UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S REPLY ARGUMENTS RELATED TO PLAINTIFFS' SECOND MOTION IN LIMINE

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Dated: December 12, 2008

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SPEECHNOW.ORG, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 08-248 (JR) REPLY ARGUMENTS RE SECOND MOTION IN LIMINE

FEDERAL ELECTION COMMISSION'S REPLY ARGUMENTS RELATED TO PLAINTIFFS' SECOND MOTION IN LIMINE

As part of its defense of the longstanding provisions of federal law challenged by the plaintiffs (collectively "SpeechNow"), the Federal Election Commission ("Commission") has relied on the expert report of Clyde Wilcox, a professor of Government at Georgetown University for 21 years and widely-published authority on campaign finance. (*See* Report of Expert Witness Professor Clyde Wilcox ("Rept."), FEC Exh. 1 at 3, 30 *ff.* (summarizing and listing publications).) SpeechNow has moved this Court to strike his report in full. Significantly, SpeechNow does not dispute Professor Wilcox's qualifications. Nor does it allege that his report is not relevant to the issues here. Instead, SpeechNow moves this Court to exclude Professor Wilcox's report by impugning part of his methodology. To do so, SpeechNow repeatedly mischaracterizes — or simply ignores — portions and aspects of his methods, previous scholarly writings, testimony, and report itself. Professor Wilcox gathered evidence through routine methods of social science research, including interviews and a review of the relevant literature, and SpeechNow fails to establish any reason why the Court should not make

findings of fact consistent with each detail of Professor Wilcox's report, let alone establish that his report should be entirely excluded from evidence.

I. PROFESSOR WILCOX'S REPORT PLAINLY COMPORTS WITH THE FEDERAL RULES OF EVIDENCE AND SHOULD NOT BE STRICKEN

A. Professor Wilcox's Preparation of His Report

At his deposition, Professor Wilcox explained at length how he prepared his report. The Commission asked him to answer two major questions (Report at 4; Wilcox Deposition ("Dep.") at 71, FEC Exh. 18):

1. Do unlimited contributions to an association whose major purpose is candidate advocacy and which makes only independent expenditures pose a danger of corruption or the appearance of corruption? Would donors to these groups likely get preferential access to or undue influence over candidates?

2. Is there an important interest in full disclosure of campaign funding that is endangered if there is not full disclosure of all receipts and expenditures of groups whose major purpose is candidate advocacy?

To answer these questions, Professor Wilcox considered a multiplicity of sources of which he had become aware over many years; reviewed the portions of the campaign finance literature he considered most "pertinent"; conducted a few interviews; and asked questions of other scholars. (*See* Dep. at 74-77, 83-86 & Dep. Exhs. 6, 9, 12). As Professor Wilcox explained (Dep. at 74), his task was to consider the two questions posed to him by the Commission, gather evidence, and come to a conclusion. (*See also id.* at 71 ("What I was asked to do here was to address two questions to the best of my scholarly ability. . . . To . . . assess the questions, look around for evidence, make my conclusion, and then write a case from my conclusion."); *id.* at 77 ("[M]y task as I understood it was to think through this particular topic, to come up with an answer, to then write a report . . . with the evidence for this answer."). As would be expected from a "veteran scholar and researcher" (2nd Mot. at 5), Professor Wilcox has read widely. And

although he naturally considered much of the materials with which he is familiar from years as a political scientist and teacher in formulating his conclusions, he only cited sources he found most "relevant" to his conclusions. (*See* Dep. at 78.)

Professor Wilcox's report reveals his thorough methods. He draws upon dozens of sources of varying types to provide expert testimony that is both reliable and relevant. He arrives at his conclusions by gathering and reviewing both systematic and anecdotal empirical data. Professor Wilcox's report and conclusions rely on at least 60 separate sources including, *inter alia*, 9 fact witness declarations; at least 10 newspaper accounts; the results of 3 public opinion polls; the administrative reports of 2 states; statements from his interviews with another 2 expert political scientists and a former Senate majority leader; more than 30 scholarly articles; and statistics regarding contributions to, and expenditures by, various political organizations. (Rept. at 26-30.)

B. Professor Wilcox's Methods Readily Meet the Standards of *Daubert* and Its Progeny

Federal Rule of Evidence 702 governs the admission of expert testimony in Federal Court. It provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts of date, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliable to facts of the case.

Plaintiffs' motion points out a handful of supposed flaws in Professor Wilcox's expert report, and on that basis argues that the entire report should be excluded as unreliable under Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This argument fundamentally misunderstands the law regarding expert testimony. *Daubert* and its progeny

were not intended to lead to exclusion of helpful evidence; rather, they were intended to enhance the flexibility of the court by rejecting the earlier "general acceptance test" for scientific evidence. *See SEC v. Johnson*, 525 F. Supp. 2d 70, 73 (D.D.C. 2007) ("*Daubert* lowered the threshold for admissibility of scientific evidence, envisioning a 'limited gatekeeper role' for trial judges."). In 2000, Rule 702 was amended in response to *Daubert* and its progeny to give the court greater discretion to allow expert testimony.

1. The *Daubert* Standard Gives the Court Flexibility and Discretion

An expert may testify "to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds." *Daubert,* 509 U.S. at 590. In a frequently-cited portion of the opinion, *Daubert* identified four factors to consider in making a determination of the scientific validity of an expert's opinion. *Id.* at 593-94. Those factors were whether the reasoning: (1) can be and has been tested, (2) has been subjected to peer review, (3) has a known or potential rate of error, and (4) has been generally accepted by the scientific community. *Id.* at 593-94. But *Daubert* stressed that "many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Id.* at 593; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150-51 (1999) (the four factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony"); *see also Pineda v. Ford Motor Co.*, 520 F.3d 237, 248 (3d Cir. 2008) (*Daubert* factors are "non-exhaustive" and other factors include "relevant literature [and] evidence of industry practice").

