See* 2 U.S.C. §§ 431(11), 441a(a)(1)(C).

4. Independent Expenditures

The Act defines "independent expenditure" as an expenditure by a person "expressly advocating the election or defeat of a clearly identified candidate" and "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." 2 U.S.C. § 431(17).

Persons who are not a political committee are not required to file reports of all their receipts and disbursements. Generally, they are only required to file reports for each quarter of the year in which they have made independent expenditures aggregating in excess of $250 during a calendar year. 2 U.S.C. § 434(c). Each quarterly report contains information regarding the independent expenditure and each person who made a contribution in excess of $200 "for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(A)-(C).

All persons, including political committees, who make independent expenditures shortly before election day that exceed certain thresholds must disclose information about the expenditures to the Commission within 24 or 48 hours. 2 U.S.C. § 434(g).

Every person, including a political committee, that makes independent expenditure communications through certain media must include in each communication a disclaimer providing information about who paid for the communication. *See* 2 U.S.C § 441d(a). The disclaimer must provide the name and contact information for the maker of the independent expenditure, and state whether the communication is authorized by any candidate or candidate's authorized committee. 2 U.S.C § 441d(a)(3). Radio or television independent expenditures must contain an additional oral and visual disclaimer stating that the person paying for the communication "is responsible for the content of this advertising." 2 U.S.C. § 441d(d)(2).

II. COURT PROCEEDINGS

On February 14, 2008, SpeechNow filed both its initial complaint and a motion for a preliminary injunction to prevent the Commission from enforcing the individual contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3). On July 1, 2008, after a hearing, the district court denied the motion. (J.A. 8, Entry 32; J.A. 372-399.)

First, the court rejected SpeechNow's argument that strict scrutiny applies to the challenged contribution limits. (J.A. 384-388.) Relying on *Buckley* and its progeny, the district court explained that strict scrutiny applies to expenditure limits and intermediate scrutiny to contribution limits. (J.A. 384-86.) Like the contributors discussed in *Buckley*, "contributors to SpeechNow are not, through their donations, engaging in direct speech"; rather, "SpeechNow, as a legally separate organization, is speaking as their proxy." (J.A. 385-86.) The district court further explained that the Supreme Court has "repeatedly rejected" the argument that strict scrutiny applies because the Act's individual contribution limit to political committees supposedly functions as a limit on expenditures. (J.A. 386, citing *McConnell v. FEC*, 540 U.S. 93, 139 (2003).)

Second, the court held that SpeechNow failed to demonstrate a likelihood of success in claiming that FECA's annual $5,000 contribution limit is unconstitutional as applied to committees that make only independent expenditures. The limit "is closely drawn to match the government interests in preventing corruption and the circumvention of the Act's disclaimer requirements." (J.A. 397.)

SpeechNow relied, the court stated, on a narrow view of corruption that is "at odds with Supreme Court precedent," including *McConnell*. (J.A. 388.) The Supreme Court "has never held that, by definition, independent expenditures pose

no threat of corruption." (*Id.*) The court noted that "'[i]ndependence' does not prevent candidates, officeholders, and party apparatchiks from being made aware of the identities of large donors." (J.A. 390-91.) Indeed, "people who operate independent expenditure committees can have the kind of 'close ties' to federal parties and officeholders that render them 'uniquely positioned to serve as conduits for corruption.'" (J.A. 391, quoting *McConnell*, 540 U.S. at 156 n.51.) The court explained that the history of section 527 groups in the 2004 presidential election and a study of those groups support this proposition.[3] (J.A. 391-93; *see also* J.A. 379-82.)

Citing *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981) ("*CalMed*"), and *McConnell*, the district court also concluded that Congress has the power to regulate committees that make independent expenditures. In arguing to the contrary, SpeechNow relied on the solo concurrence in *CalMed* by Justice Blackmun. In agreeing to uphold FECA's $5,000 contribution limit to multicandidate political committees, Justice Blackmun indicated he would not have concurred if the committee there had made only independent expenditures. 453 U.S. at 203. But Justice Blackmun's remarks on this point, the district court

[3] Stephen R. Weissman & Ruth Hassan, *527 Groups and BCRA*, in *The Election After Reform, Money Politics and the Bipartisan Campaign Reform Act* (Michael J. Malbin ed. 2006) ("Weissman & Hassan"). For the Court's convenience, the Commission has included this study at Addendum 5-38.

explained, dealt with a "hypothetical situation" and were "neither controlling nor precedential." (J.A. 394.) "More importantly, a majority of the Supreme Court in *McConnell* rejected Justice Blackmun's reasoning." (J.A. 394-95, citing *McConnell*, 540 U.S. at 152 n.48.)

The district court further found that the $5,000 contribution limit also "promotes the important government interests underlying the Act's disclaimer requirements." (J.A. 396.) It "functions to prevent a handful of wealthy donors from hiding behind 'dubious and misleading names.'" (J.A. 396, quoting *McConnell*, 540 U.S. at 197.)

The limit is "a proportional response," the court concluded, "to the government interests at stake." (J.A. 397.) A $5,000 annual contribution is "substantial," the Act places no ceiling on the total amount of funds that groups like SpeechNow can amass and spend, and it does not limit the number of persons from whom funds can be solicited. (*Id.*)

Third, the district court found that SpeechNow failed to show irreparable harm. "Even with these contribution caps in place, the individual plaintiffs retain the ability to associate with and contribute to SpeechNow — each must simply limit his contribution to $5000 per year." (J.A. 398.) The equitable balance of hardships further favored the government, the district court stated, because the

Supreme Court has held that every Act of Congress is presumed to be constitutional. (J.A. 398-99.)

Finally, the court concluded that SpeechNow also failed to demonstrate a likelihood of success in challenging the Act's biennial aggregate limits, 2 U.S.C. § 441a(a)(3). (J.A. 398.)

On July 23, 2008, SpeechNow filed a notice of appeal of the district court's denial of a preliminary injunction. (J.A. 9, Entry 38). On November 7, 2008, however, after this Court had issued scheduling orders in the injunction appeal and the parties had filed preliminary documents (D.C. Cir. Docket, No. 08-5223), SpeechNow moved to hold the appeal in abeyance. (*Id.*) More than seven months later, on June 23, 2009, SpeechNow revived its preliminary injunction appeal and, on July 15, 2009, successfully moved to expedite the appeal. (*Id.*)

SUMMARY OF ARGUMENT

SpeechNow and individual appellants seek to preliminarily enjoin the Commission from enforcing against them FECA's longstanding annual and biennial limits on the amounts an individual may contribute to political committees. The individual plaintiffs alleged in their underlying suit that those provisions violate their First Amendment right to contribute unlimited funds to an organization like SpeechNow that plans to make only independent expenditures.

The district court did not abuse its discretion in denying the requested injunction. Appellants failed to carry their heavy burden to justify the status quo-altering injunction. Since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has distinguished between expenditure limits and contribution limits, and has consistently subjected the latter to lesser scrutiny.

1. Supreme Court precedent supports the constitutionality of the contribution limits, which as marginal restrictions on speech are reviewed under intermediate scrutiny. The Court has repeatedly rejected the view that only expenditures made in coordination with candidates pose a risk of corruption. Real-world evidence about political fundraising confirms that unlimited contributions to groups for independent spending raise the danger of corruption and its appearance. A victory for appellants would undermine FECA's anti-corruption purpose and have far-reaching consequences.

Unlimited contributions to SpeechNow and similar organizations would also undercut FECA's disclaimer requirements. The public would be denied contemporaneous information about those large donors.

Finally, FECA's biennial aggregate contribution limits are constitutional. *Buckley* upheld those limits, which help prevent circumvention of other contribution limits.

The Commission recognizes that the reasoning in *EMILY's List v. FEC*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009), appears to resolve the likelihood of success issue against the Commission and that the panel in the instant litigation is currently bound by that decision. To preserve the issue for possible further judicial review by this Court sitting *en banc* or the Supreme Court, however, the Commission argues here that appellants failed to carry their burden to establish that the Commission is unlikely to succeed in defending the contribution limits at the merits stage.

2. To demonstrate a likelihood of irreparable harm, a movant must do more than merely allege the violation of First Amendment rights. But that is all appellants have done here; their alleged injuries are neither actual nor certain and, if they exist, are largely self-inflicted. Instead of making SpeechNow truly operational and raising the funds for its express advocacy communications within the statutory limits — by using the individual plaintiffs' own contributions and by appealing to additional donors — appellants chose to test first the constitutionality of those limits. Their claim of imminent harm is also undercut by their delay in pursuing their preliminary injunction appeal. And they failed to show that they face an imminent or irreparable injury from the possibility of a Commission enforcement proceeding.

3. Finally, appellants failed to establish that the injunction would further the public interest and would not harm the Commission. Both the public and the Commission have a strong interest in enforcing the campaign finance laws, thereby preventing corruption and the appearance of corruption. Temporarily lifting the contribution limits during the 2010 election cycle, even for SpeechNow, would undermine the public's confidence in the integrity of the campaign financing system. This harm could not be undone.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SPEECHNOW'S PRELIMINARY INJUNCTION MOTION

I. STANDARD OF REVIEW AND A MOVANT'S BURDEN IN SEEKING A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary and drastic remedy" that may only be awarded upon "a clear showing" that the plaintiff is entitled to the relief. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam); (internal quotation marks and citation omitted) *accord, e.g., Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004) (movant "carries the burden of persuasion" and must make a "clear showing"). To prevail, a movant "must establish" (1) "that he is likely to succeed on the merits," (2) "that he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "that the balance of equities tips in his favor,"

and (4) "that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008).[4]

This Court reviews the district court's factual determinations "under the clearly erroneous standard" and reviews questions of law "essentially *de novo*." *See* Fed. R. Civ. P. 52(a) ("clearly erroneous"); *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998). "[U]nless [an] appellant carries the heavy burden of demonstrating an abuse of discretion" in the district court's denying an injunction, "the [court's] order must be affirmed." *Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987) (internal quotation marks and citation omitted).

II. SPEECHNOW FAILED TO CARRY ITS BURDEN FOR A PRELIMINARY INJUNCTION

SpeechNow's motion seeks to alter the longtime status quo by enjoining the Commission from enforcing the Act's decades-old contribution limits so that individuals can make unlimited contributions to SpeechNow. "The purpose of a preliminary injunction," however, "is merely to preserve the relative positions of

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[4] This Circuit's "sliding-scale" approach — which permits an injunction despite weak showings in some areas if the showing in one area is particularly strong — thus appears to be "'no longer controlling.'" *Davis v. Pension Benefit Guaranty Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J. concurring, joined by Henderson, J.) (quoting *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009)). *See The Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 347 (4th Cir. 2009) (*Winter* requires modifying sliding-scale preliminary injunction standard); *Am. Trucking Ass'ns*, 559 F.3d at 1052 (same). *But see Davis*, 571 F.3d at 1292 (declining to decide question in part because *Winter* "does not squarely discuss whether the four factors are to be balanced on a sliding scale").

the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). *See also, e.g., Turner Broad. System, Inc. v. FCC*, 507 U.S. 1301 (1993) (Rehnquist, C.J., in chambers) (refusing to enjoin enforcement of a federal statute, despite First Amendment claim: "By seeking an injunction, applicants request that I issue an order *altering* the legal status quo") (emphasis in original)).

Here, the district court did not abuse its discretion in denying the motion because appellants failed to meet their heavy burden.

A. SpeechNow Failed to Demonstrate a Likelihood of Success on the Merits

The Commission recognizes that panels in this Circuit are bound by *EMILY's List v. FEC*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009), unless this Circuit sitting *en banc* or the Supreme Court stays or overrules the decision. The reasoning in that opinion that contributions to nonprofit, nonconnected political committees cannot be limited to the extent those funds will be spent on independent expenditures appears to resolve the central legal issue bearing on appellants' likelihood of success on the merits in their favor. To preserve this issue for possible further judicial review, however, we explain below why the contribution limits are constitutional as applied to SpeechNow and its prospective donors.

Despite the well-established requirement that a preliminary injunction movant demonstrate a likelihood of success on the merits, *see supra* p.18, appellants assert (Br. 25) that the Commission has the burden of showing that they do not have a likelihood of success on the merits. But the two cases on which they rely do not support that broad assertion. In *Ashcroft v. ACLU,* 542 U.S. 656, 665 (2004), the Court stated that "[w]hen plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." In the second case, *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006), the Court interpreted *Ashcroft* as implicitly resting on the view that "the burdens at the preliminary injunction stage track the burdens at trial." *Id.* at 429. (*Gonzales* actually concerned a statute that explicitly placed the burden on the government. *Id.* at 428.)

As explained *infra* pp. 19-23, in defending a contribution limit at the merits stage, the Commission must show that the limit satisfies the "lesser demand" of being "closely drawn" to match a "sufficiently important interest." But the Commission's burden does not relieve SpeechNow from having to meet a movant's burden of likely success on the merits. In *Winter*, decided after *Gonzales*, the Supreme Court "articulated clearly what must be shown to obtain a preliminary injunction," *Real Truth*, 575 F.3d at 346, and *Winter* unequivocally

reaffirms the traditional view that a movant "must establish that he is likely to succeed on the merits." *Winter,* 129 S. Ct. at 374.

To reconcile *Winter*, *Ashcroft,* and *Gonzales,* a movant must show a sufficient likelihood that the government will ultimately fail to prove a challenged provision is constitutional. *Cf. Byrum v. Landreth,* 566 F.3d 442, 446 (5th Cir. 2009) (reconciling the traditional view with government's burden in restricting commercial speech).

1. The Act's Limit on an Individual's Contributions to Political Committees Is Constitutional as Applied

a. Intermediate Scrutiny Applies to the Contribution Limits

Although appellants concede that SpeechNow will meet the criteria for political committee status once the organization passes the statutory $1,000 threshold (*e.g.*, Br. 3), they challenge, *inter alia,* FECA's $5,000 limit on contributions that an individual may give annually to a political committee like SpeechNow. 2 U.S.C. § 441a(a)(1)(C). Since *Buckley,* 424 U.S. at 19, the Supreme Court has applied lesser scrutiny to contributions than the "strict scrutiny" applicable to restrictions on campaign expenditures. *See, e.g., McConnell,* 540 U.S. at 134-36; *FEC v. Beaumont,* 539 U.S. 146, 161 (2003); *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 387-88 (2000).

In those cases, the Court recognized that a contribution limit, unlike an expenditure limit, "entails only a marginal restriction upon the contributor's ability

to engage in free communication." *Buckley*, 424 U.S. at 20. "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 21; *accord McConnell*, 540 U.S. at 135. As the Court explained, the "overall effect" of dollar limits on contributions is "merely to require candidates and political committees to raise funds from a greater number of persons or to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Buckley*, 424 U.S. at 21-22. Contribution limits leave contributors free to become members of associations and assist with their various efforts on behalf of candidates. The Court has therefore concluded that "contribution limits impose serious burdens on free speech only if they are so low as to 'preven[t] 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).

Despite this abundant Supreme Court authority, SpeechNow contends (Br. 25-32) that strict scrutiny applies here. That contention rests on SpeechNow's misreading Supreme Court cases and confusing the difference between contribution and expenditure limits. For example, SpeechNow relies (Br. 25-26, 28) on *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL II*"), but that case

concerns a challenge to a corporate *expenditure prohibition* by a nonprofit ideological corporation that wished to use its corporate treasury funds to pay for "issue advocacy." The Court accordingly applied strict scrutiny in reviewing the limit.

SpeechNow similarly ignores context in citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985) ("*NCPAC*"), as support. (Br. 30-32.) In that case, the Court distinguished the limit on independent expenditures it was striking down from the contribution limit that it had upheld in *CalMed*. The Court explained that "nothing in the statutory provision in question [in *CalMed*] limit[ed] the amount an unincorporated association or any of its members may independently expend in order to advocate political views." *Id.* at 494 (brackets, citation, and internal quotation marks omitted). Rather, the provision limited "only the amount it may contribute to a multicandidate political committee." *Id.* at 494-95. Thus, "[u]nlike *California Medical Ass'n.*, [the provision at issue in *NCPAC*] involve[d] limitations on expenditures by PACs, not on the contributions they receive . . . ." *Id.* at 495.

SpeechNow further argues that the contribution limits "can also be characterized as a limit on expenditures" and thus reviewed under strict scrutiny because they may reduce the total funds that SpeechNow has available to spend. That argument, however, elides *Buckley*'s distinction between contributions and

expenditures and, beginning in *Buckley* itself, the Supreme Court has repeatedly rejected it. *See* 424 U.S. at 21-22.[5] The Court has made clear that contribution limits do not have a "dramatic adverse effect on the funding of campaigns and political associations." *Id*.

SpeechNow cannot escape this conclusion by invoking *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), and *Davis v. FEC*, 128 S. Ct. 2759 (2008). (Br. 26, 28, 29.) *Citizens* involved a municipal restriction on contributions to a ballot measure committee; it therefore differs from the many cases applying lesser scrutiny to contribution limitations involving *candidate* elections. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978), the Court explained that that the "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." Indeed, the Court later quoted this very passage in *Bellotti* when it continued to rely on the distinction between limits involving candidate elections and those involving ballot measures. *Citizens*, 454 U.S. at 298.

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[5] The Supreme Court has even analyzed a prohibition on the national political parties' receiving *or spending* nonfederal money (and on state party committees' spending nonfederal money on certain federal election activity) as contribution limits. The Court observed that "neither provision in any way limits the total amount of money parties can spend…. Rather, they simply limit the source and individual amount of donations." *McConnell*, 540 U.S. at 139 (citation omitted). The analysis is even simpler in this case, as the Act's limits on contributions to political committees do not place any limit whatsoever on SpeechNow's independent expenditures. *See FEC v. Nat'l Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 494 (1985).

In *Davis*, the plaintiff facially challenged the constitutionality of the so-called "Millionaire's Amendment," which, under certain circumstances, "impose[d] different campaign contribution limits on candidates competing for the same congressional seat." 128 S. Ct. at 2765. Because the asymmetrical contribution limits were triggered by how much candidates spent of their own money on their own campaigns, the Court analyzed the burden as equivalent to an expenditure limit. "While [the Millionaire's Amendment] does not impose a cap on a candidate's expenditure of personal funds, it imposes an unprecedented penalty on any candidate who robustly exercises" his "fundamental right" to spend personal funds for his own campaign speech. *Id.* at 2771 (internal quotation marks and citation omitted). The Court therefore held that the Amendment could not stand unless it satisfied a "compelling" governmental interest. *Id.* at 2773 & n.7. In contrast, the contribution limits challenged here treat all nonconnected political committees alike, and they do not penalize any political committee for engaging in as much independent speech as it would like.