Numerous courts have recognized that, although the general principles of *Daubert* apply to expert testimony outside the hard sciences, the four factors specifically identified in *Daubert* are not particularly useful in evaluating the validity of social science experts such as Professor

Wilcox. *See United States v. Simmons*, 470 F.3d 1115, 1123 (5th Cir. 2006) ("Because there are areas of expertise, such as the social sciences in which the research, theories and opinions cannot have the exactness of hard science methodologies, trial judges are given broad discretion to determine whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case." (internal quotations omitted)); *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297 (8th Cir. 1997) (recognizing methodological limitations in social-science research and holding such expert testimony admissible). In cases where the testimony of an expert is not generally susceptible to controlled testing, "other indicia of reliability are considered under *Daubert*, including professional experience, education, training, and observations." *United States v. Simmons*, 470 F.3d 1115, 1123 (5th Cir. 2006).

2. Professor Wilcox Directed His Own Research, Considered a Variety of Sources, and Drew Upon His Own Significant Expertise

Professor Wilcox considered numerous sources, reviewed relevant campaign literature, conducted interviews, and questioned other scholars — a routine expert methodology. (*See supra* pp. 2-3.) Indeed, an "acceptable social science methodology" can include much less; a recognized expert can simply combine a review of the relevant information with his "knowledge of the professional research and literature in the field." *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191-92 (N.D. Cal. 2004). This review of literature in the field by an expert with knowledge and expertise is "a conventional social science approach that courts have routinely admitted as methodologically reliable." *Bowers v. National Collegiate Athletic Ass'n*, 564 F. Supp. 2d 322 (D.N.J. 2008); *see also Arnold v. Cargill, Inc.*, No. 01-2086, 2006 WL 1716221, at *6-*7 (D. Minn. June 20, 2006); *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d 451, 461-62 (S.D.N.Y. 2004); *Dukes*, 222 F.R.D. at 191-92. Furthermore, when a proffered expert is highly credentialed and prominent in the field, such as Professor Wilcox, the court may treat that as

"circumstantial evidence as to whether the expert employed a scientifically valid methodology or mode of reasoning." *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996).

Plaintiffs argue at length about supposed inadequacies in Professor Wilcox's review. As discussed *supra* in Part I.A., however, Plaintiffs grossly mischaracterize the actual care and consideration that Professor Wilcox devoted to his report. Moreover, even if Professor Wilcox had failed to examine certain sources adequately, those concerns would go to the "weight and credibility of the evidence, to be determined by the trier of fact," but would not be a reason to exclude Professor Wilcox's report entirely. *Bell v. Gonzales*, No. 03-163, 2005 WL 3555490, at *19 (D.D.C. Dec. 23, 2005) (citing *Ambrosini*, 101 F.3d at 141); *see also Morgan Stanley*, 324 F. Supp. 2d at 461-62 ("[The] critiques of [an expert]'s testimony, including that he does not rely on first-hand knowledge or studies, that his opinions are subjective, that a social framework methodology is not accepted, and that he omits inconsistent literature, are factors that should be evaluated and weighed by the trier of fact.")

Plaintiffs have also accused Professor Wilcox of bias in his alleged failure to review certain materials sufficiently. But courts in this district have rejected that argument as a reason to exclude an expert.

> Defendants accuse [the expert witness] of "cherry picking" evidence in favor of one party, rather than reliably applying an accepted methodology to all the evidence presented. In its review of precedent and the Federal Rules, the Court has encountered no authority rigidly requiring that an expert review all relevant information in a case in order to have his or her testimony admitted into evidence. . . . Failing to review all relevant evidence is not a ground for excluding [the expert]'s testimony; rather, it provides subject matter for cross-examination. In short, Defendants' arguments "go to the weight of [the expert's] testimony rather than the admissibility."

SEC v. Johnson, 525 F. Supp. 2d 70, 75-76 (D.D.C. 2007) (quoting *Wechsler v. Hunt Health Sys.*, 381 F. Supp. 2d 135, 144-45. (S.D.N.Y. 2003)) (internal citations omitted); *see also*

Ambrosini, 101 F.3d at 141 (reversing district court's exclusion of experts because "[b]y attempting to evaluate the credibility of opposing experts and the persuasiveness of competing scientific studies, the district court conflated the questions of the admissibility of expert testimony and the weight appropriately to be accorded such testimony by a fact finder.") Professor Wilcox's opinion falls well within the bounds of acceptable expert opinion as explained in *Daubert* and later cases.

Professor Wilcox's review of the relevant literature included some materials provided by the Commission. But as he explained (Dep. at 77), the Commission in no way directed his research: Although the Commission shared certain relevant documents with him, "[T]hey said, 'You're an expert. Go. Figure this out.'" Moreover, the considerable number of sources relied upon by Professor Wilcox belies SpeechNow's allegation (2nd Mot. at 5) that the FEC directed his research. SpeechNow notes (*id*. at 8) that the Commission sent at least 17 sources to Professor Wilcox that appeared in his report. This ignores, however, that almost three-fourths of the sources he relied upon were *not* provided by the Commission. (*See* Rept. at 26-30 (citing approximately 64 separate sources).)[1] SpeechNow makes no attempt to reconcile this fact with its claim (2nd Mot. at 3) that Wilcox "relie[d] wholesale on materials supplied to him by others rather than undertaking independent research . . ."[2]

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[1] In addition, SpeechNow's contention that the Commission simply directed his research is also belied by the fact that the Commission sent Professor Wilcox several sources that he did *not* use. For example, in his report Professor Wilcox did not cite at least five documents attached to a July 11, 2008 email from the Commission to him. (*See* Gall Decl. Exh. B.) The attachments to this email not cited by Professor Wilcox include *Billboard Bonanza Lobbyist Stands to Make Millions if LA Lifts Freeway Ban, Up the River: An Empirical Analysis of the Effectiveness of the Swift Boat Commercials***,** *Fast Start for Soft Money Groups in 2008, Bush Backers Donate Heavily to Veterans Ads*, and *The Birth of An Attack on Kerry*.