In sum, SpeechNow's contention that strict scrutiny applies here has no basis in law.

b. Supreme Court Precedent Supports the Constitutionality of Limitations on Contributions to Political Committees that Purport to Make Only Independent Expenditures

The Supreme Court has rejected a "crabbed view of corruption, and particularly of the appearance of corruption" that considers only direct contributions to candidates and *quid pro quo* arrangements. *McConnell*, 540 U.S. at 152. That view "ignores precedent, common sense, and the realities of political fundraising." *Id.*

As even SpeechNow admits (Br. 36), the Court has never held that independent expenditures "by definition" pose no risk of corruption. Rather, in *Buckley* the Court found only that the governmental interest in preventing corruption and its appearance was "inadequate to justify" the "ceiling on independent expenditures" under strict scrutiny, not that it was insufficient to justify contribution limits under intermediate scrutiny. 424 U.S. at 45. The Court, in fact, "assume[ed], *arguendo* that large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions." *Id.*[6] The Court nevertheless found the interest inadequate to justify

[6] As the controlling opinion in *WRTL II* explains, *Buckley* thus "suggested that this interest might also justify limits on electioneering *expenditures* because it may be that, in some circumstances, 'large independent expenditures pose the same dangers of actual or apparent *quid pro quo* arrangements as do large contributions.'" *WRTL II*, 551 U.S. at 478 (citing *Buckley*, 424 U.S. at 45) (Roberts, C.J.). The less severe restriction of a contribution limit, rather than an expenditure limit, is at issue here.

expenditure limits because the "independent advocacy restricted by the [expenditure cap] does not *presently* appear to pose dangers of real or apparent corruption *comparable* to those identified with large campaign contributions." 424 U.S. at 46 (emphases added). The Court thus made no direct holding about whether the interest adequately justifies the more marginal restriction of a limit on contributions to groups engaged exclusively in candidate advocacy.

The reason the Court found the interest inadequate was that it then appeared that "independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47. The Court thus concluded on the record before it that the lack of coordination lessens the value to the candidate and "*alleviates* the danger that expenditures will be given as a *quid pro quo*," not that independence entirely removes any danger of corruption. *Id.* (emphasis added).[7] The Court added an explicit temporal limitation to its analysis ("presently") and was making empirical assumptions; the history of electoral politics in the past thirty-three years undermines those assumptions, as the Court has come to recognize. *See infra* pp. 34-43.

Buckley itself upheld a $25,000 annual limitation on the total federal contributions an individual could make, whether those contributions were to

[7] *See also McConnell*, 251 F. Supp. 2d 176, 624-25 (D.D.C. 2003) (Kollar-Kotelly, J.) ("*Buckley* explicitly left open the possibility that a time might come when a record would indicate that independent expenditures made by individuals to support candidates would raise an appearance of corruption.")

candidates, political parties, or other political committees. In upholding that limitation, the Court did not analyze how the contributions might ultimately be spent. 424 U.S. at 38.

A few years after *Buckley*, a would-be contributor challenged the same contribution limits that SpeechNow challenges here. In an action brought under 2 U.S.C. § 437h, an individual sought to contribute more than $5,000 to a political committee "to enable that organization to make independent expenditures." *Mott v. FEC,* 494 F. Supp. 131, 133 (D.D.C. 1980), *aff'd mem. sub nom. NCPAC v. FEC*, 672 F.2d 896 (D.C. Cir. 1981). The district court dismissed the challenger's constitutional claims as insubstantial under section 437h. In upholding the provisions as applied to contributions for independent expenditures, the court relied on *Buckley's* distinction between expenditure and contribution limits. The latter limits, the court noted, "involve restrictions on indirect rather than on direct expression" and help curb corruption. *Id.* at 137. The Court further explained that the contribution limit in section 441a(a)(1)(C) reflects Congress's "concern[ ] that the 'independent' political committee might become a vehicle for avoiding the restrictions placed on direct contributions to candidates." *Id.*

Five years after *Buckley*, the Supreme Court in *CalMed* rejected the argument that contributions earmarked for administrative support could not be regulated because such contributions lacked potential to corrupt the political

process. 453 U.S. at 198 n.19. The Court understood that money is fungible and that contributions to the California Medical Association's political committee — purportedly intended to pay for one type of expense — could free up funds to pay for anything. Thus, the Court upheld the contribution limit to a political committee that *in part* spent funds on independent expenditures and administrative costs. The Court upheld those limits in their entirety; it neither traced the extent to which the contributions received would be used for independent expenditures, nor found the statute unconstitutional as applied to contributions eventually spent on independent speech.

SpeechNow relies (Br. 40) on the concurring opinion of Justice Blackmun in *CalMed*, in which he explained (453 U.S. at 203) his view that "a different result would follow if" the contribution limits at issue were applied to committees established to make only independent expenditures. But even SpeechNow recognizes that Justice Blackmun's view "is not binding precedent." (Br. 40.) Indeed, those remarks of Justice Blackmun are dicta because the political committee at issue there made both contributions and expenditures. *See CalMed*, 453 U.S. at 197 n.17 (plurality) (group of individuals making solely independent expenditures was a "hypothetical application of the Act" that the Court "need not consider.").

Five years later, in *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986)

("*MCFL*"), the Court explained that a group could become a political committee, and would therefore have to abide by all restrictions applicable to such committees, based solely on the magnitude of its independent expenditures. The Court initially held that exempting a limited class of ideological nonprofit corporations from the Act's prohibition on corporate expenditures would not open the door to corruption or to massive undisclosed political spending. The "major purpose" of such exempted corporations (*see supra* p. 6), as defined by the Court, was *not* candidate election activity, and they would still have to report their independent expenditures under 2 U.S.C. § 434(c). 479 U.S. at 262. But the Court also indicated that an ideological group like MCFL could be classified as a political committee if its independent expenditures became its major purpose: "[S]hould 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." *Id.* And "[a]s such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." *Id*. (citation omitted). Those "restrictions" include the contribution limits challenged here.

In 1996, the Court reiterated that "'the absence of prearrangement and coordination' does not eliminate, but it does help to 'alleviate,' any 'danger' that a candidate will understand [an independent] expenditure as an effort to obtain a

'*quid pro quo*.'" *Colorado Republican Federal Campaign Comm. v. FEC* ("*Colorado I*"), 518 U.S. 604, 616 (1996) (quoting *NCPAC*, 470 U.S. at 498). The Court also observed that there was a risk of corruption when donors could give large sums to entities that make independent expenditures (in that case, political party committees). *Id.* at 616-17. As Judge Leon explained before the *McConnell* case reached the Supreme Court, "Reading *Colorado I* together with *Buckley*, *Bellotti*, *Citizens Against Rent Control*, and *California Medical* leaves one with a clear impression: donations used directly for the purpose of uncoordinated federal activity, like express advocacy, can engender corruption, or the appearance thereof, and are therefore regulable." *McConnell*, 251 F. Supp. 2d at 767 (Leon, J.). *See also id*. at 765 ("Supreme Court precedent . . . intimates that donations closely connected to a candidate's campaign — even if they are not direct contributions or coordinated expenditures — raise, at a minimum, the specter of corruption.")

Moreover, by the time of *McConnell*, voluminous evidence established a more complete record of the danger of corruption and its appearance from independent expenditures. *McConnell* involved so-called "issue advocacy" focused on candidates, which, unlike the ads that SpeechNow plans to broadcast, does not include express words of candidate advocacy. Nevertheless, the record compiled there demonstrated that candidates know and feel indebted to those who made such expenditures to help elect them. The Supreme Court explained that

"[w]hile the public may not have been fully informed about the sponsorship of so-called issue ads, the record indicates that candidate and officeholders often were." *McConnell*, 540 U.S. at 128-29.[8]

In particular, the Court rejected the notion that only a "direct contribution to the candidate" can "threaten to create . . . a sense of obligation" from a candidate to a donor. *Id.* at 144. The Court explained that persons seeking influence with officeholders and candidates have shown a history of exploiting loopholes in the Act, and that indirect attempts to use money to gain influence can create actual corruption, or the appearance of corruption, that can justify congressional efforts to protect the integrity of the democratic process. *See generally id.* at 143-154. As the Court stated, "[o]ur 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.'" *Id.* at 150 (quoting *FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001) ("*Colorado II*")).

The Court explicitly rejected the kind of argument that SpeechNow makes here. *Buckley* and *CalMed* did not uphold contribution limits to political

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[8] In the district court, Judge Kollar-Kotelly found not only "that Members of Congress and federal candidates are very aware of who ran advertisements on their behalf," but also that . . . . "Members will also be favorably disposed to those who finance these groups when they later seek access to discuss pending legislation." *McConnell*, 251 F. Supp. 2d at 556.

committees simply because those funds could in turn be used to make direct contributions to candidates. Rather, as the Court explained, *Buckley* upheld "FECA's $25,000 limit on aggregate yearly contributions to candidates, *political committees*, and *party committees* out of recognition that FECA's $1,000 limit on candidate contributions would be meaningless if individuals could instead make 'huge contributions to the candidate's political party'." *McConnell,* 540 U.S. at 152 n.48 (emphases added).

Discussing *CalMed,* the *McConnell* Court stated that the Court in that case did not justify FECA's $5,000 limit on contributions to multicandidate political committees limits "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." 540 U.S. at 152 n.48. Given FECA's definition of "contribution," the $5,000 and $25,000 limits "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.*" *Id.* (emphasis added). Thus, "[i]f indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, 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.* (quotation marks and internal citations omitted).

SpeechNow's case indisputably involves such "noncoordinated expenditures" of "express advocacy," but SpeechNow fails to address *McConnell*'s explanation. And that reasoning was not dicta. This key discussion of *CalMed* was a necessary part of the Court's upholding the "soft money" restrictions in Title I of the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002). The ban on soft money contributions to the national political parties, as well as the other restrictions on soft money donations to state and local parties, had nothing to do with money that the political parties were using to make contributions to federal candidates. The political parties had never disputed that contributions to candidates could only be made with "hard money." In other words, the new soft money restrictions, by definition, involved large donations that could be spent by political party committees only on disbursements *other than* contributions. Thus, in upholding Title I, *McConnell* necessarily decided that the government interest in limiting contributions to political committees was sufficiently important, even if the funds would ultimately be spent on "express advocacy and numerous other noncoordinated expenditures." 540 U.S. at 152 n.48. In sum, *McConnell* demonstrates that, contrary to SpeechNow's contention,

the Commission is likely to prevail at the merits stage to prove that the contribution limits are constitutional.[9]

[9] The majority opinion in *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), favored by SpeechNow (*e.g.*, Br. 40), not only erroneously relied on Justice Blackmun's dicta in *CalMed* but also failed to follow the reasoning of *McConnell*. As the district court in the present case noted (J.A. 395), Judge Michael "cogently explained the significance" of *McConnell* in his dissent in *Leake*. 525 F.3d at 333. The unpublished district court decision in *Comm. on Jobs Candidate Advocacy Fund v. Herrera*, 2007 WL 2790351 (N.D. Cal. 2007), cited by SpeechNow (Br. 41), suffers from a similar defect and, unlike here, concerns an ordinance that limited both contributions and independent expenditures by political committees.

c. Additional legislative facts from McConnell and other sources demonstrate that large contributions to groups that make independent expenditures can lead to corruption and its appearance[10]

"Candidates whose campaigns benefit from these ads greatly appreciate the help of these groups," explained former Senator Dale Bumpers. "In fact, Members will also be more favorably disposed to those who finance these groups when they later seek access to discuss pending legislation." *McConnell*, 251 F. Supp. 2d at 556 (*quoted in* opinion of Kollar-Kotelly, J.). According to a Republican consultant, "[U]sually the ads are helpful and candidates appreciate them." Rocky Pennington, *A Practitioner Looks at How Issue Groups Select and Target Federal Candidates*, in *Inside the Campaign Finance Battle* 251 (A. Corrado *et al*., eds., 2003). A Democratic consultant agreed, explaining that "[o]f course candidates

[10] The parties and amici may present legislative facts at any level of litigation. *See, e.g.*, Brief for State of Oregon, 1908 WL 27605, in *Muller v. Oregon*, 208 U.S. 412 (1908) (original "Brandeis brief"); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) ("The writings and studies of social science experts on legislative facts are often considered and cited by the Supreme Court with or without introduction into the record or even consideration by the trial court." (internal citations omitted.)). Legislative facts usually do not concern the immediate parties ("adjudicative" or "historical" facts) but are general facts that help the court resolve questions of law or policy. They are frequently based on a variety of materials such as reports, news articles, and academic studies, including political and social science studies. No Federal Rule of Evidence directly limits a court's authority to consider them. *See, e.g.*, Kenneth C. Davis, *Administrative Law Text* § 7.03, at 160 (3d ed. 1972); Fed. R. Evid. 201(a), Advisory Committee's Note; *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162 (D.C. Cir. 1979) ("The distinction between legislative and adjudicative facts has been widely accepted both within and without this circuit").

often appreciate the help that these interest groups can provide, such as running attack ads for which the candidate has no responsibility." Terry S. Beckett, *A Consultant's View on How Issue Ads Shaped a Congressional Election,* in *id.* at 256. Former congressional candidate Linda Chapin explained that "[f]ederal candidates appreciate interest group electioneering ads like those described above that benefit their campaigns, just as they appreciate large donations that help their campaigns." *McConnell,* 251 F. Supp. 2d at 556 (*quoted in* opinion of Kollar-Kotelly, J.).

That candidates value independent spending is unsurprising: Empirical analyses confirm the spending's effectiveness. For example, a 2002 study of reported independent expenditure spending by PACs concluded that "independent expenditures can significantly affect vote choice." Richard N. Engstrom and Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, Pol. Research Quarterly 55 (4):885-905, 885 (2002). Similarly, an analysis of organized labor's 1996 candidate-focused advocacy campaigns that avoided express advocacy concluded that "money spent outside the regular campaigns on 'voter education' can have a major effect on election results." Gary C. Jacobson,

The Effect of the AFL-CIO's "Voter Education" Campaigns on the 1996 House Elections, 61 J. Pol. (1): 185-94.[11]

The effectiveness of independent expenditures and candidate-focused communications that omit express advocacy — and their value to candidates — continues to rise as political professionals apply the lessons of past campaigns. As a large study of the 2000 elections concluded, "'interest groups in 2000 . . . mounted the equivalent of full-fledged campaigns for and against specific candidates. The campaigns were fully professional, and included pollsters, media consultants, general strategists, mail consultants, and so forth.'" David B. Magleby, *Conclusions and Implications for Future Research*, in *The Other Campaign: Soft Money and Issue Advocacy in the 2000 Congressional Elections* (David Magleby, ed. 2003).

Independent groups can effectively supplement their preferred candidate's campaign efforts, without directly coordinating with them. Officials with both MoveOn.org and The Media Fund explained their ability to achieve "striking

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[11] Specific examples of independent expenditures that are widely understood to have dramatically influenced elections include the National Security Political Action Committee's "Willie Horton" ad in the 1988 presidential race, Kenneth T. Walsh, *Political Ads: Good, Bad, and Ugly*, U.S. News & World Rep., Jan. 28, 2008, at 53, and the Swift Boat Vets ads that impugned Senator Kerry's war record during the 2004 election. *See, e.g.*, Michael Janofsky, *Advocacy Groups Spent Record Amount of 2004 Election*, N.Y. Times, Dec. 17, 2004; Frank Luntz, *Why Bush Won the Credibility Factor*, Wash. Times, Nov. 5, 2004, at A21.

synchronicity" with the advertising of the Kerry Campaign in 2004 by "noting that it is relatively easy to monitor the media purchases by candidates." *See, e.g.*, Jim Rutenberg, *Democrat's Ads in Tandem Provoke G.O.P.*, N.Y. Times, Mar. 27, 2004. As a Republican strategist explained, "smart people can figure out pretty easily how to run a campaign that's consistent with or in concert with candidates they oppose or support." Interview with Paul Manafort by Jules Witcover, *The Buying of the President*, Center for Public Integrity, Mar. 20, 2007, http://www.buyingofthepresident.org/index.php/interviews/paul_manafort.

Contributions to independent groups to run ads have, in fact, been even more valuable to a candidate's campaign than a direct contribution in one unique way: interest group ads allow candidates to keep their hands clean. The Swift Boat campaign "'delivered a message that the Bush campaign and the RNC could not, and Bush got the best of both worlds because he could decry 527s and benefit from their activities at the same time.'" Ctr. for the Study of Elections and Democracy, *527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return /Swift Boat Veterans 527 Played Historic Role* (Dec. 16, 2004) (quoting Professor David Magleby).

As a result of their value to candidates, large contributions to groups that make independent expenditures lead to preferential access for donors and undue influence over officeholders. Because contributions to political committees have

been limited under the Act (and soft money donations to parties banned since BCRA), access- and influence-seeking donors have also made large contributions to independent groups, including section 501(c) and 527 organizations purporting not to constitute "political committees" under FECA. In the 2004 election, numerous 527 groups raised hundreds of millions of dollars — much of it from those who previously donated substantial amounts of party soft money — to employ legions of campaign workers and to run candidate-focused ads in about a dozen swing states. *See* Glen Justice, *Advocacy Groups Reflect on Their Role in the Election,* N.Y. Times, Nov. 5, 2005; Weissman & Hasssan (Addendum 5-38).

George Soros, who contributed more than $20 million to such 527 groups in 2004, admittedly sought access and influence over Senator Kerry through these contributions: "I would be very happy," Soros explained in a 2004 interview, "to advise Kerry, if he's willing to listen to me, and to criticize him if he isn't. I've been trying to exert some influence over our policies, and I hope I'll get a better hearing under Kerry." Jane Mayer, *The Money Man: Can George Soros's Millions Insure the Defeat of President Bush,* New Yorker, Oct. 18, 2004; Weissman & Hassan at 79 (Addendum 6). Similarly, T. Boone Pickens, who contributed $1 million to Swift Boat Vets and later received an invitation to an exclusive state dinner, admitted that "he has had some influence" on President Bush's position on drilling and energy independence. *See* John Fund, *Energy*

Independent: Maverick Oilman Boone Pickens Talks About Fuel Prices And His Love For Philanthropy, Wall Street J., June 2, 2007, at 2. As former Senator Bumpers warned, "'members will . . . be favorably disposed to those who finance the[] groups [running independent ads] when they later seek access to discuss pending legislation.'" *McConnell*, 251 F. Supp. 2d at 556 (Kollar-Kotelly, J.).

In fact, much like solicitations for party soft money, solicitations for contributions to 527 groups were made by partisan activists who reassured donors that their contributions would be appreciated by party officials. Indeed, a typically dense web of relations between independent expenditure groups, candidates, and parties ensures that candidates know of the help provided by the groups as well as their donors. *See generally* Weissman & Hassan at 84-90 (Addendum 11-17); Robert W. Hickmott, *Large Contributions Given to Influence Legislation*, in *Inside the Campaign Finance Battle* 302-04 (2003). In 2004, for example, visible signals from party leaders helped Republican-leaning groups, such as Progress for America, raise funds. *See* Weissman & Hassan at 88 (Addendum 15). Leaders of Democratic-leaning 527 organizations sought to persuade donors that their serious efforts were recognized by the party: Ellen Malcolm, president of America Coming Together, and former Clinton Chief of Staff Harold Ickes, who ran The Media Fund, reassured donors of their relationship to the party and the campaigns. *Id*. at 86-87. Their message was, "We don't talk to the campaigns, are not

connected to them, but they know and appreciate us and contributions are part of the public record and they are aware." *Id*. at 86.

Even if their identities are not broadly known or otherwise reported, access- or influence-seeking donors can signal to candidates and party leaders that they have given to independent groups. "[I]nterest groups can be the ones who apprise politicians of the advertisements that they run on their behalf." *McConnell*, 251 F. Supp. 2d at 556 (Kollar-Kotelly, J.). Although candidates may know who is running ads helpful to them, the public may not. Individuals may create groups with "dubious and misleading names" like "The Coalition — Americans Working for Real Change," "Citizens for Better Medicare," and "Republicans for Clean Air." *See McConnell*, 540 U.S. at 197 (quoting *McConnell*, 251 F. Supp. 2d at 237). Because independent groups usually operate under these types of names, the California Fair Political Practices Commission concluded in a 2008 report that "[f]or the average voter it involves far too much detective work to figure out who is really behind a particular 'independent expenditure' committee or effort." FPPC, *Independent Expenditures: The Giant Gorilla in Campaign Finance*, June 2008, at 6, http://www.fppc.ca.gov/ie/IEReport2.pdf.

Large contributions to groups that make independent expenditures can influence legislative votes. In 1998, for example, Republican Majority Leader Mitch McConnell promised Republican Senators that the tobacco industry would

mount a television campaign to support senators who voted to kill comprehensive tobacco legislation. According to Senator McCain, the promise was used to influence votes. John McCain, *Congress is Mired in Corrupt Soft Money*, in *Inside the Campaign Finance Battle* 325 (A. Corrado *et al*., eds., 2003). Also in 1998, a Native American tribe offered to undertake a substantial independent spending campaign supporting Oklahoma Congressman Vince Snowbarger's re-election in exchange for his support of legislation involving a casino the tribe wanted to build. *See* Jack Cashill, *Moore of the Same Old Stuff*, Ingrams Magazine, November 1999 at 19-20; Rick Alm and Jim Sullinger, *Congressman Calls Lobbyist's Tactics Illegal — Lobbyist Argued Monday Over Whether Papers Faxed to the Congressman's Office Last Month Were A Veiled Attempt to Buy His Vote*, Kan. City Star, Oct. 6, 1998.[12]

[12] Indeed, as part of a criminal scheme, one legislator arranged for legislative favors in return for donations to groups that purported to make independent expenditures. According to witnesses in connection with a criminal investigation, the former majority leader of the Wisconsin state senate, Charles Chvala, encouraged entities to contribute to such groups after they had "maxed out" their giving to candidate and party committees. Contributors sought favorable legislative action in return, and in one case appeared to obtain the removal of an unfavorable tax provision from a budget bill. *See, e.g.*, Steve Schultze and Richard P. Jones, *Chvala Charged With Extortion*, Milwaukee J. Sentinel, Oct. 18, 2002, at 2; Steven Walters and Patrick Marley, *Chvala Reaches Plea Deal*, Milwaukee J. Sentinel, Oct. 24, 2005, at 2; *Wisconsin v. Chvala*, No. 02-CF002451 (Dane Cty. Cir. Ct., filed Oct. 17, 2002) (Compl.). Congress can, of course, address not just such "straight cash-for-votes transactions," but also less direct and less detectable forms of corruption. *McConnell*, 540 U.S. at 153.

In light of these facts, the public unsurprisingly views large contributions to fund independent expenditures as potentially corruptive. Only three months ago, the Supreme Court held that a plaintiff's due process rights were violated when a judge who participated in a decision against the plaintiff had benefited in his election campaign from an "extraordinary" amount of independent expenditures and contributions to fund independent expenditures by the head of the defendant corporation. *Caperton v. A.T. Massey Coal Co., Inc.,* 129 S. Ct. 2252, 2256-2257 (2009). In finding that the judge should have recused himself, the Court did not determine whether he was actually biased in favor of the defendant, *id.* at 2263; however, "the risk that [the corporate officer's] influence engendered actual bias is sufficiently substantial that it must be forbidden." *Id.* at 2264 (internal quotation marks and citation omitted).

The corporate officer had spent over $500,000 on his own independent expenditures to support the judge. 129 S. Ct. at 2257. He had also contributed almost $2.5 million — more than two-thirds of the funds received — to "And for the Sake of the Kids," an innocently-named 527 group that ran independent expenditures against one of the court's incumbent justices and helped defeat him. *Id.* A telephone poll of West Virginians later revealed that more than two-thirds doubted the judge elected with the corporate officer's help could fairly consider the corporation's appeal. *Id.* at 2258. Similarly, a survey during the *McConnell*

litigation revealed that an overwhelming majority of the public believed that ads run by issue groups on a candidate's behalf would "likely" lead to "special consideration" by Members of Congress. *McConnell*, 251 F. Supp. 2d at 513, 557-58 (Kollar-Kotelly, J.); *id.* at 800 n.117, 872 (Leon, J.).

The concerns described above properly informed the district court's reasoning below when it examined the activities of section 527 organizations and concluded that appellants had not shown a likelihood of success on the merits (J.A. 389-393).

d. A Victory for SpeechNow Would Undermine the Anti-Corruption Purpose of the Act

If SpeechNow could accept unlimited contributions, that ability would raise the risk of corruption or, at the least, the appearance of corruption. The organization's bylaws do not clearly state whether SpeechNow's contributors may inform candidates of the group's efforts after expenditures are made nor whether the contributors may generally publicize them or the contributors' role in financing them. Although SpeechNow's bylaws attempt to "prohibit[ ] speech" by the organization's members and donors directly to candidates about SpeechNow's advertising mentioning the candidates, the organization cannot in practice police that prohibition. (*See* J.A. 85 §§ 7, 10.) In any event, as discussed above and as the Supreme Court found in *McConnell*, candidates and officeholders usually know whose expenditures helped them in their elections. Even Jon Coupal,

SpeechNow's vice-president and secretary, has publicly indicated that independent expenditures can raise the risk of corruption or, at the least, the appearance of corruption. (J.A. 290-91; *see also* Jon Coupal, *Burning Through Taxpayer Dollars*, Howard Jarvis Taxpayers Ass'n: California Commentary, Vol. 2, Issue XIII, March 29, 2004.)

Moreover, although appellants have brought an as-applied challenge, if they prevail, their victory would not only free SpeechNow from contribution limits; as appellants themselves predict, it would create a precedent for other "major purpose" organizations. *See, e.g.,* Appellants' Mot. to Expedite Consideration at 9 ("A preliminary injunction for SpeechNow.org may also encourage other groups to adopt SpeechNow.org's model"); Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 1081 (16th ed. 2007). In congressional testimony, the executive director of the Campaign Finance Institute, Michael J. Malbin, summarized the danger of permitting unlimited contributions to independent groups, even those that purported not to meet the political committee requirements: "With almost all of the 527s associating themselves with the two major parties and their candidates, and with the great majority of contributions coming from donors giving in the millions, rather than thousands or even tens of thousands of dollars, big 527 donors today are positioned to garner more attention and consideration from parties and candidates than those who give the maximum direct contribution of $2,000-

$25,000." Senate Committee on Rules and Administration, Hearing to Examine and Discuss S.271, a Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code, 109th Cong. (Mar. 8, 2005) (written testimony of Michael J. Malbin) (available at http://rules.senate.gov/hearings/2005/MalbinTestimony.pdf.

Thus, success for SpeechNow could lead to the proliferation of independent expenditure political committees devoted to supporting or opposing a single federal candidate or officeholder and funded entirely by very large contributions. Donors could contribute millions of dollars in an election year for express candidate advocacy and thereby would gain unprecedented influence over candidates and elected officials. *See* Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. Ky. L. Rev. 341, 346 (2004) ("[W]hen a political committee is focused on electing one particular candidate (or defeating that candidate's opponent), a large-dollar gift to that political committee is almost as good as a large-dollar gift to the candidate's own campaign would be as a means to secure improper favoritism from that candidate once in office."). The risk of corruption and its appearance would remain even if these groups were to include in their bylaws the same prohibitions and restrictions that SpeechNow includes in its bylaws.

e. Contributors to SpeechNow Differ in Constitutionally Significant Ways from Individual Independent Speakers

Individuals who make their own independent expenditures select the candidates they will support or oppose. They write their own scripts for their express advocacy or use a consultant to do so and approve them. In short, such individuals speak in their own voices. *See, e.g., FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

In sharp contrast, SpeechNow's contributors, like contributors to candidates and political parties, will "speak" only indirectly. SpeechNow's founder, president, and treasurer, David Keating, administers all of the organization's affairs, including the creation of all the proposed advertisements. (J.A. 17-18 ¶ 8; J.A. 51¶ 4.) The bylaws do not require SpeechNow's five members, in exercising their powers, to consult with nonmember contributors, and an individual cannot become a "member" by providing financial or other support to the organization. (J.A. 78 § 5.). Although the organization will inform potential contributors that their contributions "may be used for political purposes such as supporting or opposing candidates" (J.A. 83 § 11), the organization will also advise potential contributors that their contributions "will be spent according to the sole discretion" of SpeechNow (J.A. 83 § 11; J.A. 284, 288 (draft solicitation letters)). Thus, contributions to SpeechNow are not like independent speech in an individual's own voice to support particular candidates, but are instead "the undifferentiated,

symbolic act of contributing" and only "serve[] as a general expression of support" for SpeechNow and the candidates it prefers. *Buckley*, 424 U.S. at 21.

SpeechNow is not unique in this respect. Many political committees, especially "the ideological nonconnected PACs," are dominated by a few insiders and large donors and are rarely accountable to the majority of donors. Larry J. Sabato, *PACs and Parties*, in Annelise Anderson, ed., *Political Money* 77 (2000) (accessible through http://www.campaignfinancesite.org/book/html/contents.html). "Most . . . [nonconnected political committees] are, in fact, 'one person' operations in which a single executive director, or at best a small group of insiders, makes the crucial decisions without much review." Frank J. Sorauf, *Who's in Charge? Accountability in Political Action Committees*, 99 Pol. Science Q. 591, 595 (1984-85). Thus, "[i]n giving money to a PAC . . . , donors have chosen a political act that has as one of its attractions a lack of responsibility for the final disposition of their contributions. . . . [T]hey have chosen a course of political action that demands only a modest level of involvement." *Id.* at 611.

f. Unlimited Contributions to Organizations Like SpeechNow Would Undercut the Act's Disclaimer Requirements

Under appellants' view of the law, SpeechNow would not be required to reveal the donors behind its expenditures in the disclaimers required in its express advocacy communications, even though the Supreme Court has held that the Act's

disclosure provisions serve important governmental interests. The Act requires that these communications include informational disclaimers: stating who is making the independent expenditure, providing contact information, and stating whether the communication was authorized by any candidate. Disclaimers on independent expenditures by political committees need not include information about who contributed to the political committee.

Although candidates and officeholders whose elections were influenced would likely know the identity of the big donors behind SpeechNow's ads, the public would not receive this information contemporaneously.[13] In *McConnell*, for example, the Supreme Court found that "Republicans for Clean Air, which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals — brothers who together spent $25 million on ads supporting their favored candidate." 540 U.S. at 128. If individuals cannot hide behind the façade of an independent expenditure organization but instead pay for such communications themselves, the disclaimers will then directly reveal the true source of the communications' funding. Thus, by accepting unlimited

[13] Even though the identity of individuals who paid for the ads through SpeechNow may eventually be disclosed in the organization's independent expenditure reports, Congress and the Supreme Court have recognized the public's interest in learning who is responsible for election ads at the moment they are aired. *See, e.g.*, *McConnell*, 540 U.S. at 231 (upholding the application of disclaimer requirements to electioneering communications).

contributions and acting as a conduit, SpeechNow would deprive the public of accurate disclaimers that help prevent corruption.

2. The Act's Biennial Aggregate Contribution Limits are Constitutional

Buckley upheld the Act's limit on total annual individual contributions, even though this limit restricts the number of candidates and committees with which an individual may associate. 424 U.S. at 38. The Court found that this aggregate contribution limit was a "modest restraint" and a mere "corollary" of the individual contribution limit that was closely drawn to match sufficiently important interests. *Id*. The aggregate limit "serve[s] to prevent evasion of the [candidate] contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate." *Id.*

Since *Buckley*, the aggregate biennial contribution limits have been increased and indexed to inflation. The limit for an individual for the 2009-2010 election cycle totals $115,500 ($69,900 to all political committees and parties; $45,600 to all candidates). *See* www.fec.gov/pages/brochures/contrib.shtml#Chart (visited Sept. 17, 2009); *see also* J.A. 269-270.

Buckley and subsequent cases have affirmed the constitutionality of the Act's contribution limits to candidates, *id*. at 23-35; political committees, *Cal Med*, 453 U.S. at 182; and political party committees, *McConnell*, 540 U.S. at 142-89.

The biennial aggregate contribution limit remains a constitutional corollary of those limits. Although SpeechNow.org will not make contributions to candidates, this fact does not undermine the validity of the biennial limit; as we explained *supra* section II.A.1, contribution limits to political committees that only make independent expenditures are also constitutional.

B. SpeechNow Failed To Demonstrate Irreparable Harm

SpeechNow and the individual plaintiffs failed to meet their burden of demonstrating that they will suffer irreparable harm without the requested temporary relief. To obtain a preliminary injunction, "[a] litigant must do more than merely *allege* the violation of First Amendment rights" because "the finding of irreparable injury cannot meaningfully be rested on a mere contention of a litigant." *Wagner v. Taylor*, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (quotation marks omitted); *see also NTEU v. United States*, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991).

Instead, "in instances where a plaintiff alleges injury from a rule or regulation that may only potentially affect speech, the plaintiff must establish a causal link between the injunction sought and the alleged injury, that is, the plaintiff must demonstrate that the injunction will prevent the feared deprivation of free speech rights." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) ("*Chaplaincy*") (internal quotation marks and citation

omitted). This requirement sets a "high standard for irreparable injury." *Id.* at 297. The "injury must be both certain and great," and "actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Plaintiffs must also "show that [t]he injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Id.* (internal citation and quotation marks omitted).

1. SpeechNow's Alleged Injuries Are Neither Actual Nor Certain and, If They Exist, Are Largely Self-Inflicted

Contrary to SpeechNow's repeated assertion, the Act's contribution limits for individuals do not "mak[e] it virtually impossible for SpeechNow to carry out its mission." (J.A. 16 ¶ 2; *see also, e.g.*, Br. 46.) The annual and biennial contribution limits did not prevent Keating and his colleagues from taking steps toward achieving their goals. They adopted articles of organization and bylaws, appointed an agent for service of process, registered with the District of Columbia, and filed a Notice of Section 527 status with the Internal Revenue Service. (J.A. 65-76; *see also* J.A. 281 (Notice of Business Tax Registration).)

Keating also developed a working website, including a "sign-up page for people who are interested in supporting the organization's activities." (J.A. 51 ¶ 4.) Visitors who submit their names and addresses are encouraged to check a box indicating whether they would "consider making a donation to SpeechNow.org." http:// www. SpeechNow.org/supportpage (visited Feb. 22,

2008). Keating drafted proposed public solicitations (J.A. 283-88) and prepared scripts for express advocacy advertisements SpeechNow allegedly wished to run in elections in Indiana and Louisiana. (J.A. 110-114.) The total cost of these activities, Keating declared, was less than the threshold $1,000 amount for political committee status or the $5,000 individual contribution limit. (J.A. 60-61 ¶ 31.) And as a result of this litigation, national newspapers have publicized SpeechNow.[14] Thus, the organization is situated better in its "start-up" phase than many of the thousands of major-purpose entities that have complied with the Act's contribution limits for the last thirty plus years. (*See* J.A. 273 (Summary of PAC Activity 1990-2006).)

Appellants presented no evidence, however, that they took other inexpensive and common steps to raise funds. For example, SpeechNow's members could have tapped their extensive social and business networks. In addition to his functions as SpeechNow's founder and president, Keating is executive director of Club for Growth, "the nation's largest political action group supporting pro-economic growth," and a veteran political activist. (J.A. 50 ¶ 2; J.A. 58-59 ¶ 27; http://www.clubforgrowth.org/keating.php (last visited Sept. 7, 2009).)

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[14] *See, e.g., Suit Aims To Ease Campaign Funding Limit*, The Washington Times (Feb. 15, 2008) (J.A. 297-98); *Suit Could Unleash Surge Of Money In 2008 Presidential Race*, The New York Sun (Feb. 15, 2008) (J.A. 303-04; *On Message*, Los Angeles Times (Feb. 15, 2008) (J.A. 300-01); *Unfettered Speech, Now*, Washington Post (Feb 16, 2008) (J.A. 293-94).