[2] SpeechNow's claim that Professor Wilcox did not conduct independent research is also refuted by its admission (2nd Mot. at 6) that he interviewed a former elected official.

SpeechNow's claim that the FEC directed Professor Wilcox's research is also contradicted by portions of his testimony that SpeechNow omits from its motion. SpeechNow alleges (2nd Mot. at 8) that much of the evidence cited by Professor Wilcox was not the product of his own independent research, including, for example, the report of the California Fair Political Practice Commission ("CFPPC") and the results of opinion surveys. Professor Wilcox testified (Dep. at 82-83), however, that he was aware of the existence of the CFPPC report prior to conversations with the Commission, that he was the first to suggest that the experience of individual states would be particularly salient because of existing federal contribution limits, and that he could not remember whether it was he or the Commission that first mentioned the relevance of the CFFPC report. He also explained (*id*.) that he specifically asked for the results of the "Mellman Wirthlin" report from the *McConnell* case analyzing a public opinion survey, so the Commission's sending of that information at his request does not support SpeechNow's claim that the Commission directed his research.[3]

In any event, SpeechNow cites no precedent or rule, and the Commission is aware of none, that suggests that an expert cannot rely on materials provided by counsel. Indeed, it is

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SpeechNow's argument that he should have conducted more interviews is puzzling, given that neither of SpeechNow's experts conducted any such interviews.

[3] As part of its argument that the Commission directed his research, SpeechNow also notes (2nd Mot. at 8) that at the Commission's suggestion, Professor Wilcox did not review facts specific to the plaintiffs. Indeed, the Commission specifically asked Professor Wilcox to answer two questions (*see supra* p. 2), which asked generally about what might ensue if the limits on contributions to organizations that fund independent expenditures are struck down. Such explanation by counsel of the topics on which an expert report is needed hardly constitutes improper direction of a report. The Commission's decision to seek expert testimony on the "abstract question" of the dangers of permitting unlimited contributions to political committees, (Dep. at 78), rather than on the facts specific to the particular plaintiffs here, makes great sense. SpeechNow was created to bring a test case and it has engaged in virtually no activity beyond this lawsuit — *see* FEC's Mem. in Support of Resp. to Pls.' Prop. Findings of Fact at 1-4, Doc. No. 56 — but a victory for it here would likely have huge ramifications on other organizations and the entire campaign finance system.

entirely routine for counsel to supply materials to their experts, which is precisely why the "privilege normally afforded attorney work product gives way to the realities of expert preparation in regard to materials presented to an expert for consideration in forming an opinion to which he will testify at trial." *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1442, 1444 (D. Colo. 1988). Indeed, in some cases "[a]n expert who was not an eye witness to the events about which he will testify *obtains the majority of the material he considers through the attorneys who employ him.*" *Id.* (emphasis added). *See also In re TMI Litigation*, 166 F.R.D. 8, 10 (M.D. Pa. 1996) (expert's testimony admissible even though his knowledge of the TMI accident "was limited to the information provided to him by Plaintiffs' counsel" as long as other evidence from plaintiff substantiates the information provided to expert). While cross-examination may be an appropriate tool for plaintiffs to question Professor Wilcox's methodology — a procedure that plaintiffs have already had an opportunity to use — there is no basis for excluding his testimony. This case does not concern a technical dispute about adjudicative facts, and "[t]his is not a situation in which [the Commission's] counsel supplied the expert with a skewed version of the facts without a footing in the evidence" offered to the Court. *NN&R, Inc. v. One Beacon Ins. Group*, No. 03-5011, 2006 WL 2845703, at *3 (D.N.J. 2006). Finally, plaintiffs "point to no misstatement that [Wilcox] relied on that may have tainted his understanding" of the issues in the case. *Id.* Thus, his "opinion and methodology are sufficiently reliable and relevant to meet the requirements of Fed. R. Evid. 702." *Id.*

The number of sources relied on by Professor Wilcox, almost three-quarters of which he independently located, belies SpeechNow's claim (2nd Mot. at 5) that time pressures caused Professor Wilcox to prepare nothing more than a position paper based on sources provided by the FEC. The claim that Wilcox "simply cobbled together materials" is directly contradicted by

portions of his testimony omitted by SpeechNow. When asked by counsel "Was it a rush job?", Professor Wilcox testified "No, but it was a priority job." (Dep. at 75.) *See also id.* at 78 ("[I]t's not a rush job, but time was a priority."). He also testified that he reviewed a significant amount of material while preparing for his report, but only cited those sources which he found the most relevant.[4] (*See also id*. at 76 ("I didn't list everything I read, but the parts that I ended up finding relevant for this report I do cite . . .").) His considerable efforts are evident in his twenty-six page, single-spaced, well-documented final report.

3. SpeechNow's Other Criticisms of Professor Wilcox Lack Merit

SpeechNow impugns (*see, e.g.*, 2nd Mot. at 3, 6) Professor Wilcox's report with a variety of other specious criticisms. But even a cursory review of the report's purported deficiencies reveals that the errors SpeechNow accuses Professor Wilcox of making are illusory, and that there is no basis in law or fact to strike his report.