Crane is the founder and longtime president of the Cato Institute, a well-known nonprofit research organization. (J.A. 104 ¶ 8.) Jon Coupal, SpeechNow's vice-president and secretary (J.A. 76), is president of the Howard Jarvis Taxpayer Association, a California taxpayer organization with more than 250,000 supporters. Howard Jarvis Taxpayers Association, About Us, http://www.hjta.org/aboutus (visited Feb. 26, 2008).

SpeechNow provided no evidence that these well-connected members consulted their Rolodexes for names of affluent friends, colleagues, and relatives and then "dialed for dollars." Personal telephone calls and face-to-face meetings are effective methods of raising larger contributions, including those within the contribution limits. *See* Jeffrey M. Berry and Clyde Wilcox, *The Interest Group Society* 50-51 (5th ed. 2009); Institute for Politics, Democracy & the Internet, The George Washington University Graduate School of Political Management, *Small Donors and Online Giving* 20 (2006) (available at www.IPDI.org) (Larger regulated contributions are more likely to have been made because "they were encouraged by a family member, friend or colleague. This personal touch is a powerful incentive and it . . . reflects the networks of donors within which large donors circulate."); s*ee also id.* at 19, 23. Moreover, the potential donors identified from their responses to SpeechNow's website could have helped finance the

organization's advertisements and thereby obviated the need for any extra-limit donations, such as the donation proposed by appellant Young.

If, as SpeechNow told the district court (J.A. 55-56 ¶¶ 18-19; J.A. 101), the initial proposed advertisements would have cost approximately $120,000, the organization could have financed the advertisements with contributions within the statutory limits from the individual appellants and from as few as twenty-two additional individual contributors who each gave $5,000. Appellants' failure to engage in self-help reflected a tactical decision. At the preliminary injunction hearing, SpeechNow's counsel admitted that SpeechNow had taken few steps to make the organization operational, choosing to pursue this lawsuit first instead. (J.A. 312, lines 11-12.)[15] Thus, appellants chose not to accept contributions in amounts up to $5,000 while they pursue this test case.[16] "[S]elf-inflicted wounds are not irreparable injury. Only the injury inflicted by one's adversary counts for this purpose." *Second City Music, Inc. v. City of Chicago, Ill.*, 333 F.3d 846, 850

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15 THE COURT: Okay. So it would be correct to conclude that except for asking for an advisory opinion and filing this lawsuit, SpeechNow has had no operational life at all?

MR. SIMPSON: That's essentially true, other than the web site.

(J.A. 312, lines 21-25.)

16 Although appellants express concern about the reporting and disclosure requirements (Br. 53-54), they chose not to challenge those in their requested preliminary injunction.

(7th Cir. 2003).[17] Appellants have not met their burden to "establish a causal link between the injunction sought and the alleged injury." *Chaplaincy*, 454 F.3d at 301 (internal quotation marks and citation omitted).

Appellants' "cries of urgency are [also] sharply undercut by [their] own rather leisurely approach to . . . preliminary injunctive relief." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 163 (lst Cir. 2004). *Accord, e.g., Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) ("[A] period of delay may . . . indicate an absence of the kind of irreparable harm required to support a preliminary injunction." (Internal quotation marks omitted.)); 11A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Fed. Prac. & Proc. Civ.2d* § 2948.1, at 156 & n.12. Although appellants initially appealed the denial of their preliminary injunction motion within a month of the district court's decision (J.A. 9, Entry 38), they moved for an abeyance three months later, and then waited more than seven months, until late June 2009, to revive the appeal — and then asked this Court to expedite the matter. (D.C. Cir. Docket , No. 08-5223.) *See M&G Elecs. Sales Corp. v. Sony Kabushiki Kaisha*, 250 F. Supp. 2d 91, 105-

[17] *See also, e.g., Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) ("We will not consider a self-inflicted harm to be irreparable."); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995) ("Because defendants have acted to permit the outcome which they find unacceptable, we must conclude that such an outcome is not an irreparable injury."); *Lee v. Christian Coalition of America, Inc.*, 160 F. Supp. 2d 14, 33 (D.D.C. 2001) (self-inflicted harm does not satisfy the irreparable harm criterion); *Barton v. District of Columbia*, 131 F. Supp. 2d 236, 248 (D.D.C. 2001).

106 (E.D.N.Y. 2003) (holding that the plaintiff's delay, including an earlier filed, but later withdrawn, motion for a preliminary injunction, was properly considered in ruling on subsequent preliminary injunction motion).

2. The Contribution Limits Do Not Substantially Harm the Speech and Associational Rights of the Individual Appellants

The contribution limits in themselves do not undermine the potential for vigorous and effective discussion of candidates by individual citizens and groups. *Buckley*, 424 U.S. at 21-22, 28-29. Appellant Young allegedly would contribute $110,000 immediately to SpeechNow. (J.A. 18 ¶ 10.) He could, however, spend $105,000 of that sum (or more) "on direct political expression" rather than "contribut[ing] amounts greater than the statutory limits." *Buckley*, 424 U.S. at 22. The Supreme Court upheld the contribution limits in part precisely because individuals have that option, so Young cannot demonstrate that FECA has caused him irreparable harm because he chooses not to exercise the option.

Appellant Crane and non-plaintiff Richard Marder allegedly would immediately donate $6,000 and $5,500, respectively, if not for the $5,000 contribution limit. (J.A. 18 ¶ 9; J.A. 57 ¶ 25.) Appellant Keating would also contribute $5,500. (J.A. 57 ¶ 25.) But the relatively small amounts above the statutory threshold that they are prepared to contribute are not of constitutional dimension — they are "distinctions in degree," not significant "differences in

kind." *Buckley*, 424 U.S. at 30. SpeechNow also alleges that appellants Burkhardt and Russo would contribute $100 each. (J.A. 19 ¶¶ 11-12.) But these amounts are well below the $5,000 limit and may be given freely even if SpeechNow registers and operates as a political committee.

The gist of appellants' allegations of harm, therefore, seems to be that the individual appellants other than Young are injured because they cannot pool their resources through SpeechNow with *all $110,000* of Young's proposed contribution — an amount that would have provided approximately 90% of the funds for the proposed initial $120,000 ad campaign. But under *Buckley*, Congress can enact contribution limits even if the indirect effect of those limits is to require a political committee to reach out to additional sympathetic individuals and for Young to spend his cash in excess of $5,000 on his own direct political expression.

SpeechNow invokes *Elrod v. Burns*, 427 U.S. 347 (1976), but that case does not supply the missing requisite irreparable injury. *Elrod* held that employee dismissal based on political party patronage was an unconstitutional infringement of employees' First Amendment rights. *Id.* at 372. This holding rested on the specific finding that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id.*

at 373. Here, however, SpeechNow and the individual appellants did not allege that the government was taking any action against them, let alone the kind of imminent or actual threats present in *Elrod*.

This Court has repeatedly explained that *Elrod* does not eliminate a plaintiff's burden to show that its interests in political speech are actually threatened or in fact being impaired. *Chaplaincy*, 454 F.3d at 301 (discussing *Elrod* and stating that, "there is no *per se* rule that a violation of freedom of expression *automatically* constitutes irreparable harm" (internal citation and quotation marks omitted)); *NTEU*, 927 F.2d at 1254-55; *Wagner*, 836 F.2d at 576 n.76; *see also Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 919 F.2d 148, 149-150 (D.C. Cir. 1990) (denying preliminary injunction to require local government to issue parade permit for planned march longer than one for which plaintiff had received permit because shorter parade was not total denial of First Amendment rights).[18]

3. SpeechNow Faces No Imminent or Irreparable Injury from the Possibility of an Enforcement Proceeding

SpeechNow also failed to establish that "[t]he injury complained of [is] of such *imminence* that there is a clear and present need for equitable relief to prevent

[18] In conjunction with citing *Elrod*, SpeechNow cites (Br. 45) *Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009), but that case concerned a Fourth Amendment challenge to the District's "Neighborhood Safety Zones" checkpoint program that allowed police to stop and question individuals entering a particular neighborhood.

irreparable harm." *Wisconsin Gas*, 758 F.2d at 674 (emphasis in original; internal citation and quotation marks omitted). Appellants claim that they "fac[e] punishment for breaking the law" (Br. 46), but they provide only a hypothetical sequence of events that is "far too speculative to warrant preliminary injunctive relief." *Chaplaincy*, 454 F.3d at 298.

The alleged harm depends upon the Commission's instituting and completing an investigation. Setting aside that the Commission has never tried to enforce a prior restraint on anyone's speech, the harm SpeechNow fears is far from imminent. Congress carefully designed the Act's enforcement procedures "to ensure fairness . . . to respondents." *See Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). Under the Act's elaborate enforcement procedures — which include multiple opportunities for an administrative respondent to file briefs and permit only a court to impose a remedy on a respondent unwilling to agree to one — "complaints filed shortly before elections . . . might not be investigated and prosecuted until after the event." *Id.* at 559. Accordingly, the likelihood that SpeechNow would suffer anything beyond an investigative proceeding during the life of a preliminary injunction is remote.

Having to respond to an administrative enforcement proceeding is not irreparable harm. "'Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *FTC v. Standard Oil Co. of Cal.*,

449 U.S. 232, 244 (1980) (quoting *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)); *see also Sears Roebuck & Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1972). Thus, any burden associated with responding to a possible future FEC enforcement proceeding cannot constitute irreparable harm warranting preliminary injunctive relief.

Even if an administrative proceeding during that time concluded with the institution of an enforcement suit against appellants, they would then have a full opportunity to present their constitutional arguments *de novo* to a federal court before they could be subject to any penalties. *See generally* 2 U.S.C. § 437g(a)(4)-(6). That distant eventuality is not imminent.

C. The Requested Preliminary Injunction Would Substantially Harm the Commission and the Public

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376-77 (internal quotation marks and citation omitted). Permitting SpeechNow to evade the Act's individual and aggregate limits on contributions to political committees would substantially injure the public and the Commission. Both have a strong interest in enforcing the federal campaign finance laws, thereby preventing corruption and the appearance of corruption. SpeechNow failed to establish that the requested preliminary injunction would be unlikely to cause these harms or that any non-self-inflicted

harm to SpeechNow would outweigh the harms to the public and the Commission. *See CityFed. Fin. Corp. v. OTS*, 58 F.3d 738, 746 (D.C. Cir. 1995).

The provisions challenged here have been on the books for more than thirty years. Indeed, Congress enacted the definition of "political committee" now found in 2 U.S.C. § 431(4) in 1971.[19] The individual contribution limits in 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)(B) were enacted in 1974 and 1976.[20] The Supreme Court generally upheld the Act's contribution limits in *Buckley* in 1976.

A "presumption of constitutionality . . . attaches to every Act of Congress," and that presumption is "an equity to be considered in favor of . . . [the government] in balancing hardships." *Walters v. Nat'l Assn. of Radiation Survivors*, 468 U.S. 1323, 1324 (1984). As Chief Justice Rehnquist stated in the similar context of a requested injunction pending appeal in a First Amendment case, "[J]udicial power to stay an act of Congress, like judicial power to hold that act unconstitutional, is an awesome responsibility calling for the utmost circumspection in its exercise." *Turner Broad. System*, 507 U.S. at 1301 (1993) (Rehnquist, C.J., in chambers) (internal quotation omitted).

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[19] Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §§ 301-306, 86 Stat. 3, 11-16 (Feb. 7, 1972).

[20] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263 (Oct. 15, 1974); Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Title I, § 112(2), 90 Stat. 475 (May 11, 1976).

A temporary lifting of the Act's contribution limits during the 2010 election cycle, even limited to SpeechNow, would undermine the public's confidence in the integrity of the federal campaign financing system. The harm in allowing unlimited contributions to a political committee cannot be undone.

As Justice Rehnquist explained, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers . . . injury." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). The Commission and the public are similarly harmed when a court proscribes enforcement of a federal statute.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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TITLE 2. THE CONGRESS
Chapter 14—Federal Election Campaigns
Subchapter 1—Disclosure of Federal Campaign Funds

§ 431. Definitions

When used in this Act:

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year;

*****

(8) (A) The term "contribution" includes—

(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office;

*****

(9) (A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office;

*****

(11) The term "person" includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.

*****

(17) *Independent expenditure*. The term 'independent expenditure' means an expenditure by a person—

(A) expressly advocating the election or defeat of a clearly identified candidate; and

(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents.

§ 441a. Limitations, contributions, and expenditures

(a) *Dollar limits on contributions.*

(1) Except as provided in subsection (i) and section 315A (2 U.S.C. § 441a-1), no person shall make contributions—

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000;

*****

(3) During the period which begins on January 1 of an odd-numbered year and ends on December 31 of the next even-numbered year, no individual may make contributions aggregating more than—

(A) $37,500, in the case of contributions to candidates and the authorized committees of candidates;

(B) $57,500, in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees which are not political committees of national political parties.

*****

§ 441d. Publication and distribution of statements and solicitations; charge for newspaper or magazine space

(a) Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in section 304(f)(3)) (2 U.S.C. § 434(f)(3)), such communication—

*****

(d) *Additional requirements.*

(2) *Communications by others.* Any communication described in paragraph (3) of subsection (a) which is transmitted through radio or television shall include, in addition to the requirements of that paragraph, in a clearly spoken manner, the following audio statement: '_____ is responsible for the content of this advertising.' (with the blank to be filled in with the name of the political committee or other person paying for the communication and the name of any connected organization of the payor). If transmitted through television, the statement shall be conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.

TITLE 11--FEDERAL ELECTIONS

CHAPTER I--FEDERAL ELECTION COMMISSION

PART 110_CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS--

Sec. 110.1 Contributions by persons other than Multicandidate political committees (2 U.S.C. 441a(a)(1)).

(n) Contributions to committees making independent expenditures. The limitations on contributions of this section also apply to contributions made to political committees making independent expenditures under 11 CFR Part 109.

*****

Sec. 110.5 Aggregate biennial contribution limitation for individuals (2 U.S.C. 441a(a)(3)).

(d) Independent expenditures. The bi-annual limitation on contributions in this section applies to contributions made to persons, including political committees, making independent expenditures under 11 CFR part 109.

The Election After Reform

Money, Politics, and the Bipartisan Campaign Reform Act

Edited by
Michael J. Malbin

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5

BCRA and the 527 Groups

Stephen R. Weissman and Ruth Hassan

In the wake of the 2004 election, press commentary suggested that rising "527 groups" had undermined the 2002 Bipartisan Campaign Reform Act's ban on unlimited corporate, union, and individual contributions to political parties and candidates. According to the *National Journal*, backers of the new law who had "sought to tamp down dire warnings" that close to $500 million in banned soft money "would simply migrate from the parties to 527 organizations" were now "singing a different tune" (Carney 2004a). A *New York Times* editorial lamented, "No sooner had the [campaign finance reform] bill become law than party financiers found a loophole and created groups known as 527s, after the tax-code section that regulated them" (*New York Times* 2004c). The Federal Election Commission (FEC) had refused to subject 527s to contribution restrictions so long as their stirring campaign ads and voter mobilization programs steered clear of formal candidate endorsements such as "vote for" and "vote against." The result, reported the *Washington Post*, was a new pattern of soft money giving, with "corporate chieftains and companies such as Microsoft, Boeing, and General Electric" displaced as "key contributors" by "two dozen superwealthy and largely unknown men and women . . . each giving more than $1 million" (Grimaldi and Edsall 2004). Billionaire George Soros would top the list at $24 million.

While there is considerable truth in this emerging portrait, it is vastly incomplete and significantly distorted. Deeper analysis reveals that while 527 soft money was important in 2004, new 527 dollars did not replace most of the party soft money banned by BCRA. In addition, BCRA eradicated a significant sum of soft money collected by congressional "leaders" via 527 accounts. The simple image of Republican-created vs. Democratic-created 527s overlooks important political distinctions, particularly between groups that existed before BCRA and those that were constructed afterwards. It also understates the degree to which

many of these partisan ties developed subsequent to the act of creation and became institutionalized.

Furthermore, the press's focus on about two dozen big 527 donors has distracted attention from broader 527 fundraising trends between 2002 and 2004 and what they portend in the future. These trends include a remarkable jump in trade union contributions, both stagnation and transformation in business giving, and, most important, a cross-sector increase in the willingness of donors to contribute at high levels. Analysis of the donors who provided the bulk of individual contributions in the last two election cycles reveals that they were mainly drawn from the ranks of individual soft money donors to parties. Yet it also shows that these ex-soft money donors gave far more to 527s in 2004 than they had previously given as soft money to parties. We conclude that while 2004 was the year in which small donors began to alter the financing of presidential campaigns, it was also one in which the unprecedented generosity of ex-party soft money donors demonstrated the potential for dramatic future expansion of 527 activities.

527S REPLACED SOME, BUT NOT THE MAJORITY, OF SOFT MONEY

In order to discover whether 527 money replaced traditional soft money in 2004, we had to determine how much the 527s received for federal elections in 2004 compared to 2002. In pursuing our research we were aware that some public discussion of 527 group finances had inflated the numbers by encompassing groups oriented to state elections—such as the Democratic and Republican Governors' Associations—and some had deflated the numbers by omitting labor union 527s with extensive federal activities.[1]

Limiting our analysis to 527s that were primarily or very substantially involved in federal elections, including those controlled by federal officeholders and candidates, we used an electronic database on 527 finances in the 2002 cycle provided by the Center for Public Integrity and electronic data on the 2004 cycle from the Internal Revenue Service 527 groups' website. To determine which groups were federal, we examined how they spent their money and described or presented their activities. The overwhelming majority of our eventual "federal" 527s were pretty thoroughly committed to federal races. Several others, mainly some of the labor union 527s, were heavily involved but also did substantial state and local work. We included a labor union 527 among our federal 527s only if we were able to clearly attribute *at least* a third of its total expenditures to specific federal elections. This is a conservative estimate because the IRS does not require that 527 expenditures for administration, personnel, media, and state party assistance be identified by specific election. Based on both the available data and statements by major union representatives, we are confident that a substantial majority of the $89 million reported spent by our eight union federal 527s in 2004 (as of December 12) went for federal elections.[2]

We restricted our analysis to federal 527s that reported at least $200,000 in donations in either the 2002 or 2004 election cycles, which includes almost all of the money that went into our federal 527s.[3] While it is possible that our data are incomplete because some 527s are not complying with federal financial reporting requirements, we found only one major instance in 2004. This was Moving America Forward, a political action committee (PAC) headed by Bill Richardson, the Governor of New Mexico and Chairman of the Democratic Convention. This group raised at least $2.9 million and, by its own account, was involved in some partisan voter mobilization efforts in federal as well as state and local contests in several presidential "battleground" states. It reported its finances only to the state of New Mexico (Armendariz 2004; Richardson 2004; Anderson 2004; Couch 2004). In a phone communication with the Campaign Finance Institute (CFI), Moving America Forward's counsel asserted that it was exempt from federal reporting under a provision of the law that, to the contrary, only excuses groups that are "solely" aiding the election of "any individual to any State or local public office . . . or political organization" (Public Law 107-276).[4]

Total Activity

After accounting for duplication due to intergroup transfers, we found that total contributions to federal 527s rose from $151 million in 2002 (including $37 million for soft money accounts of congressional "leadership PACs" later abolished by BCRA) to $424 million in 2004—an increase of $273 million. It is clear that there was a significant, post-BCRA increase in contributions to these non-party soft money vehicles. However, the national parties raised $496 million in soft money in the 2002 cycle; and state parties raised an estimated $95 million in soft money for federal elections in the same cycle.[5] This made a total of $591 million in soft money abolished by BCRA. But since the 527s raised only $273 million more in 2004 than in the last year of party and candidate soft money, this 527 money failed to replace $318 million of the $591 million.

- Pre-BCRA Party Soft Money — $591 million
- Post-BCRA *Increase* in Federal 527 Soft Money — $273 million
- Post-BCRA *Decrease* in Total Soft Money — $318 million

But even this figure overestimates the 527s' importance in substituting for traditional soft money. National party soft money receipts had tripled between 1992 and 1996 and doubled from 2000–2004. And congressional leadership PAC soft money was also growing rapidly. There is little doubt that considerably more soft money than $591 million would have been collected for the 2004 elections in the absence of BCRA. This judgment is reinforced by the vast expansion of corporate and other soft money giving to party-connected "host committees" for the 2004 presidential nominating conventions (an increase from $56 million to $138 million since 2000), as well as the unanticipated high levels of donations to 527s by

ex-soft money donors in 2004 that we explore below. In sum, BCRA made a great deal of difference in the amount of soft money available in 2004.

We should also be cautious about attributing all of the increase in 527 fundraising from 2002 to 2004 to the post-BCRA environment. With the added cost of a presidential election in 2004, 527 groups might have increased their receipts over 2002 anyway. And some of the increased contributions may have also resulted from the unusual passion the presidential contest election inspired, which appears to have been associated with large increases in campaign giving generally.

All of the subsequent analysis of 527s in 2004 in this chapter is based on nearly final contributions and expenditures data made available by the IRS by December 12, 2004. The data cover $405 million of the $424 million raised during the full cycle and encompass all the relevant 527s except for the following, which reported raising approximately $5 million very late in the cycle: America Votes 2004, Colorado Conservative Voters, LCV II, Mainstream 2004, Reclaim Our Democracy, Republican National Lawyers, Save American Medicine, and The NEA Fund for Children and Public Education.

Tables 5.3 and 5.4 (see appendix) list federal 527s active in 2002 (with a separate subcategory for the soft money branches of leadership PACs) and 2004 along with their contributions and expenditures. The tables indicate which of the 527s were largely oriented to supporting Democrats or Republicans. After adjusting for transfers (mainly by the pro-Democratic Joint Victory Campaign in 2004, which served as the fundraising arm for America Coming Together and The Media Fund), the Democrats held major advantages in net contributions during both cycles ($106-$44 million in '02 and $321-$84 million in '04). The nearly four-to-one funding ratio in favor of the Democrats in 2004 is even higher than the three-to-one ratio that would have been obtained in '02 ($85-$29 million) without the now abolished leadership PACs.

"REPEATERS" AND "FIRST TIMERS" IN 2004

The 527 groups active in 2004 may be usefully divided into two categories. "Repeaters" (twenty-nine groups) were active in both the 2002 and 2004 cycles, while "First Timers" were active only in 2004 (fifty-one groups). See tables 5.5 and 5.6 in the appendix for details on these groups and their contributions.

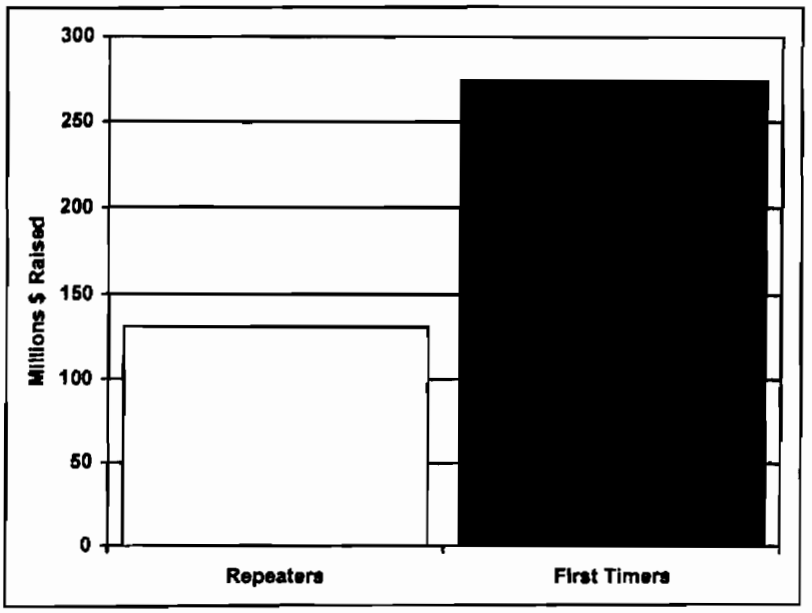
These categories were also distinguished by their political characteristics. As the tables indicate, sponsors of twenty-two of the twenty-nine Repeaters groups also sponsored political action committees that contributed to candidates.[6] In their relationships to these entities as well as their political self-definitions, Repeaters generally represented relatively stable, more deeply rooted and longer term political interests. Some groups were associated with broad issue constituencies. Examples included the pro-free market Club for Growth, environmental organizations like the Sierra Club, and the labor unions. Other groups were anchored in issue-based party factions. Among these were EMILY's List, which

supports Democratic pro-choice women candidates, and two centrist groups, the Republican Leadership Council and New Democratic Network (NDN).

In contrast, only seven of fifty-one First Timers in 2004 had associated PACs. (The largest First Timer, the pro-Democratic America Coming Together [ACT] had a PAC, but it was of slight importance. For most of the cycle, ACT expended just 2 percent of its funds through its "hard money" PAC account). First Timers mainly represented relatively transient or recently organized party or candidate interests. A prominent First Timer was Swift Boat Vets and POWs for Truth organized by veterans critical of Democratic presidential candidate John Kerry's Vietnam War performance. Other major groups included Citizens for a Strong Senate, established by former aides to Democratic Vice Presidential candidate John Edwards and active in several Senate races; The Media Fund, which was formed to promote the Democratic presidential candidate; the pro-Bush Progress for America, organized by former Bush campaign officials and consultants; and Americans for Jobs, an especially short-lived "drive-by" 527 that ran ads ambushing Democratic presidential aspirant Howard Dean shortly before the Iowa caucuses.

In 2004, as figure 5.1 illustrates, after adjusting for intergroup transfers, Repeaters raised $131 million (up from $96 million in 2002), but First Timers held sway with an imposing $274 million.

Figure 5.1 Federal 527s in 2004: Repeaters vs. First Timers



Among Repeaters, some groups did better in fundraising in 2004 and some did worse, as the percentage increases and decreases in table 5.5 show (see appendix). Large dollar increases were recorded by Service Employees International Union (SEIU), American Federation of State, County, and Municipal Employees (AFSCME), 21st Century Democrats, Club for Growth Inc., League of Conservation Voters, National Association of Realtors, National Federation of Republican Women, NDN, Progressive Majority, Planned Parenthood, and the Sierra Club. Groups showing large decreases included Communication Workers of America (CWA), College Republican National Committee, Republican Leadership Council, Republican Main Street Partnership, and the United Food and Commercial Workers Union (UFCW).

So while many observers have looked at the 2004 election through the prism of the biggest fundraisers—First Timer groups like America Coming Together and The Media Fund on tbe Democratic side and Swift Boat Vets, POWs for Truth, and Progress for America on the Republican one—it is important to remember that the Repeaters are also a very important part of the 527 picture.

PARTIES, PRESIDENTIAL CAMPAIGNS, AND THE NEW 527s

During 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. The same was true of the Bush campaign and its associates. We reached this conclusion based on both press reports (which are cited in endnotes) and confidential interviews with knowledgeable individuals. The 527s in question included the largest fundraisers and spenders: America Coming Together and The Media Fund on the Democratic side and Progress for America on the Republican one. Other Democratic groups—America Votes and Grassroots Democrats—also benefited from party support. After accounting for transfers, the above groups raised a total of $186 million, or 46 percent of the $405 million in total 527 funds—but 67 percent of the $274 million in total First Timer funds.

Although parties and campaigns, and their close associates, helped foster major 527 groups, there is no available evidence that they engaged in illegal requests for soft money or illegal coordinated communications. On the contrary, the individuals involved in supporting the 527s appear to have been rather scrupulous in following the letter of the law and its regulations, which forbade parties, candidates, and their agents after November 6, 2002, from requesting or spending soft money in federal elections. After that date, the key supporters of 527s defined their roles publicly as independent of party and campaign structures, took steps to formally separate themselves (or, more precisely, parts of themselves) from close financial relationships with such structures, and seem to have refrained from coordinating their communications with the political campaigns. However, there is little doubt that *both before and after November 6, 2002*, the parties, the Bush campaign, and their close associates were at times complicit in, and actively facilitated, the rise of 527s. They acted through:

- permissiveness toward the activism of paid consultants with high standing and identification in both parties;
- the fundraising clout of a former president (Bill Clinton) who was closely linked to his party's national committee and presidential candidate; and
- various official winks and nods.

The area in which the parties and campaigns were most influential was fundraising.

Democrats

The Democratic effort began when Democratic National Committee (DNC) Chairman Terry McAuliffe established a Task Force on BCRA, which really got going when the law passed in 2002. Members included Harold Ickes, a paid adviser to McAuliffe, President Clinton's former Deputy Chief of Staff and a member of the DNC's Executive Committee; Minyon Moore, DNC Chief Operating Officer; Josh Wachs, DNC Chief of Staff; Joe Sandler, DNC counsel; Michael Whouley, a leading Democratic consultant; and former White House officials John Podesta and Doug Sosnik (Edsall 2002). Ickes thought the Democratic Party was far behind the Republicans in adopting technologies to attract hard rather than newly banned soft money. And he believed the Democratic 2004 presidential nominee would participate in the public primary financing system with its spending ceilings, leaving that candidate broke by spring. At the same time, President Bush would opt out of the public system and be flush with private contributions. The eventual outgrowth of the Task Force's deliberations was two 527 groups, The Media Fund and Grassroots Democrats. At a gathering of Democratic donors in October 2002, McAuliffe discussed Ickes' plans for The Media Fund. He also appealed for financial aid to a new organization to be established by Joe Carmichael, president of the DNC's Association of State Democratic Chairs (Stone 2002; Van Natta and Oppel 2002). This would meet the need for an organization outside the national party that could relate to state parties, give them guidance, and help them raise limited "Levin funds" and other soft money. Ickes would subsequently head up The Media Fund and help select the board and staff of Grassroots Democrats, led by Carmichael after resigning his DNC position.

The following month—with BCRA now in effect—Ickes attended a meeting at a Washington restaurant of pro-Democratic interest groups. It was convoked by Gina Glantz, Assistant to the President of the SEIU and former Campaign Manager for Bill Bradley's presidential campaign. Others in attendance included SEIU President Andrew Stern, former AFL-CIO Political Director Steve Rosenthal, EMILY's List President Ellen Malcolm (also on the DNC Executive Committee and a veteran of many "coordinated campaigns" with national and state Democratic committees), and Sierra Club Executive Director Carl Pope. The discussion concerned "taking on Bush" in the 2004 election where the Republicans seemed to enjoy a large financial advantage. Rosenthal and Stern discussed plans

for a new, labor-backed organization that would emphasize ground operations (as opposed to TV and radio "air wars"). Participants also focused on the need to better coordinate interest group campaign operations (Cummings 2003). Ickes, who had obtained legal advice before attending this first post-BCRA meeting, was dropping the part of his portfolio with McAuliffe and the DNC that concerned campaign finance but continuing his consultancy on such matters as the party convention, nominating rules, and political advice. The consultancy would last until February 2004. (In 2002, The Ickes and Enright Group received $112,521 from the DNC through November 7. In 2003–2004, it received $123,860 from March 13, 2003, through February 18, 2004.)[7]

Ickes also attended a larger follow-up meeting in early May 2003, which discussed the establishment of America Votes to avoid duplication of effort by politically active groups. In reaction to a split between Rosenthal's Partnership for American Families and some of its previous labor backers, the group also contemplated creation of a new, broader-based voter mobilization group called America Coming Together (ACT) (Edsall 2003b).

As plans developed for ACT and America Votes, McAuliffe was "probably" kept informed by some participants and was formerly notified by Malcolm before the group was unveiled in August. By that time businessmen George Soros and Peter Lewis—armed with a brief from two consultants who had been recommended by ex-DNC BCRA Task Force Member John Podesta—had decided to pledge an initial $20 million to seed the new groups on the condition that ACT centralize its operations under Rosenthal and expand its planned ground-war activities from just a few to as many as seventeen "battleground" states. Malcolm and Ickes would soon lead a broad fundraising effort for both ACT and The Media Fund through still another 527 group called the Joint Victory Campaign (Cummings 2003; Mayer 2004; Stone and Barnes 2003).

Malcolm had "credibility" with certain cause-oriented donors because of her success as the leader of EMILY's List, which supported pro-choice Democratic women. Ickes' credibility flowed from his long Democratic political history and ties with Democratic Party leaders (he was the "political hack," joked one of his admirers). To engage potential donors, Malcolm and Ickes explained their well thought out campaign plans and their long-term goal of investing not just in an election but also in building a campaign infrastructure for the party. They felt they were giving the donors much more information than the party had and were therefore more accountable to them. They also 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."

It quickly became clear that more political clout was needed with both major categories of potential donors: those, like Soros, seeking to realize "ideological" goals by getting rid of Bush and those interested in "access" to potential decision-makers. (This distinction should not be taken as absolute. Soros, for example, told reporter Jane Mayer, "I would be very happy to advise Kerry, if he's willing to listen to me, and to criticize him, if he isn't. I've been trying to exert

some influence over our policies and I hope I'll get a better hearing under Kerry.") (Mayer 2004). It was decided to bring in former President Bill Clinton, who was extremely active in DNC fundraising and spoke "frequently" to Terry McAuliffe, whom he had selected as DNC chief. In other words, Clinton was not only the best-known Democrat but "a major force" in the DNC (VandeHei 2002b, 2003; Kaplan 2002). The goal was "to show the donors this was the real deal," to communicate, "I know them, you can trust them, this is the strategy." In October 2003—the same month in which he starred in party fundraisers in New York and Washington, DC (Theimer 2003; Lakely 2003)—the former president attended a dinner meeting of about fifteen people, mostly potential donors, at Soros's 5th Avenue New York City apartment. He told them that ACT met a critical need and that if ACT had existed in 2000 the Democrats would have won. As one of the 527 group leaders put it, "He koshered us. He gave the donors confidence, both ideological ones and the access ones." Clinton also encouraged about a dozen potential donors to The Media Fund at a meeting in Los Angeles in February 2004, a year in which he energetically raised money for both the DNC and Senator John Kerry's presidential campaign (Stone 2004a; Haberman 2004; Sweet 2004; *China Daily* 2004; *The Frontrunner* 2004). The leaders of ACT and The Media Fund were quite visible soliciting party donors and hobnobbing with the party and presidential campaign during the Democratic National Convention in Boston. They set themselves up on the second floor of the Four Seasons Hotel, down the hall from the DNC Finance Division which catered to large donors. Ickes, who was a delegate and member of the DNC Executive Committee, and Malcolm, who had resigned from the Committee when ACT was established, were also visible on the convention floor. Whatever their intentions, such conspicuous cohabitation undoubtedly burnished the groups' perceived identification with the party and presidential campaign (Rutenberg and Justice 2004a; Farhi 2004b).

Republicans

Republican efforts to foster independent groups developed more slowly. They centered at first on a 501(c)(4) advocacy group, Progress for America (PFA), which was doing grassroots work in favor of Bush administration policies. From the beginning this group was closely associated with the Bush administration, the RNC, and their consultants.

PFA was founded in 2001 by Tony Feather, Political Director of the 2000 Bush-Cheney campaign and partner in Feather, Larson, & Synhorst-DCI (FLS-DCI), a campaign consulting firm that worked for the RNC. On its website (www.fls-dci.com), the firm featured a tribute from Karl Rove, Bush's chief political adviser. From 2001 through 2003, PFA itself paid no salaries, benefits, or occupancy costs according to the group's Form 990 annual returns filed with the IRS. To avert a potential legal conflict between FLS-DCI's party and anticipated presidential campaign work and PFA's status as an independent political group, Feather relinquished his leadership of PFA as BCRA came into effect. He chose

Chris LaCivita, former Political Director of the National Republican Senatorial Committee, as the new president. During his service with PFA, LaCivita was a paid contractor with DCI Group, a public affairs and lobbying entity that shared a common partner with FLS-DCI—Tom Synhorst. Like Feather, Synhorst had extensive national Republican political experience, having served as an adviser to Bush-Cheney 2000 and in key roles in the floor operations of the 1996 and 2000 Republican conventions (Cillizza 2003b; Stone 2003).[8]

PFA's LaCivita spent much of 2003 wrestling with the problem of how to achieve the organization's goal of running pro-Republican federal political campaigns through a soft money 501(c)(4) group that was prohibited from having a primary mission of influencing elections. At one point he produced plans to spend about half of PFA's funds on campaign-oriented "issue advocacy" directed to the general public and half on express candidate advocacy directed to an enlarged group of "members." (The notion was that the IRS would not count "internal communications" as "political expenditures.") At PFA's October 2003 Issues Conference, an assemblage of political operatives, lobbyists, and donors was addressed by Ed Gillespie, RNC Chair, Ken Mehlman, Bush-Cheney 2004 Director; and Benjamin Ginsberg, counsel to both PFA and the presidential campaign (Drinkard 2004). The political operatives excused themselves when the question of donations came up.