First, SpeechNow argues (2nd Mot. at 19) that the report is inadmissible because Professor Wilcox testified that he would not submit it for publication to a political science journal or post it on the internet. SpeechNow ignores, however, Professor Wilcox's explanations at deposition why his expert report was not a good candidate for publication in a journal. Wilcox explained (Dep. at 71, 74, 319) that political science journals typically publish "very short papers that address a narrow issue" of a "controversial nature," with "original research," not "broad, . . . synthetic reviews of the literature." Wilcox believes that his report's conclusions, which involve the well-established threat of corruption or its appearance that would arise from unlimited

[4] Professor Wilcox, for example, reviewed materials provided to him by another scholar and by a graduate student he asked to locate materials. In both instances, Professor Wilcox reviewed the materials, including two conference papers and various papers on the topic of corruption, but found them irrelevant and did not cite them. (*See* Dep. at 83-86, 98-99 & Dep. Exh. 6.)

contributions to groups that fund independent expenditures, are not sufficiently controversial to appeal to publishers of political science journals (*id*. at 319):

> Here I'm just drawing on scholarship and my own expertise to answer specific questions. These questions turned out not to be of deep theoretical interest of the discipline. I think at the end of the day . . . these are not the questions the discipline is primarily concerned about right now, and it would be my guess that most people would get this and then say, yeah, well, so what? We know that.

Professor Wilcox testified that his report could instead be revised so that it would be suitable for a book chapter "because book chapters are typically longer," "have more room for . . . nuance and subtlety and . . . qualitative evidence." (*Id.* at 320.) His reluctance to submit the report for publication to a political science journal thus suggests nothing about the care he took to write it or its capacity to assist the Court. Indeed, after the testimony quoted by SpeechNow (2nd Mot. at 19), Professor Wilcox then went on to say "I think I did a good job. I did my best to answer the questions and put together the evidence that supports it. So, as a scholar, I stand by the report." (Dep. at 71.)

Second, SpeechNow absurdly suggests (2nd Mot. at 6) that Professor Wilcox erred because he did not review the "entire campaign finance literature" when preparing his report. The campaign finance literature is, however, remarkably broad and Professor Wilcox testified that such a review would take six months and would be difficult to achieve in light of new articles that continually come out. (Dep. at 77-78.) Professor Wilcox's testimony was that during the time he was preparing the report he "read a lot of stuff," for both the report and in preparation for his classes (*id.* at 76), that he "reviewed in [his] mind various evidence that [he] had over the years," "reread some articles" and "looked at the literature" (*id.* at 74), and then cited the reports he thought were most "pertinent" (*id*. at 76) and "relevant" (*id.* at 78). Such a process is exactly the sort of review of the literature one would expect from an expert who was

already familiar it. The review of the entire campaign finance literature that SpeechNow contends is required would undoubtedly include a host of topics that fall under the rubric of campaign finance, but are scarcely germane to the issues raised in this case.[5] SpeechNow cites nothing which suggests that an expert must become familiar with an entire literature relating to an entire field of academic or legal inquiry, no matter how far-flung and irrelevant its subtopics might be to the specific issues before the court.

Third, SpeechNow asserts (2nd Mot. at 6) that Professor Wilcox failed to review the "most pertinent academic works." SpeechNow identifies those "most pertinent" works as those relied on by its expert, Professor Jeffrey Milyo. SpeechNow does not, however, explain how those particular works are the most pertinent of the "entire campaign finance literature" and more pertinent than the sources relied upon by Professor Wilcox. (*Id*. at 6-7.) In fact, Professor Milyo cites one source that is completely irrelevant. Robyn Dawes' theoretical work "Social Dilemmas" makes absolutely no mention of contributions, independent expenditures, campaign finance, or elections. Milyo considers Dawes' work relevant insofar as he uses it to support his theoretical claim that collusive behavior is generally less likely to occur when the number of persons involved in a potentially collusive arrangement increases. (*See* Robyn Dawes, *Social Dilemmas,* Ann. Rev. Psychology, Volume 31:169-93 (1980); FEC Exh. 154.) But as the Commission explained (FEC's Response to Plaintiffs' Proposed Findings of Fact [Doc. No. 55] at 56-58), Milyo was unable at deposition to explain how collusive behavior between an

[5] Such topics include, to name just a few, the reporting requirements for candidates and political parties, prohibitions against contributions by foreign nationals or in the name of another, regulations for allocation between federal and nonfederal accounts for state and local political parties, the public financing system and federal matching funds, the use of campaign funds for non-campaign purposes, etc. SpeechNow makes no attempt to explain how all the issues that touch upon campaign finance are relevant to this case, or why Wilcox was obligated to familiarize himself with them.

officeholder and SpeechNow would fit within this system of payoffs described by Dawes. Thus, one of the works Milyo considers "most pertinent" to this case is not relevant at all.

Fourth, SpeechNow falsely claims (2nd Mot. at 16-17) that Professor Wilcox has not supported his conclusion that the "quality and impact of independent expenditures and candidate-focused issue advocacy has increased," or his conclusion that "[m]ost independent expenditures and issue advocacy campaigns are designed by professionals, pretested by professionals, and their impact is studied by professionals in order to create more effective campaign for the next election." Wilcox, however, provides (Rept. at 16) ample support for both conclusions, including an article by scholar David Magleby as well as specific facts evincing the professionalism of recent campaign activities undertaken by organizations like the NRA, the AFL-CIO, America Coming Together, and the National Federation of Independent Business. Similarly, SpeechNow claims that Wilcox does not provide support for his conclusion that "access-seeking donors will be directed to make large contributions to the most effective [independent expenditure] committees." Again, however, Wilcox supports his conclusion with myriad examples of access-seeking donors making indirect contributions to parties, issue advocacy campaigns, and independent expenditure campaigns (Rept. at 6-13). He also supports his conclusion with Robert Hickmott's declaration from *McConnell* in which Hickmott noted that hard money contributors are often asked to help fund independent expenditure campaigns to help the same candidate. Each of Professor Wilcox's claims are supported by the political science literature, historical examples, and other evidence in his report.