When LaCivita departed PFA in the spring of 2004 to work on two Republican Senate campaigns, he was succeeded as president by DCI partner Brian McCabe. LaCivita would soon be better known as senior strategist for the anti-Kerry 527 group, Swift Boat Vets and POWs for Truth. The fledgling Swift Boat group had approached PFA for assistance, and the latter had recommended LaCivita. While handling the Swift Boat operation, LaCivita also returned briefly to PFA as a contractor.

By the late spring of 2004, FLS-DCI, the DCI Group, and PFA were all involved in the Bush campaign. FLS-DCI conducted message phone calls and telemarketing, respectively, for the Bush and RNC campaigns for which it was ultimately paid at least $19 million (Edsall and Grimaldi 2004).[9] DCI Group had a small contract for services at the Republican convention. And PFA had decided to organize a pro-Bush 527 in May 2004, following the FEC's decision not to regulate 527s. While each of these organizations was a separate unit with distinctive functions, they also had important relationships. The linchpin was FLS-DCI partner Tom Synhorst. He had established and was a partner in the DCI Group, which frequently used FLS-DCI as a vendor for phone work. Synhorst was also a "strategic adviser" and leading fundraiser for PFA both before and after it moved its campaign work from a 501(c)(4) "advocacy" group to a 527 political organization. Like Harold Ickes, Synhorst maintained that his personal 527 group work was in a separate "silo" from his firm's (FLS-DCI) work for the party and campaign. And like Ickes' efforts, Synhorst's activities were certainly visible to his firm's political clients, and his political relationships were presumably known to many potential 527 donors (Edsall 2004a; Stone 2004b; Getter 2004).[10]

As it sought funds, PFA confronted even more daunting obstacles than ACT

and The Media Fund. Not only did the organization, like its Democratic counterparts, lack a long track record, but the Republican National Committee had called upon the FEC to limit the financing of 527s (Bolton 2004b). (President Bush would reiterate this position in reaction to the controversial Swift Boat group attack on Democratic nominee John Kerry (Bumiller and Zernike 2004). Moreover, the corporations that PFA initially looked toward as a main source of funds proved reluctant to contribute, often citing warnings from counsel about the uncertain legality of 527s (Cummings 2004a; Edsall 2004c). In response, PFA hired three "traditional Republican fundraisers." Ensconced at the Ritz-Carlton Hotel during the Republican convention in New York, it succeeded in enlisting both funds and fundraising assistance from two of President Bush's most ardent financiers: Alex Spanos and Dawn Arnall. Most important, it received the ultimate wink and nod from the Republican Party and the Bush campaign.

In a joint statement on May 13, 2004, RNC Chair Ed Gillespie and Bush-Cheney Campaign Chairman Marc Racicot declared that the FEC's inaction on 527s "has given the 'green light' to all non-federal '527s' to forge full steam ahead in their efforts to affect the outcome of this year's Federal elections, and, *in particular, the presidential race* [emphasis added]. . . . The 2004 elections will now be a free-for-all. Groups like the Leadership Forum, Progress for America, the Republican Governors' Association, GOPAC and others now know that they can legally engage in the same way Democrat leaning groups like ACT, The Media Fund, MoveOn, and Moving America Forward have been engaging" (Bush-Cheney Campaign and the Republican National Committee 2004). It should be noted that of the four pro-Republican groups named, the last two were not substantially engaged in federal elections, and the Leadership Forum was not involved in the presidential contest.

The phrasing was careful in avoiding words that the FEC might interpret as illegally "soliciting" and "directing" soft money, but PFA leaders considered the statement an official blessing that was central to their fundraising. As one key strategist commented, "If we weren't on the list, it would have been over. Our message had been we don't like 527s. Then the Republican Party and campaign said, 'Don't fight them anymore.' From there it was all up. We didn't have a Clinton to encourage donors like the Democrats had." PFA viewed its eventual donors as "ideological" supporters of the Bush administration rather than as seekers of special access.

In sum, the parties responded to BCRA in broadly similar ways. They permitted some of their leading political consultants, who were strongly identified with them, to serve their interests by generating new soft money pots. And party officials or politically active notables put the party imprimatur on selected 527 fundraising to reassure potential donors. The Democrats started early and were legally able to use the party apparatus to launch The Media Fund and Grassroots Democrats before BCRA fell into place. Then they forged relations with initiatives by interest groups and party factions. The Republicans got off the ground late, and party and campaign leaders were compelled to issue a careful official statement in order to overcome numerous obstacles. At the end of the day, though, each

party committee and at least one presidential campaign were, to a significant degree, identified with a major 527 group (America Coming Together and Progress for America, respectively) that aspired to be active in future campaigns.

THE CHANGING MIX OF 527 DONORS

We analyzed contributions of $5,000 or more to our list of federal 527 groups. These accounted for all but $16,070,872 million of total receipts in 2002 and $15,134,945 million of total receipts in 2004. We discovered that there was a dramatic evolution in the three main categories of 527 donors from 2002 to 2004.[11] Labor union contributions increased from $55 million to $94 million, a major, but frequently overlooked, development. To put it another way, unions gave pro-Democratic 527s about four times as much as billionaire George Soros did. The major increase in labor donations to 527s signified that labor more than made up for the $36 million in soft money it gave (mainly through 527s) to national parties in the 2002 cycle.[12] On the other hand, business donations (meaning those not of individual businessmen but of corporations, trade associations, and individual incorporated entities like lawyers' and doctors' practices) declined from $32 million to $30 million (actually to $26 million if one omits a large contribution by the "Sustainable World Corporation," widely regarded as a nonfunctioning business representing Linda Pritzker, a member of one of the world's wealthiest families) (Wallison 2004). So business contributions to 527s in no way made up for the $216 million in soft money that business entities had given to national parties in the 2002 cycle.[13] The biggest change, though, came in donations by individuals, which rocketed from a mere $37 million to $256 million. Figure 5.2 illustrates all the changes.

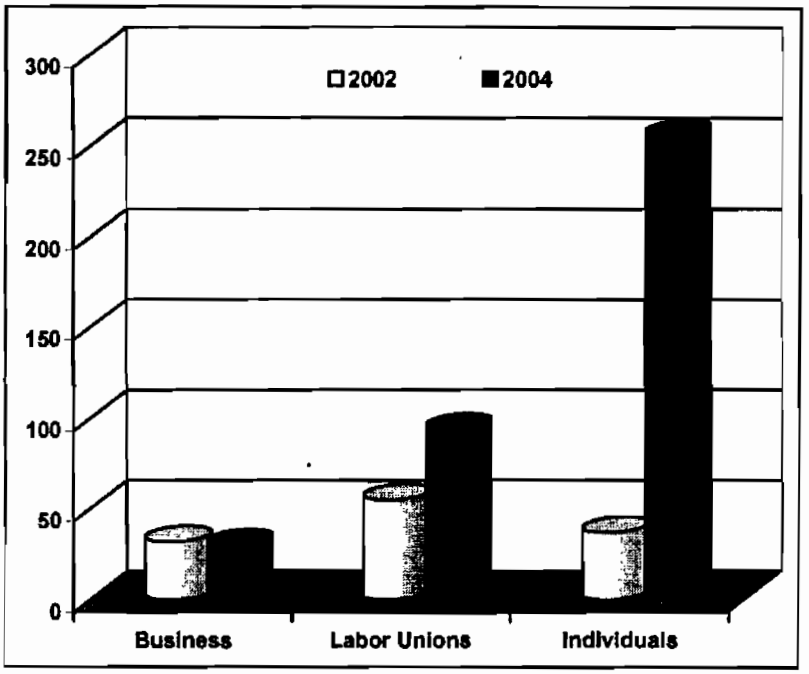
Examining these three categories more closely, table 5.7 (see appendix) shows that the jump in union contributions between the two cycles was essentially the work of two large unions that were already giving to 527s: SEIU and AFSCME.

In 2002 a substantial part of labor's money ($21 million out of $55 million) went to labor 527s and was transferred to national and other Democratic Party Committees for federal elections. In 2004, labor's enlarged federal effort consisted mainly of labor 527s making cash transfers and furnishing in-kind assistance to new pro-Democratic 527s, particularly America Coming Together, Grassroots Democrats, The Media Fund, Moving America Forward, The Partnership for America's Families, and Voices for Working Families.

Within the business sector, there was more turbulence despite an overall stagnation in funds. Business donors who had given nearly $15 million of $21 million in business contributions to leadership PACs in 2002 vanished along with the soft money leadership PACs themselves in 2004. Also departing were businesses that had given almost $5 million to both federal organizations and leadership PACs. Making up for those losses, continuing business donors upped their giving from $12 million to $16 million, and more than $13 million more flowed in from new donors.

Contributions from certain categories of business plunged: communications,

Figure 5.2 Federal 527 Donors by Sector, 2002 and 2004 Election Cycles (*$ millions*)



pharmaceutical, insurance, energy and transport corporations especially. Others ascended, including trial lawyers, private holding companies, realtors, and the U.S. Chamber of Commerce. The top recipient of business's donations continued to be the Repeater New Democratic Network. But in 2004 business turned away from previously favored Republican groups such as the Republican Leadership Coalition, Republican Leadership Council, and Republican Main Street Partnership, and toward the National Association of Realtors and newer pro-Republican groups like the November Fund and Progress for America.

Unlike both the business and labor sectors, new donors supplied the brunt of individual contributions in 2004 ($157 million). But continuing donors raised their giving as well: from $18 million to $99 million. Less significantly, donors who had provided $19 million in 2002 abandoned the 527 ship in 2004. There was once again a striking change in the recipients of donations. Of the ten top 527s benefiting from individual contributions in 2002, the first nine were Repeaters; but in 2004, only two of the first eight were Repeaters.

MORE DONORS GAVE AT HIGH LEVELS IN 2004

Probably the most remarkable development between the two election cycles was the increase in the size of top contributions in all three sectors.

Among labor unions the donor base remained relatively stable (rising from forty to forty-six unions). As we have seen, the two main givers (SEIU and AFSCME) were almost entirely responsible for the near doubling of union contributions between 2002 and 2004. As a result, their donations rose from 58 percent ($32 million) to 78 percent ($73 million) of total donations.

Although business giving was stagnant, and the number of businesses giving at least $5,000 fell dramatically (from 1,034 to 361), between 2002 and 2004 the average business contribution rose from $30,286 to $81,886. This was largely the result of increased giving by the top-most supporters. In 2002, it required seventy-eight businesses to generate 50 percent of the total money—in 2004 it took only seven donors.

But the most important change occurred among individuals. This was the sector that mainly powered the 2004 surge in giving to 527s. In 2002, there were 1,232 individuals who provided an average donation of $30,112. But in 2004, 1,887 donors produced an average contribution of $135,805—more than four times as high as 2002, with 50 percent more donors. The amount given by the typical donor didn't change very much: the *median* donation rose from $10,000 to $12,000. The *average* contribution went up dramatically because of the increased generosity of higher end givers in 2004. As table 5.1 indicates, this was overwhelmingly the result of two trends:

- multifold increases since 2002 in the number of donors who were willing to give $100,000 or more, which increased from 66 to 265; and
- the special 2004 role of twenty-four $2 million + donors who provided 56 percent of all individual contributions over $5,000.

What has often been forgotten is that while the top twenty-four donors provided $142 million, other individual large donors (especially $100,000 + ones) gave $114 million. The *general* willingness to give more at the high end was the basis of the expansion of individual giving from $37 million in 2002 to $256 million in 2004.

Table 5.1 Changing Patterns of Individual Giving to Federal 527s

	2002 Cycle			*2004 Cycle*		
Range of Donation	*n*	*Amount*	*% of Total*	*n*	*Amount*	*% of Total*
$2 Million and Over	0	$0	—	24	$142,497,241	56
$1 Million to $1,999,999	2	2,152,000	6	28	35,216,957	14
$500,000 to $999,999	8	6,132,190	17	25	16,380,500	6
$250,000 to $499,999	13	4,238,550	11	36	12,297,148	5
$100,000 to $249,000	43	5,872,372	16	152	20,360,946	8
$5,000 to $100,000	1,165	18,672,941	50	1,617	29,511,550	12
Total	1,231	37,068,053	100	1,882	256,264,342	100

THE LARGE DONORS GAVE MUCH MORE THAN PREVIOUS SOFT MONEY DONATIONS

Who exactly were these generous individuals who, along with a few unions, powered the overall boost in 527 finances from one cycle to the other? Do the data show that those who gave big money to 527s in 2002 and 2004 were mainly ex-party soft money donors? Yes. Does the scale of giving in 2004 indicate that such donors were mainly switching their soft money from one legalized vehicle to another? Not at all.

Table 5.2 provides a closer look at the 113 people who donated at least $250,000 to federal 527s in the '04 cycle. These donations accounted for $207 million of the $256 million in $5,000 and over contributions, that is, 81 percent of these donations.

As the table indicates, this group was replete with wealthy players in the private, corporate economy. (Several of the more modest descriptions under "Employer," though, fail to indicate the donor's economic base. For example, Alice Walton of "Rocking W. Ranch Inc." is a member of the family that owns 38 percent of Wal-Mart; Marian Ware of "Ware Family Office/Retired" is a member of the family that founded American Waterworks and ran it until 2003; Maconda O'Connor, "self/social worker" is the daughter of Houston business icon George Brown; and John Templeton is not only "Templeton Foundation/ retired" but a world renowned financial investor who named and owned a major mutual fund.)

The two columns on the right side of the table show that 73 of the 113 large donors in 2004 (65 percent) had indeed been active in the former soft money system. Over the previous two cycles, 2000 and 2002, they had furnished a total of $50 million in soft money to national party committees. (In some instances, attributing to the individual the total soft money contributions of his or her company and those associated with it would have raised contribution levels, but not so much to have significantly changed the overall total.)[14] At the same time, eleven of these seventy-three individuals had given a little over $4 million to 527s in 2002. Yet in 2004 alone, as the table notes, the seventy-three former soft money donors provided $157 million to 527s—three times the combined amount they had given to parties in 2000 and 2002 and 527s in 2002. *Clearly what was happening was not only a shift in their soft money giving—from party to 527—but also a vast escalation in their total donations.*

It is also important to understand that these seventy-three ex-soft money donors, a dozen of whom had given the parties less than $100,000, comprised a relatively small percentage of individual soft money donors in the 2000 and 2002 cycles. According to www.fecinfo.com, there were 516 individuals or couples who gave at least $100,000 in soft money to the parties in 2000 and 319 who did the same in 2002.

It should also be noted, in view of the past predominance of corporate organizational party soft money, that only fourteen of the seventy-three large individual donors were specifically tied to the top 500 corporations that donated soft money in either 2000 or 2002.[15]

Table 5.2 Individuals' $250,000+ Contributions to Federal 527s in the 2004 Cycle and Their Recent National Party Soft Money Donations

Name	Money to 527s	Employer	Party Soft Money 2000 & 2002	
			Dem	Rep
Soros, George	24,000,000	Soros Fund Management	208,000	
Lewis, Peter	22,545,000	The Progressive Group	75,000	500
Bing, Stephen	13,902,682	Shangri-La Entertainment	7,385,000	
Sandler, Herb & Marion	13,007,959	Golden West Finance Group		
Perry, Bob	8,060,000	Perry Homes		140,000
Arnall, Dawn	5,000,000	Ameriquest Capital	250,000	1,000,000
Spanos, Alex	5,000,000	AG Spanos Companies		866,500
Watt, Ted	5,000,000	Gateway	87,500	75,000
Pickens, Boone T.	4,600,000	PB Capital		145,000
Perenchio, Jerry/Living Trust	4,000,000	Chartwell Partners LLC		1,231,500
Rappaport, Andrew	3,858,400	August Capital	150,000	
Simmons, Harold	3,700,000	Contran Corp		21,700
Messinger, Alida	3,447,200	None	730,000	
Levy Hinte, Jeanne	3,425,000	Self/Writer		
Pritzker, Linda	3,365,000	Self/Investor		
Eychaner, Fred	3,075,000	Newsweb Corp	8,295,000	
Cullman, Lewis	2,651,000	Self/Philanthropist	6,000	
Walton, Alice	2,600,000	Rocking W Ranch Inc.		100,000
Glaser, Robert	2,229,000	Real Networks Inc.	90,000	
Lindner, Carl H.	2,225,000	American Financial Group	745,000	1,630,000
Varis, Agnes	2,006,000	AgVar Chemicals	808,000	
DeVus, Richard	2,000,000	Amway		425,000
Ragon, Terry	2,000,000	Intersystems		
van Andel, Jay	2,000,000	Alticor		100,000
McHale, Jonathan	1,800,000	Self/Investor		
Singer, Paul	1,785,000	Elliot Capital Advisors		570,500
Harris, John IV	1,660,700	None		
Hunting, John	1,627,000	None/Retired	25,000	
Mcclendon, Aubrey	1,625,000	Chesapeake Energy		
Field, Joseph	1,575,000	Entercom		
McNair, Robert	1,551,000	Palmetto Partners		50,000
Abraham, S. Daniel	1,320,000	Slim Fast Foods	2,543,000	
Rowling, Robert B.	1,250,000	TRT Holdings		
Mattso, Christine	1,200,000	Self/Homemaker	4,300	
Gund, Louise	1,155,000	Self/Philanthropist	1,028,000	
McCormack, Wm	1,125,000	Tinhouse	20,000	
Lewis, Daniel	1,100,000	Retired		
Bing, Peter	1,089,257	Self		
Chambers, Anne Cox	1,082,000	Cox Enterprises/Philanthropist	225,000	
Gill, Tim	1,065,000	Gill Foundation	195,700	
Marcus, Bernard	1,050,000	Retired		804,500
Sillerman, Robert	1,050,000	The Sillerman Companies	990,000	
Jensen, G. J.	1,038,000	Housewife		75,000
Brunckhorst, Frank	1,025,000	Boars Head Provisions		
Buell, Susie Tompkins	1,020,000	Self/Retired	344,300	
Ortenberg, A&E Claiborne	1,017,000	Retired		
Rosenthal, Richard	1,007,000	Uptown Arts		