Finally, SpeechNow argues (2nd Mot. at 7) that Professor Wilcox fails to consider academic works that cast doubt on the conclusions of studies he cited. SpeechNow, however, identifies only one supposedly suspect study, a 1990 article authored by Thomas Hall and Frank

Wayman. SpeechNow claims that Professor Wilcox was not entitled to rely on this article because others have subsequently criticized its methodology. To make its point, SpeechNow cites only one source, the Rebuttal Report of Professor James Snyder, Jr. from *McConnell v. FEC*, No 02-0582 (D.D.C. 2003). However, the fact that a single source exists that criticizes another academic article is no basis for striking an expert report, and SpeechNow cites nothing which even remotely suggests that it is. *Cf. In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 746 n.15 (3rd Cir. 1994) ("[T]here will be cases in which a party argues that an expert's testimony is unreliable because the conclusions of an expert's study are different from those of other experts. In such cases, there is no basis for holding the expert's testimony inadmissible.").

II. SPEECHNOW REPEATEDLY IGNORES AND MISCHARACTERIZES PORTIONS OF SOURCES CITED BY PROFESSOR WILCOX IN HIS EXPERT REPORT

SpeechNow claims (2nd Mot. at 9) that Professor Wilcox ignored portions of materials upon which he relied that might contradict his conclusions, but SpeechNow mischaracterizes — or itself ignores — portions of those materials and his discussion of them.

A. Michael J. Malbin, *Rethinking the Campaign Finance Agenda*, 6 The Forum, Issue 1, Article 3 (2008) (Gall Decl. Exh. F)

SpeechNow alleges (2nd Mot. at 9-10) that Professor Wilcox overlooks portions of Michael J. Malbin's article, *Rethinking the Campaign Finance Agenda,* to create a false impression that Malbin concluded that unlimited contributions to independent expenditure groups create a risk of corruption. Quoting Malbin, Wilcox writes (Report at 5):

> When large contributions are permitted, policymakers have pressured potential donors to give large sums before their issues are addressed by government. Political scientist Michael Malbin notes that these efforts might be thought of as harassment or 'rent seeking' by politicians, but "whatever the language, the record is replete with fully documented examples from 1972 onward. This is not about appearances. The problem is real, it cannot possibly be rooted out with disclosure, and it is stimulated by unlimited contributions" (Malbin 2008).

Based on this quotation, SpeechNow alleges (2nd Mot. at 10) that Wilcox has misled the reader into assuming that Malbin had concluded that unlimited contributions to groups that fund independent expenditures create a risk of corruption. A fair reader, however, would understand that Malbin was discussing direct contributions to candidates, and that Wilcox was appropriately relying on that discussion. The Malbin quotation appears in the second of three paragraphs of Professor Wilcox's report devoted specifically to a background point, *i.e.*, the dangers of large direct contributions to candidates. (Rept. at 5.) The paragraphs begin: "The danger of large direct contributions to candidates is well established in political science." (*Id.*). A few sentences later, Wilcox turns to discussing unlimited contributions to independent expenditure groups: "Large contributions to groups whose principal purpose is to make independent expenditures has the same potential for corruption as large direct contributions to candidates." Only by ignoring the paragraphs that surround Wilcox's quotation of Malbin can SpeechNow complain that Wilcox has fooled the reader.

Moreover, SpeechNow overstates the extent to which Malbin's observations might differ from Professor Wilcox's conclusions. Malbin contrasts independent spending and contributions, (2nd Mot. at 10), but at that point in his article he is discussing whether *independent spending* should be limited, not whether the size of contributions to groups devoted to independent advocacy should be limited. Gall Decl., Exh. F at 3 (discussing a debate between proponents of "the abolition of contribution limits" and those who "say the Constitution should be amended to let Congress limit spending"). Limiting spending by political committees is, of course, foreclosed by Supreme Court precedent and not at issue in this case. In that context, Malbin points out only that preventing officeholders from seeking funds deals with "quasi-extortion," but he does not say that it solves the problem of "quasi-bribery," noting that "[c]onstraining the

ability to ask does not solve all of the world's problems." *Id.* at 3-4. Thus, Wilcox did not inappropriately rely on the Malbin article.

If anything, Professor Wilcox may have underused the Malbin article in support of his conclusions. There are at least three places in Malbin's article not referenced by Professor Wilcox at which Malbin's conclusions support the conclusions in the expert report:

1. Professor Wilcox notes (Rept. at 21-22) that money is more likely to matter at other stages of the legislative process than roll-call voting. Malbin agrees, citing the Hall and Wayman study for the proposition that "contributions have an agenda-setting effect." Gall Decl., Exh. F at 2.
2. Wilcox describes (Rept. at 9-11) the rise of organizations since 2002 through which large contributors have aided particular candidates and avoided candidate contribution limits. Malbin makes similar points, noting for example: "Since 2002, individual mega-donors have been looking around for their best election vehicles under the new law." Gall Decl., Exh. F at 8.
3. Wilcox states (Report at 6) his research shows that many contributors to candidates "give in part or primarily to protect or promote their business interests." Malbin discusses an ongoing study of the motivations of donors and contrasts the motivations of donors of $500 or more with donors of $100 or less. While both sets of donors "report being motivated by general or universalistic concerns," large donors "far more often say they are motivated to give because of a concern for their *own* business interests." (Gall Decl., Exh. F at 12.)