Aronson, Theodore	1,000,000	Aronson, Johnson, Oritz LP		
Carsey, Marcy	1,000,000	Self/Producer		
Clark, James	1,000,000	Self/Investor		
Earhart, Anne Getty	1,000,000	Self/Investor		
Ragon, Susan	1,000,000	Intersystems		
Bacon, Louis	950,000	Moore Capital Management		205,000
Ward, Tom	875,000	Chesapeake Energy		
Dyson, Robert	850,000	DysonKissnerMoran Corp	855,000	
Lewis, Jonathan	821,800	Progressive Insurance		
Huizenga, H. Wayne	820,000	Self/Investor		
Leeds, Gerald & Lilo	805,500	Retired	192,000	
Crow, Harlan	775,000	Crow Holdings		7,500
Lee, Barbara	770,000	Self/Philanthropist	232,000	
Ware, Marian	750,000	Ware Family Office/Retired		345,200
Stephens, Jackson	750,000	EOE Inc.		25,000
Sussman, S. Donald	720,000	Caremi Partners	1,545,000	100,000
Foos, Richard & Shari	662,500	Self/Psychotherapist	85,000	
O'Connor, Maconda	650,000	Self/Social worker		
Gilder, Richard	620,000	Gilder Gagnon Howe & Co. LLC		250,000
Childs, John	590,000	JW Childs Associates		750,000
Ware, Marilyn	550,000	Ware Family Office/Retired		186,800
Snyder, Harold	550,000	HBJ Investments	770,000	
Stephenson, James	550,000	Yancy Brothers Co.		10,000
Recanati, Michael	525,000	Maritime Overseas Corp	50,000	
Templeton, John	520,000	Templeton Foundation/Retired		585,900
McKay, Rob	520,000	McKay Investment Group	15,000	
Lindner, Robert	510,000	United Dairy Farmers		380,000
Colombel, Andrea	500,000	The Trace Foundation		
Hughes, B. Wayne Sr.	500,000	Public Storage Inc		956,200
Nicholas, Peter	500,000	Boston Scientific Corp		
Searle, Dan	500,000	Retired		
Troutt, Kenny	500,000	Mt. Vernon Investment Group		
Kieschnick, Michael	481,030	Working Assets	35,000	
Bass, Anne T.	480,000	Self/Investor		
Schwartz, Bernard	470,000	Loral Space & Comm Ltd	3,536,300	
Benter, William	463,750	ACUSIS LLC		
Bass, Robert	450,000	Keystone		
Corzine, Jon	450,000	US Senator	2,416,000	
Matthews, George	450,000	Retired		
Soros, Jonathan	439,000	Soros Management	50,000	
Burnett, Nancy	400,000	Sea Studios Foundation		
Orr, Susan	400,000	Telosa Software	145,000	
Bonderman, David	370,000	Texas Pacific Group	215,000	
Cofrin, Gladys	360,000	Self/Counselor	35,000	
Bridges, Rutt	350,000	Big Horn Center for Public Policy	30,000	
Maltz, David	332,050	Self/Developer		
Paulson, Wendy Judge	323,000	None/Volunteer NYC Teacher		
Manheimer, Virginia	316,295	Investor		
Day, Robert	300,000	Trust Co of the West		143,700
Entenza, Matthew	300,000	Attorney/Self		
Saunders, Thomas	300,000	Saunders Karp & Megrue		366,000
Schiffrin, Richard	300,000	Schiffrin Barroway LLP	20,000	
Daniels, George	298,503	Daniel Manufactoring Corp		

(continues)

Table 5.2 Continued

Name	Money to 527s	Employer	Party Soft Money 2000 & 2002 Dem	Rep
Gruener, Garrett	282,915	Alta Partners	75,300	
Bastian, Bruce	277,000	Self/Retired	310,000	
Hogan, Wayne	275,000	PathCanada	290,000	
Resnick, Stewart	275,000	Roll Intern Corp	125,000	
Lieberman, Leonard	263,000	Self/Consultant		
Doerr, John	260,000	Kleiner Perkins Caufield	475,000	
Gilmore, Elizabeth	260,000	Mertz Gilmore Foundation	20,000	
Buttenweiser, Peter	257,535	Buttenweiser & Associates	1,252,500	
Perry, Lisa	257,300	Philanthropist	775,200	
Kendrick, E. G. (Ken)	250,000	Datatel, Inc.		146,900
Powers, William	250,000	PIMCO		300
Schmidt, Wendy	250,000	Homemaker		
Stephens, Warren	250,000	*		
From All Donors (n = 113)			(n = 46)	(n = 32)
Total	206,990,376		38,054,100	11,693,700
Average Donation	1,831,773		827,263	365,428
Median Donation	820,000		220,000	166,850
From Soft Money Donors (n = 73)				
Total	157,299,562		49,747,800	
Average Donation	2,154,789		681,477	
Median Donation	775,000		208,000	

*No entry.

Table 5.8 (see appendix) profiles the sixty-six individuals who gave at least $100,000 to federal 527s in 2002. They accounted for more than $18 million of $37 million in contributions, that is, 50 percent of the total. Only twenty-three individuals gave at least $250,000 in 2002 (compared to 113 in 2004), and they provided only 34 percent of total individual donations (compared to 81 percent in 2004).

We expected that the forty-two soft money donors among the sixty-six individuals who contributed at least $100,000 to 527s in 2002 would have been less generous than their 2004 successors. After all, the party soft money system was still available to large donors in 2002. And that was the case. This smaller group of party donors had actually given the parties more soft money ($52 million rather than $50 million) over the 2000 and 2002 election cycles than the 2004 cadre. But they generated just $11 million for 527s in 2002—fourteen times less than the 2004 group did.

Without question, a segment of former party individual soft money donors have been the main funders of 527s. However post-BCRA *levels* of giving are not simply explained by the "hydraulic theory" that money, like water, inevitably finds its way around an obstacle. *Most* former individual soft money donors have

not given large donations to 527s. But for those who did in 2004, one may say that a river of party soft money has turned into an ocean of 527 money.

THE FUTURE OF 527s

Despite the hard money fundraising success of both major parties in 2004, two of the leading First Timer 527s in 2004, ACT and PFA, indicated they planned to continue on in future federal elections (Cillizza 2004a; Justice 2004b; Cummings 2004b; VandeHei 2005). (ACT subsequently put their plans on hold.) And there are reasons to believe that 527s in general could play even larger roles in future elections than they did in 2004. First, the genie of huge contributions is out of the bottle, and it is unlikely to return, considering past trends in party soft money and convention host committee funding. Secondly, if the legal status of 527s and the relation of some of them to parties become institutionalized, or particular lobbying issues arise, some trade associations and corporations might be persuaded to overcome their current reluctance to provide soft money donations without direct political pressure from candidates. (During the 2000 cycle, a 527 representing the pharmaceutical industry, Citizens for Better Medicare, spent an estimated $65 million.) Thirdly, despite the presence of seventy-three individuals who had given parties soft money among the large 2004 527 contributors, the fundraising potential of ex-soft money donors has hardly been tapped. In 2000 alone, 214 individuals gave the parties at least $200,000 and 516 gave more than $100,000, according to www.fecinfo.com. Even if the passions that propelled campaign donors in 2004 subside somewhat in the nonpresidential year of 2006, they are likely to revive during the presidential contest of 2008.

However, developments in both the federal campaign finance and nonprofit legal regimes spawned the 527 phenomenon, and further changes in policy could influence its future. During the 1996 presidential campaign, a number of 501(c)(5) labor unions, 501(c)(6) trade associations, and 501(c)(4) advocacy groups made substantial expenditures unhampered by any contribution limits. Their entry in force was fostered by federal court decisions that seemed to liberate "issue advocacy" communications and partisan voter mobilization activities from campaign law restrictions (Common Cause 2000). It was also facilitated by the Internal Revenue Service's lack of clarity about which of these groups' activities were political and could therefore not be pursued as part of the organizations' primary missions (Hill 2001).

But after the election, a congressional investigation, the IRS's rejection of the Christian Coalition's longstanding application for 501(c)(4) status, and innovative proposals by nonprofit group tax lawyers helped make 527 groups the "loophole of choice" for unregulated contributions in the 2000 election. The 527s' advantages over other nonprofits included the ability to make elections their primary, even exclusive activity; absence of the 35 percent tax on the lesser of their political expenditures or investment income; and the exemption of their donations from a steep gift tax (Trister 2000). Despite new laws mandating public

disclosure of 527 group finances (other nonprofits do not have to reveal their contributors), 527s have grown rapidly.

Proposals have been submitted to Congress and the FEC to restrict soft money contributions to 527 groups. If such a proposal were adopted, it is likely that efforts would be made to utilize the less efficient nonprofit vehicles that were so prominent in 1996. These kind of groups continue to be active in elections, with the 501(c)(6) U.S. Chamber of Commerce and Americans for Job Security and 501(c)(5) AFL-CIO leading recent examples. PFA's earlier efforts to develop ways to better utilize its 501(c)(4) structure for campaign purposes are also instructive. Much would depend on whether or not the FEC and IRS developed a common and coherent policy in determining when such groups had a major purpose of influencing elections.

With reformers raising the issue of 527 regulation with the FEC and Congress, a leading response to restrictive proposals is sure to be, "Where is the threat of corruption (or its appearance) that is the sole justification under current constitutional doctrine for limiting political speech?" After all, the 527s are not making contributions to candidates or parties; nor are they coordinating their spending with them. And many of the donors are promoting their ideologies rather than looking for individual favors. Aren't the 527 donors simply furthering independent political expression, and, in the words of one tax attorney, "allowing causes to have angels?" (Eilperin 2000).

However one might answer this question in the abstract, it will in fact be answered by Congress and the FEC in a real world context. It is this context that we have endeavored to portray as accurately as possible in this chapter. With our findings in mind, we might rephrase the question about potential corruption or its appearance in three parts:

- 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? Will this sentiment permit 527 groups and donors, in the Supreme Court's words, to "exert undue influence on an officeholder's judgment" (or appear to do so)? (*McConnell v. Federal Election Commission* (540 U.S. 93 [2003]);
- If some organizations sponsoring 527 independent groups also sponsor PACs that channel contributions to candidates (as, for example, the Club for Growth and New Democratic Network do), is there a danger that the candidates and parties will look at 527 spending as simply another form of contribution? Will contributions to 527s thus foster, or appear to foster, "politicians too compliant with the wishes of large contributors"? (*McConnell v. Federal Election Commission*); and
- 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?

There is nothing more hazardous in politics than predictions. But in the absence of policy change, we can expect that the 527 system will generally expand and become more complex. Repeater 527s, generally well rooted in interest group structures, will attempt to build on their recent growth. A few of the 2004 First Timers (notably PFA) are already beginning to seek ways of institutionalizing their successes in representing broad party interests. But the elections of 2006 and 2008 will probably again feature a host of new groups geared to shorter term candidate and party interests. The emerging 527 system may make campaigns somewhat more interesting but also more difficult to hold accountable. Finally, the preponderance of large donors is likely to raise—even more seriously than it does now—the question of what BCRA has really accomplished.

NOTES

1. The otherwise excellent listing of 527 groups active in federal races on the Center for Public Integrity website (see www.publicintegrity.org/527) omits all labor unions including those that were predominantly active in such races.

2. See, for example, the statements of Service Employees International Union representatives regarding the union's largely federal 2004 election activities in "A Union Chief's Bold New Tack," (Business Week Online 2004) and SEIU press release, "Anatomy of an Election Strategy" (Service Employees International Union 2004). Together, SEIU and its New York affiliate spent $51 million of the $89 million union federal 527 total in 2004.

3. Data from 2000, when the 527 phenomenon came into its own, is incomplete because public disclosure of 527 group finances was not established until the last six months of the cycle. According to the Center for Public Integrity, there were forty "federal-oriented" 527s that reported less than $200,000 in donations for the 2004 cycle; these groups collected only $2.5 million (see www.publicintegrity.org/527).

4. Adding subparagraph (3)(5)(i) to Section 527 of the Internal Revenue Code.

5. National party soft money contributions data are from www.fec.gov. Prof. Ray La Raja provided additional information on state party soft money spending for federal elections in the 2002 cycle based on his research in FEC databases. He also suggested the methodology we employ to calculate the state party-raised component in state party soft money spending through deducting national party transfers to state and local parties. For further information on this methodology, see Ray La Raja and Elizabeth Jarvis-Shean, "Assessing the Impact of a Ban on Soft Money" (La Raja and Jarvis-Shean 2001).

6. Information on PACs, which either shared expenses with their 527 soft money counterparts or were separately maintained by the same organizational sponsor, was obtained from Robert Biersack, Deputy Press Officer, Federal Election Commission, and from searches of committees on the FEC website (www.fec.gov).

7. See www.fecinfo.com (DNC expenditures, consultant fees, 2002); www.opensecrets.org/parties/expend.asp?cmte = DNC&cycle = 2004 (for 2004).

8. See also www.dcigroup.com.

9. See also www.opensecrets.org/parties/expend.asp?cmte = RNC&cycle = 2004.

10. DCI Group's Republican Party payments for the convention are listed at www.opensecrets.org.

11. In 2002 the additional "other" category comprised mainly party committees, but also 527s and their sponsors and Indian tribes. In 2004, with party soft money abolished, it consisted largely of 527s and to a much lesser extent, Indian tribes.

12. See discussion above on p. 3 of labor 527s' "federal" election spending, and www.fecinfo.com.

13. See www.fecinfo.com.

14. Most notably, Robert Rowling provided no soft money but those associated with the company he chaired (TRT Holdings) gave, in rounded numbers, $134,000; Aubrey McClendon and Tom Ward of Chesapeake Energy also gave no soft money while their firm provided $100,000. Peter Nicholas did not give, but his company gave $165,000. Among the soft money donors, George Soros provided $208,000 of Soros Fund Management's total of $743,000, Harlan Crow of Crow Holdings gave $7,500, but those associated with Crow Holdings provided a total of $335,000; Ted Waitt gave $162,500 while Gateway Inc. donated a total of $778,000; Harold Simmons of Contran Corp. gave $22,000, but his company provided $863,000, and Paul Singer of Elliot Capital Advisers gave $570,5000 while his firm provided $1.303 million.

15. Data on corporate giving of soft money from www.fecinfo.com.

APPENDIX

Table 5.3 Federal 527 Organizations in the 2002 Election Cycle (>$200,000)

527 Committee Name	*Contributions*	*Expenditures*
General—Democratic Oriented		
AFSCME Special Account	$ 19,575,709	$ 19,375,052
SEIU Political Education and Action Local Fund	7,674,610	5,505,063
IMPAC 2000	6,948,686	7,029,821
EMILY'S List	6,821,112	7,714,815
AFL-CIO COPE—Treasury Fund	5,533,588	5,732,568
Comm. Workers of America Non-Fed. Sep. Segregated Fund	4,511,305	6,970,539
1199 SEIU New York State Political Action Fund	4,298,508	4,536,751
New Democrat Network Non Federal	4,235,722	3,662,273
Laborers' Political League Education Fund	4,097,455	4,105,741
League of Conservation Voters, Inc.	3,524,000	1,694,248
Sierra Club Voter Education Fund	3,351,200	3,930,028
UFCW Active Ballot Club Education Fund	3,156,510	2,987,351
NEA Fund for Children & Public Education	2,556,846	2,430,841
SMWIA Political Education League	2,178,975	2,171,907
Campaign Money Watch	1,504,184	1,441,646
Mainstreet USA, Inc.	1,146,000	966,057
Working Families 2000	954,944	70,310
Campaign for Americas Future (Labor)	847,500	823,403
21st Century Democrats	772,908	856,329
Pro Choice Vote	654,300	642,911
Citizens for Michigan's Future	616,000	616,005
Voters for Choice Non-Federal	541,935	607,716
Every Child Matters	515,857	384,198
Participation 2000 Inc.	509,650	173,541
Great Lakes '92 Fund, Inc.	494,690	592,850
Progressive Majority	295,765	118,782
Daschle Democrats, Inc.	244,489	229,921
Planned Parenthood Votes	228,642	1,010,869
Total (n = 28)	87,791,092	86,381,538
Net Total: After Transfers Among Groups	85,366,851	83,957,297
General—Republican Oriented		
College Republican National Committee, Inc.	$ 8,445,903	$ 10,650,711
Club for Growth, Inc.	4,215,967	4,905,651
Republican Leadership Coalition	3,915,342	4,132,661
Bush-Cheney 2000, Inc-Recount Fund	3,897,036	9,243,360
Republican Leadership Council (RLC)—State	2,237,025	2,861,762
Republican Main Street Partnership	1,802,548	1,880,577
The Leadership Forum	1,000,000	1,000,000
Wish List	864,800	1,046,375
Council for Better Government	721,354	707,980
National Federation of Republican Women	592,599	3,814,520
American Council of Life Insurers Non Federal PAC	520,952	489,600
National Association of Realtors 527 Fund	484,000	530,572

Table 5.3 Continued

527 Committee Name	*Contributions*	*Expenditures*
Republicans Abroad Non Federal	419,865	413,267
Republican Majority Issues Committee	267,555	311,374
Total (n = 14)	29,384,946	41,988,410
Net Total: After Transfers Among Groups	29,129,946	41,733,410
Leadership PACs—Democratic Oriented		
New American Optimists	$ 4,621,154	$ 4,617,824
DASHPAC Nonfederal Account	2,722,454	2,847,765
Searchlight Leadership Fund Non Federal	1,670,152	1,971,083
Lone Star Fund Non Federal Account	1,506,131	1,511,718
Effective Government Committee-Nonfederal Account	1,381,750	1,320,549
Citizen Soldier Fund—Nonfederal Account	1,353,400	1,365,460
National Leadership PAC Non Federal	1,051,266	1,126,257
Blue Dog Non Federal PAC	965,867	886,141
Glacier PAC Nonfederal	783,650	827,695
Congressional Black Caucus Political Action Committee	672,524	257,180
21st Century Leadership Fund	620,650	237,946
Mainstream America Political Action Committee	498,814	420,445
Committee for a Democratic Majority	455,704	536,434
Democratic Majority PAC	444,021	487,208
HillPAC-NY	356,100	351,043
Building Our Leadership Diversity PAC Non Federal	320,250	322,370
Leadership in the New Century PAC Non Federal	306,068	286,657
Florida 19 PAC	286,450	271,144
Committee for Leadership and Progress-NY	280,714	286,600
McAuliffe for Chair	266,378	308,902
DAKPAC Non Federal Account	231,759	242,515
Silver State 21st Century PAC Non Federal	222,423	223,548
Rhode Island Political Action Committee Non Federal	220,150	287,914
Bob Graham Leadership Forum	218,000	217,451
For Dems Non Federal	217,012	216,998
JFC Leadership Committee	210,900	95,750
Total (n = 26)	21,883,739	21,524,600
Net Total: After Transfers Among Groups	21,833,739	21,318,100
Leadership PACs—Republican Oriented		
Americans for a Republican Majority Non Federal Account	2,341,634	1,901,435
Rely On Your Beliefs Fund	1,716,776	1,719,831
KOMPAC State Victory Fund	1,134,595	1,088,088
New Majority Project PAC	1,026,900	1,098,198
Volunteer PAC Non Federal	955,785	953,254
Republican Majority Fund Non Federal Account	910,226	687,003
America's Foundation Non Federal Account	881,939	894,019
Congressman Tom Davis Virginia Victory Fund	837,349	856,477
Together for Our Majority Political Action Committee Non Federal	817,975	808,416
New Republican Majority Fund—State PAC	680,772	684,991
Campaign for America's Future (Utah)	549,373	338,073
Majority Leader's Fund	537,620	241,628