It is thus clear that Professor Wilcox's reliance on Malbin was sound and offers no support for SpeechNow's motion in limine.

B. Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 Political Research Quarterly 885 (2002) (Gall Decl. Ex. G)

Professor Wilcox says that "[s]cholars have generally concluded independent expenditures do help candidates" and quotes a conclusion from Richard Engstrom and Christopher Kenny's *The Effects of Independent Expenditures in Senate Elections*: "independent expenditures can significantly affect vote choice. . . In general, our results seem to conform to the conventionally accepted account of the 20-year history of independent expenditures in U.S. elections." (Rept. at 13.) SpeechNow claims (2nd Mot. at 11-12) that Professor Wilcox has ignored the portion of Engstrom and Kenny's article that notes that although writers have mentioned independent expenditures as an example of corruption, "it is rare to find independent expenditures figuring prominently in more rigorous examinations of the role money plays in politics." (Gall Decl. Exh. G, at 889.)

These two statements are not inconsistent. Engstrom and Kenny explain the "conventionally accepted account" by pointing to a number of academic articles arguing that independent expenditures affect elections. (*See id.* at 888-90, discussing works by Latus, Sabato, and Sorauf). Engstrom and Kenny characterize their own empirical analysis as "more rigorous" than the other pieces mentioned, and their findings are consistent with the "conventionally accepted account" they describe of independent expenditures affecting vote choice. (*Id.* at 885, 888-90.) Engstrom and Kenny's empirical study, along with earlier theoretical works, are thus consistent with Professor Wilcox's statement that "[s]cholars have generally concluded independent expenditures do help candidates" (Rept. at 13.) In turn, their work supports Professor Wilcox's statement (Rept. at 6) that there is "ample evidence that candidates appreciate independent expenditure campaigns, and would be likely to reward those who fund them."

Moreover, Professor Wilcox draws (Rept. at 18-22) from numerous additional resources in support of his conclusion that candidates appreciate independent expenditure campaigns, including Weissman and Hassan's 2006 study "BCRA and 527 Groups," 6 sworn fact witness declarations from the *McConnell* case litigated in 2002, and various events within the last few years in Wisconsin and West Virginia.

C. Gary C. Jacobson, *The Effects of the AFL-CIO's "Voter Education" Campaigns on the 1996 House Elections*, 61 Journal of Politics 185 (1999) (Gall Decl. Exh. H)

SpeechNow also claims (2nd Mot. at 12-13) that Professor Wilcox selectively quotes from Gary Jacobson's study of the effect of union-sponsored issue advocacy in the 1996 election to exaggerate the effect of independent expenditures on election results. SpeechNow's argument is illogical and meritless. Wilcox writes (Rept. at 13-14):

> Political scientist Gary Jacobson, one of the leading experts on Congressional elections, concludes from his careful statistical analysis of the impact of the AFL-CIO's issue advocacy campaigns in 1996 that "labor can plausibly claim responsibility for defeating a majority of first term [Republican] losers. Thus, money spent outside the regular campaigns on 'voter education' can have a major effect on election results."

SpeechNow notes (2nd Mot. at 12) that Jacobsen also concluded: "money, by itself, does not defeat incumbents. Only in combination with potent issues and high-quality challengers do even the best-financed campaigns have a decent chance of succeeding." SpeechNow also notes (*id.* at 13) that Jacobson concluded that "Labor's 'voter education' drive achieved its goal only when the Democratic candidate conducted a vigorous local campaign, confirming the need for all three conditions — plenty of money, potent issues, and capable challengers — to defeat House incumbents." SpeechNow suggests (2nd Mot. at 12-13) that Professor Wilcox purposely overlooks the latter two conclusions because they somehow cast doubt on the conclusion he did quote. But Professor Jacobson's conclusions do not conflict with each other, and SpeechNow

makes no attempt to explain how they do. Money spent outside regular campaigns can have a major effect on election results, even if by itself that type of spending is not sufficient to defeat incumbents. And even if it is true that "plenty of money, potent issues, and capable challengers" are all necessary conditions to defeat House incumbents, SpeechNow does not explain how this conflicts with the notion that money spent outside regular campaigns can have a major effect on election results. The proposition that money spent outside a regular campaign is neither necessary nor sufficient to produce a dispositive election result does not conflict with the proposition that this type of spending can, in fact, have a major effect.

III. SPEECHNOW REPEATEDLY MISCHARACTERIZES PORTIONS OF PROFESSOR WILCOX'S PREVIOUS SCHOLARLY WORKS

SpeechNow claims (2nd Mot. at 9) that Professor Wilcox ignores portions of his own works that might contradict his expert report's conclusions. A closer look reveals that SpeechNow attempts to manufacture inconsistency between Wilcox's report and his previous works by mischaracterizing those works, or by ignoring portions of his deposition testimony.

A. Clyde Wilcox, et al., *The Financiers of Congressional Elections: Investors, Ideologues and Intimates* (Columbia University Press 2003)

In his expert report, Professor Wilcox explains (Rept. at 6) that many contribute to candidates in order to promote their business interests, as indicated by a survey of congressional donors of $1,000 or less in 1996 that showed that "nearly three in four admit that they give for [those] reasons at least some of the time." SpeechNow argues (2nd Mot. at 13-14) that this quotation "produces the impression that [Wilcox] believes that those seeking access are the largest group of donors." This impression, SpeechNow claims (*id.*), conflicts with the conclusion drawn by Wilcox and his four co-authors in *The Financiers of Congressional Elections* that the "vast majority of donors give for 'ideological' reasons."

There is, however, no conflict between Professor Wilcox's report and his book. That book is the source on which Professor Wilcox relied for the very proposition at issue in his report. (Rept. at 6 & n.1.) Professor Wilcox's report does not produce the impression claimed by SpeechNow, *i.e.*, that the majority of donors seek access *solely* to promote their business interests. Rather, Professor Wilcox merely explains that the majority of donors contributing $1,000 or less in 1997 to congressional candidates admit that they give to promote their *business interests at least some of the time*. People obviously often give to candidates for multiple purposes and Professor Wilcox explained precisely that in his Report, noting that contributors make contributions "for a variety and mixture of motives" and that "many are 'investors' who give in part or primarily to protect or promote their business interests." (Rept. at 6.)

Regardless, the comparison SpeechNow tries to draw is inapposite. In their book, Professor Wilcox and his co-authors write about contributions of $1,000 or less to congressional candidates, and the motivations for those donations, as background. The bulk of Professor Wilcox's report addresses the results likely to ensue if individuals can make large, unlimited contributions to independent groups. He concludes that donors making large contributions are more likely to get access to candidates, not that all donors — including small donors making contributions of $1,000 or less — are likely to get the same access, or are even seeking such access. In any event, there is an appearance of corruption when individuals obtain preferential access from their large, unlimited contributions and advance their business interests, regardless of whether those individuals had additional motivations.

B. Clyde Wilcox, et al., *Interest Groups and Advocacy Organizations After BCRA*, in *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* 112 (Michael Malbin ed., Rowman & Littlefield Publishers 2006) (FEC Exh. 55)

SpeechNow's pattern of mischaracterizing Professor Wilcox's previous scholarly works continues in its discussion of "Interest Groups and Advocacy Organizations After BRCA," a chapter co-written with three other scholars in the book *The Election After Reform.* The article states that "officeholders do not ask for the contributions to 527s, so the potential reward is no longer so direct"; SpeechNow claims (2nd Mot. at 15) that Professor Wilcox's concluded in his report that "individuals who donate to independent groups will gain influence over candidates who are grateful for their support." But this mischaracterization, and SpeechNow's claim that these statements are inconsistent, is based on a straw man of its own creation. Wilcox's *actual* conclusion is not expressed in the absolute terms SpeechNow suggests. Wilcox concludes (Report at 4; emphasis added) that "unlimited contributions to groups that air independent expenditures would *frequently lead* to preferential access for donors . . . ." This conclusion hardly conflicts with the notion that the potential reward to a candidate is less direct than situations where the candidate specifically asks for the contribution. In any event, whether the candidate has specifically asked for a contribution or not, there is a danger of corruption and its appearance.

C. Clyde Wilcox, *Designing Campaign Finance Disclosures in the States: Tracing the Tributaries of Campaign Finance*, 4 Election Law Journal 371 (2005) (Gall Decl. Exh. I)

SpeechNow argues (2nd Mot. at 16) about additional purported inconsistencies by juxtaposing Professor Wilcox's observation that "[t]he dangers of large direct contributions to candidates is well-established in political science," with his past observations that debate persists about corruption and that it is difficult to define and prove. SpeechNow compares apples to

oranges. In his report, Professor Wilcox concludes that there is little debate *among political scientists* about the dangers of large direct contributions to candidates. Conversely, in *Designing Campaign Finance Disclosure in the States*, Wilcox clearly refers (at 373) to an ongoing "societal debate over what constitutes corruption" that has included broad segments of the public "includ[ing] academics, journalists non-profit associations, politicians, and on occasion ordinary citizens . . ." Notably, SpeechNow's quotation from this paragraph of Wilcox's article omits this language, which makes clear that he is referring to a broader public debate, as opposed to the reduced level of debate among political scientists.

During Wilcox's deposition, counsel for SpeechNow inquired into the subject matter of these purported inconsistencies, but SpeechNow now completely ignores Professor Wilcox's detailed response. He explained why political scientists have generally concluded that large contributions pose a risk of corruption even though they have been unable to prove it to a certainty. Professor Wilcox explained (Dep. at 168-70) that the dangers of large direct contributions are well-established because political scientists have been writing about these dangers since at least the early 1930s and that most would agree that "at some point really large contributions create the possibility for corruption." Nonetheless, he explains (*id.*; emphasis added) that because unlimited contributions to federal candidates have been illegal for over thirty years, political scientists have largely been unable to study their effects systematically:

> Q: "The danger of large contributions is well-established in political science." Well-established. Does that mean that there are lots of — there's lots of empirical research or something else?
>
> A: Something else.
>
> Q: And what is that something else?
>
> A: It means that it becomes an understanding that most political scientists have acknowledged in some form or another in their writing. *We don't actually write about this much because large direct contributions to candidates have been banned since 1974*. . . . But at some point or another in most of the research,

> plus most of the writings many, many political scientists have . . . talked about the fact that unlimited contributions can lead to corruption.

Proving corruption from unlimited direct contributions is indeed difficult when those very contributions are illegal.[6] For example, Professor Wilcox noted (Report at 21-22) in his report that a systematic study of the impact of contributions on roll-call votes involved PAC contributions. While the study showed that the PAC contributions had limited impact on roll-call voting by members of Congress, such research involved PAC contributions limited by law, as opposed to unlimited contributions. As Professor Wilcox explains (*id*. at 22), "the weak relationship between PAC contributions and policymaking is precisely what contribution limits in FECA were intended to create."

IV. THE OPINIONS OF PLAINTIFFS' EXPERTS ARE COMPLETELY UNSUPPORTED

Federal Rule of Evidence 702 provides that expert testimony must be based on "sufficient facts or data." As explained above, Professor Wilcox's report relies on actual systematic and anecdotal empirical data drawn from over 60 separate sources, including witness declarations, public opinion polls, personal interviews, newspaper accounts, state administrative reports, scholarly articles and statistics regarding federal and state contributions and expenditures. Nonetheless, SpeechNow repeatedly asserts that Professor Wilcox's report lacks evidentiary support. (*See, e.g.*, 2nd Mot. at 3, 9, 16.)