Battle Born State PAC	506,787	453,089
American Success PAC Non-Federal Account	462,528	332,881
Committee for a United Republican Team Non Federal	269,853	255,272
George Allen Committee	264,941	261,389
7th District Congressional Republican Committee	264,716	218,383
Friends of the Big Sky Non Federal Account	228,162	160,731
Washington Fund-State Account	201,910	207,317
GROWPAC Non Federal	201,147	210,873
Total (n = 20)	14,790,987	13,371,347
Net Total: After Transfers Among Groups	14,557,053	13,137,413
Federal 527s and Leadership PACs		
Total Democratic & Republican:	$153,850,755	$163,265,895
Net Total: After Transfers Among Groups	$150,731,079	$160,146,219

Table 5.4 Federal 527 Organizations in the 2004 Election Cycle (>$200,000)

527 Committee Name	*Contributions*	*Expenditures*
Democratic Oriented		
America Coming Together—Non Federal Account	$ 78,652,163	$ 76,270,931
Joint Victory Campaign 2004[a]	71,809,666	72,347,983
The Media Fund	59,394,183	54,429,053
SEIU Political Education & Action Fund	40,995,542	43,681,298
AFSCME Special Account	22,135,127	22,112,744
MoveOn.org Voter Fund	12,517,365	21,205,288
New Democrat Network Non Federal Account	12,221,608	12,194,451
Citizens For A Strong Senate	10,848,730	10,143,121
Sierra Club Voter Education Fund	8,727,127	6,147,176
EMILY's List Non Federal	7,684,046	7,983,328
1199 SEIU Non Federal Committee	7,477,295	7,445,101
Voices For Working Families	7,466,056	6,809,102
League of Conservation Voters Inc. 527	6,552,500	5,621,288
AFL-CIO COPE—Treasury Fund	6,336,464	6,332,448
Democratic Victory 2004	3,930,969	2,603,654
Laborers Political League Education Fund	3,665,284	3,486,802
The Partnership for America's Families	3,071,211	2,880,906
Grassroots Democrats	2,818,883	2,468,622
Stronger America Now	2,789,817	2,664,919
America Votes, Inc.	2,622,636	2,533,523
21st Century Democrats	2,542,116	1,255,859
SMWIA Political Ed League	2,164,830	2,051,382
Coalition to Defend the American Dream	1,935,844	1,609,000
CWA Non Federal Separate Segregated Fund	1,924,455	1,641,536
Music For America	1,667,820	1,507,324
Win Back Respect	1,382,227	1,083,184
Americans for Progress & Opportunity	1,306,092	1,305,667
Young Democrats of America	1,109,840	719,894
Environment2004, Inc.	1,107,080	1,117,370
Environmental Accountability Fund	1,084,807	965,107
American Family Voices Voters' Alliance, Inc.	1,060,000	1,108,628
Campaign Money Watch	1,022,842	993,921
Americans for Jobs	1,000,000	994,137
Democracy for America Non Federal	879,500	520,981
Planned Parenthood Votes	799,683	595,288
Revolutionary Women	789,640	827,417
Focus South Dakota, Inc.	*687,450*	*619,767*
Progressive Majority	659,300	766,104
PunkVoter, Inc.	636,161	1,020,593
Compare Decide Vote	600,000	538,294
The Real Economy Group	585,000	570,750
Campaign for America's Future—CC Fund	550,651	41,249
UFCW Active Ballot Club Education Fund	543,550	602,033
National Progress Fund	517,149	426,199
Environment2004 Action Fund	507,750	491,554

Organizing and Campaign Training Center	501,765	445,821
NJDC Victory Fund	484,461	421,782
Defenders of Wildlife Action Fund 527 Account	484,000	526,980
Arts PAC	464,753	189,211
Communities Voting Together	412,096	—
Bring Ohio Back	400,681	574,256
Click Back America	398,000	219,162
American Democracy Project	364,500	480,334
Clean Water Action Education Fund	343,300	231,796
! Si Se Puede ! Boston 2004, Inc.	331,000	239,182
Uniting People for Victory	284,000	228,194
Roofers Political Ed and Legislative Fund	232,432	263,152
Texans for Truth	225,495	486,929
National Democratic Ethnic Leadership Council	212,040	96,122
Total (n = 59)	403,918,982	397,137,897
Net Total: After Transfers Among Groups	321,185,549	314,404,464
Republican Oriented		
Progress For America Voter Fund	$44,929,174	$35,437,204
Swift Boat Vets and POWs for Truth	17,068,390	22,424,420
Club for Growth	7,863,572	9,257,228
College Republican National Committee, Inc.	6,372,843	8,207,393
Club for Growth.net	4,115,037	3,927,530
National Association of Realtors 527 Fund	3,215,263	3,149,895
The November Fund	3,150,054	3,075,978
CA Republican National Convention Delegation 2004 Account	1,600,750	1,506,499
Republican Leadership Coalition, Inc.	1,456,876	1,439,110
National Federation of Republican Women	1,301,811	3,321,249
Americans United to Preserve Marriage	1,192,090	1,056,962
Americas PAC	1,081,700	1,056,666
Florida Leadership Council	878,500	729,366
Republican Leadership Council (RLC)	753,303	772,625
The Leadership Forum	696,973	501,255
Softer Voices	676,100	764,436
Wish List Non Federal	585,197	703,997
Main Street Individual Fund	471,600	253,612
Republicans Abroad Non Federal	444,057	501,717
Council For Better Government	294,000	297,000
Concern for Better Government	236,000	187,100
Total (n = 21)	98,383,290	98,571,242
Net Total: After Transfers Among Groups	83,922,290	84,110,242
Republican and Democratic Oriented Committees		
Total (n = 80)	$502,302,272	$495,709,139
Net Total: After Transfers Among Groups	$405,107,839	$398,514,706

[a]Joint Victory Campaign 2004, a fundraising conduit for other 527s, represents $70,879,391 of the $97,194,433 in total transfers.

Table 5.5 Repeaters: Federal 527 Organizations Active in Both the 2002 and 2004 Cycles (>$200,000)

Committee Name	Associated PAC	2002 Contributions	2004 Contributions	% Δ
1199 SEIU New York State Political Action Fund	X	$ 4,298,508	$ 7,477,295	74
21st Century Democrats	X	772,908	2,542,116	229
AFL-CIO COPE—Treasury Fund	X	5,533,588	6,336,464	15
AFSCME Special Account	X	19,575,709	22,135,127	13
Campaign for Americas Future (Labor)	X	847,500	550,651	−35
Campaign Money Watch (Reform Voter Project)		1,504,184	1,022,842	−32
Club for Growth Inc.	X	4,215,967	7,863,572	87
College Republican National Committee, Inc.		8,445,903	6,372,843	−25
Communications Workers of America Non Fed. Separate Segregated Fund	X	4,511,305	1,924,455	−57
Conncil for Better Government		721,354	294,000	−59
EMILY's List	X	6,821,112	7,684,046	13
Laborers' Political League—Education Fund	X	4,097,455	3,665,284	−11
League of Conservation Voters, Inc.	X	3,524,000	6,552,500	86
Mainstreet USA, Inc. (American Family Voices Voters Alliance)		1,146,000	1,060,000	−8
National Association of Realtors 527 Fund	X	484,000	3,215,263	564
National Federation of Republican Women	X	592,599	1,301,811	120
New Democrat Network Non Federal	X	4,235,722	12,221,608	189
Planned Parenthood Votes	X	228,642	799,683	250
Progressive Majority	X	295,765	659,300	123
Republican Leadership Coalition		3,915,342	1,456,876	−63
Republican Leadersbip Council (RLC)—State	X	2,237,025	753,303	−66
Republican Main Street Partnership (Main Street Individual)	X	1,802,548	471,600	−74
Republicans Abroad Non Federal		419,865	444,057	6
SEIU Political Education and Action Local Fund	X	7,674,610	40,995,542	434
Sierra Club Voter Education Fund	X	3,351,200	8,727,127	160
SMWIA Political Education League	X	2,178,975	2,164,830	−1
The Leadership Forum		1,000,000	696,973	−30
WISH List	X	864,800	585,197	−32
UFCW Active Ballot Club Education Fund	X	3,156,510	543,550	−83
Total (n = 29)		$98,453,097	$150,517,915	53
Net Total: After Transfers Among Groups		$95,952,004	$131,174,015	37

Table 5.6 First Timers: Federal 527 Organizations Active Only in the 2004 Cycle (>$200,000)

Committee Name	*Associated PAC*	*Contributions*
America Coming Together Nonfederal Account	X	$78,652,163
Joint Victory Campaign 2004	X	71,809,666
Media Fund		59,394,183
Progress For America Voter Fund		44,929,174
Swift Boat Vets and POWs for Truth		17,068,390
MoveOn.org Voter Fund	X	12,517,365
Citizens For A Strong Senate		10,848,730
Voices For Working Families		7,466,056
Club for Growth.net		4,115,037
Democratic Victory 2004	X	3,930,969
The November Fund		3,150,054
The Partnership for America's Families		3,071,211
Grassroots Democrats		2,818,883
Stronger America Now		2,789,817
America Votes, Inc.		2,622,636
Coalition to Defend the American Dream		1,935,844
Music for America		1,667,820
CA Republican National Convention Delegation 2004 Account		1,600,750
Win Back Respect		1,382,227
Americans for Progress & Opportunity		1,306,092
Americans United to Preserve Marriage		1,192,090
Young Democrats of America		1,109,840
Environment2004, Inc.		1,107,080
Environmental Accountability Fund		1,084,807
Americas PAC		1,081,700
Americans for Jobs		1,000,000
Democracy for America Non Federal	X	879,500
Florida Leadership Council		878,500
Revolutionary Women		789,640
Focus South Dakota, Inc.		687,450
Softer Voices		676,100
PunkVoter, Inc.		636,161
Compare Decide Vote		600,000
The Real Economy Group		585,000
National Progress Fund		517,149
Environment2004 Action Fund		507,750
Organizing and Campaign Training Center		501,765
NJDC Victory Fund		484,461
Defenders of Wildlife Action Fund 527 Account	X	471,600
Arts PAC	X	464,753
Communities Voting Together		412,096
Bring Ohio Back		400,681
Click Back America		398,000

(continues)

Table 5.6 Continued

Committee Name	*Associated PAC*	*Contributions*
American Democracy Project		364,500
Clean Water Action Education Fund		343,300
! Si Se Puede ! Boston 2004, Inc.		331,000
Uniting People for Victory		284,000
Concern for Better Government		236,000
Roofers Political Education and Legislative Fund		232,432
Texans for Truth		225,495
National Democratic Ethnic Leadership Council		212,040
Total (n = 51)		$351,771,957
Net Total: After Transfers Among Groups		$273,925,859

Table 5.7 Labor Union Donations to Federal 527s in the 2002 and 2004 Cycles (>$5,000)

Donor	*2002 Contributions*	*2004 Contributions*	*%Δ*
AFGE	$ 25,000	$ 145,000	480
AFL-CIO	5,803,532	6,941,559	20
AFSCME	19,807,709	22,550,324	14
American Federation Of Teachers	71,000	1,815,000	2,456
American Postal Workers Union	100,000	500,000	400
Communications Workers Of America	4,244,242	2,407,038	−43
IBEW	134,500	1,087,750	709
IBPAT	15,000	375,000	2,400
Ironworkers International	21,000	45,000	114
LIUNA	3,741,387	3,070,428	−18
International Association Of Machinists	610,000	105,000	−83
National Education Association	2,477,000	207,500	−92
SEIU	12,085,613	50,636,054	319
SMWIA	2,131,200	1,990,000	−7
United Auto Workers	275,000	1,145,000	316
UFCW	3,203,510	869,050	−73
UNITE	55,000	275,000	400
United Steel Workers	135,000	210,000	56
IAFF	5,000	10,000	100
Total (n = 19)	$54,940,693	$94,384,703	72

Table 5.8 Individuals' $100,000+ Contributions to Federal 527s in the 2002 Cycle and Their Recent National Party Soft Money Donations

Name	Money to 527s	Employer	Party Soft Money 2000 & 2002 DEM	REP
Messinger, Alida	$ 1,088,000	*	$ 730,000	
Kirsch, Steven	1,064,000	Proper Software Corp	3,904,000	
Bing, Stephen	999,089	Shangri-La Entertainment	7,385,000	
Hunting, John/Living Trust	949,000	Self/Retired	25,000	
Harris, Jay	849,000	*		
Hiatt, Arnold	814,000	Stride Rite Foundation		
Searle, Dan	730,000	Kinship Corporation		
Harris, John	716,000	*		
Fonda, Jane	638,100	Self/Seymour 1989 Trust		
Gund, Louise	527,000	Self	1,028,000	
Perry, Bob	480,000	Perry Homes/Self		140,00
Distler, Stephen	470,000	EM Warburg Pincus & Co.		136,60
Stephens, Jackson	368,500	EOE Inc.		25,00
Corzine, Jon	354,500	US Government	2,416,000	
Butteuwieser, Peter	327,500	Peter Buttenwieser & Assoc.	1,252,500	
Wagenfeld, Sandra	306,000	Aviatech Inc.		
O'Connor, Maconda	300,000	Self		
Brooks, Paula J.	299,050	Self/Royal Wolff Ventures		276,50
Crow, Harlan	280,000	Crow Family Holdings		7,50
Paulson, Wendy	278,000	*		
Gilder, Richard	275,000	Gilder Gagnono Howe & Co.		250,00
Cofrin, Gladys	250,000	Self	35,000	
Levine, S. Robert	250,000	Armstrong Investments Corp.		
Williams, John	235,000	Self		
Lecompte, Janet	205,729	Self		
Malcolm, Ellen	200,000	EMILY's List	1,000	
Burnett, Jason	200,000	AEI/Brookings		
Motley, Ronald	200,000	Ness Motley		
Perenchio, Jerry	199,000	Chartwell Partners LLC		1,231,50
Turner, Tab	189,000	Turner & Assoc.	15,000	
Chambers, Merle	185,000	Leith Ventures	489,000	
Hull, Blair	170,000	Hull Group/Retired/Philathropist	25,000	
Cofrin, Mary Ann	165,000	Self	130,000	
Greenwood, Amalia	162,044	Retired		75
Eychaner, Fred	160,000	Newsweb Corp.	8,295,000	
Schwartz, Bernard	158,000	Loral Space & Communications	3,536,300	
Hume, William	154,000	Basic American Inc.		100,00
O'Quinn, John	150,000	O'Quinn & Laminack	2,615,000	
Trumpower, Mike	150,000	Retired		
Palevsky, Max	150,000	*		
Powers, John	145,000	Self		
Reuss, Margaret M.	141,450	*		
Rooney, J. Patrick	132,000	Woodland Group		17,500
Hindery, Leo	130,000	YES Network	1,440,200	
Devos, Richard	120,000	Amway		425,000

Pacey, O. E.	115,966	Retired		
Saban, Haim	115,000	Saban Entertainment/Self	12,655,000	
Guerrera, Domenic	113,882	Retired		1,500
Orr, Susan	109,701	TRAC	145,000	
Cumming, Ian	105,000	Self/Lacadia National Corp.	985,000	
Hoffman, Shepard	105,000	Self/Stanley Mandel & Iola	5,000	
Corzine, Joanne	105,000	Self		3,000
Shaw, Gregory	101,000	Microsoft	92,000	
Manheimer, Virginia	100,300	Self		
Donahoe, Eileen	100,200	Self		
Byrd, Wade	100,000	Self	46,000	
Leeds, Gerald & Lilo	100,000	Institute for Student Achievement	192,000	
Baron, Frederick	100,000	Self	345,000	
Alameel, David	100,000	Aflan Group	100,000	
Eisenberg, Lewis	100,000	Granite Capital Corp.	215,900	
Gilchrist, Berg	100,000	*		
Hyde, Joseph	100,000	*		
Mars, Jacqueline	100,000	*		
Patterson, Cary	100,000	Nix Petterson & Roach LLP	905,500	
Reand, Wayne	100,000	Reaud Morgan & Quinn	605,000	
Sandler, Steven	100,000	Self		

From All Donors (n = 66)		(N = 29)	(N = 13)
Total	$18,485,011	$49,400,500	$2,827,750
Average Donation	$280,076	$1,703,466	$217,519
Median Donation	$163,522	$489,000	$136,600
From Soft Money Donors (n = 42)			
Total	$11,460,266	$52,288,250	
Average Donation	$272,863	$1,243,530	
Median Donation	$161,022	$203,950	

*No entry.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,936 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ David Kolker
David Kolker
Associate General Counsel
Federal Election Commission

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of September 2009, I caused the Federal Election Commission's brief in *SpeechNow.org, et al. v. FEC,* No. 08-5223, to be filed with the Clerk of the Court by the electronic CM/ECF System. I further certify that I also caused the requisite number of paper copies of the brief to be filed with the Clerk.

I also certify that on this date, I caused to be served two paper copies of the Commission's brief by next-day delivery service on the following counsel for the appellants:

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September 23, 2009

/s/ David Kolker
David Kolker
Associate General Counsel
Federal Election Commission