These accusations are surprising, considering that conclusions drawn by each of SpeechNow's experts, Rodney Smith and Professor Jeffrey Milyo, are completely unsupported.

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[6] *See FEC v. Colorado Republican Fed. Campaign Comm. ("Colorado II")*, 533 U.S. 431, 457 (2001) ("Since there is no recent experience with unlimited coordinated spending, the question is whether experience under the present law confirms a serious threat of abuse from the unlimited coordinated party spending as the Government contends. Cf. *Burson v. Freeman*, 504 U.S. 191, 208 (1992) (opinion of Blackmun, J.) (noting difficulty of mustering evidence to support long-enforced statutes).")

Smith, for example, opines that "(b)ecause the cost of acquiring new donors is often greater than the amount received from a new donor, small groups usually start at a loss and remain there until they go into debt and/or cease to exist." (SN Facts ¶ 82.) Smith's opinion, however, is entirely unsupported. As the Commission explained (FEC's Memorandum in Support of Response to Plaintiffs' Proposed Findings of Fact ("FEC Resp. Mem.") [Doc. No. 56] at 9-10), the two matrices in Smith's report that purport to illustrate the costs of fundraising were invented by him and not intended to actually mirror reality. Neither matrix is based on historical data. Smith also opines that "raising money via the Internet" is "out of reach for the vast majority of non-wealthy candidates and start-up organizations." (SN Facts ¶ 81.) Smith's report does not, however, include any specific fundraising cost ratios, or any other data which contradicts the common understanding that fundraising is now cheaper than it has ever been due primarily to the effects of the Internet on fundraising costs.[7] (*See* FEC Resp. Mem. at 12-13.)

Similarly, Professor Milyo opines about the significance of large contributions as seed funding and a signaling tool without evidentiary support. (*See* SN Facts ¶¶ 79, 90; Milyo Decl. ¶¶ 54, 93.) As explained by the Commission (FEC Resp. Mem. at 18), Milyo's assertions are pure conjecture: he relies exclusively on contributions to 527s in 2003 and 2004, he conducted no interviews with operators of political groups or their donors, he omits discussing or citing any scholarly articles or studies on the subject of large contributions as a signaling tool, and he fails to consider the various circumstances that might affect whether a political organization in any particular election cycle successfully raises funds. Seen in this light, if Professor Wilcox's report

[7] As the Commission explains (FEC Resp. Mem. at 12-13), Rodney Smith's report not only lacks evidentiary support regarding the effect of the Internet on political fundraising, but he is also not qualified to speak as an expert on the subject. His last foray into Internet political fundraising was with the National Republican Senatorial Committee more than ten years ago, and he admits that he "would not purport to be an expert in internet fundraising." (*See* Smith Dep. at 19, 24, FEC Exh. 15.)

— based on actual systematic and anecdotal empirical data — were to be found inadmissible, then so must the plaintiffs' expert reports.

V. PROFESSOR WILCOX'S EXPERT REPORT IS ADMISSIBLE AS EVIDENTIARY SUPPORT FOR THE FEC'S PROPOSED FINDINGS OF FACT

Plaintiffs also ask (at 2-3) the Court to exclude Professor Wilcox's report because it does not meet the requirements of Rule 56(e), but the parties have not filed summary judgment motions and Professor Wilcox has, in any event, verified his report in sworn deposition testimony. Rule 26(a)(2)(B) requires only that expert reports be "signed by the witness," Fed. R. Civ. P. 26(a)(2)(B), as Professor Wilcox did on the cover (*see* Rept.).

Even if the Court were to consider each of the technical requirements of Rule 56 as applicable to the fact-finding in this case, Professor Wilcox's expert report is admissible for summary judgment purposes because he identified and endorsed it in deposition testimony, and he has subsequently affirmed the report's contents in a sworn declaration. Where an expert has verified or reaffirmed his or her report in deposition testimony, the unsworn report may be considered at summary judgment. *See Maytag Corp. v. Electrolux Home Prods., Inc.*, 448 F. Supp. 2d 1034, 1064 (N.D. Iowa 2006); *Medtronic Xomed, Inc. v. Gyrus ENT LLC*, 440 F. Supp. 2d 1300, 1310 n.6 (M.D. Fla. 2006). Alternatively, a party may cure the deficiency of an unsworn expert report by filing a subsequent declaration or affidavit by the expert verifying the report's contents. *E.g.*, *Straus v. DVC Worldwide, Inc.*, 484 F. Supp. 2d 620, 634 (S.D. Tex. 2007); *Brenord v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 133 F. Supp. 2d 179, 183 n.1 (E.D.N.Y. 2001); *Microbix Biosystems, Inc. v. Biowhittaker, Inc.*, 172 F. Supp. 2d 665, 675 n.20 (D. Md. 2000).

In this case, plaintiffs deposed Professor Wilcox, and during that deposition his report was marked as an exhibit and he identified the report and stated that he stood by the report.

(Dep. at 68-69, 73). To remove any doubt, Professor Wilcox has also verified the contents of his report in a sworn declaration. Wilcox Decl., FEC Exh. 166. Plaintiffs had a full opportunity to address the basis of Professor Wilcox's report during his deposition, and the authenticity of the report has been confirmed. There is thus no basis for exclusion of Professor Wilcox's report under Rule 56 or for the factual record being developed pursuant to 2 U.S.C. § 437h.

CONCLUSION

For the foregoing reasons, Professor Wilcox's report should be admitted as an expert report and relied upon by the Court.

Respectfully submitted,

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Dated: December 12, 2008