RECORD NO. 08-5223

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG; DAVID KEATING; FRED M. YOUNG, JR; EDWARD H. CRANE III; BRAD RUSSO; SCOTT BURKHARDT,

Plaintiffs – Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE

Buckeye Institute's 1851 Center for Constitutional Law, Concerned Women for America Legislative Action Committee, FRC Action, Goldwater Institute's Scharf-Norton Center for Constitutional Litigation

Supporting Appellants

***Heidi K. Abegg**
Alan P. Dye
Webster Chamberlain & Bean
1747 Pennsylvania Avenue, NW
Suite 1000
Washington, D.C. 20006
(202) 785-9500

Counsel for Amici Curiae

Dated: August 31, 2009

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

All parties appearing in this Court are listed in the Brief for Appellants SpeechNow.org, David Keating, Fred M. Young, Jr., Edward H. Crane, III, Brad Russo, and Scott Burkhard, as are references to the rulings and related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, a*micus curiae* The Buckeye Institute's 1851 Center for Constitutional Law states that it is a non-profit corporation, it has no parent corporation, and is not a publicly held corporation that issues stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, a*micus curiae* The Concerned Women for America Legislative Action Committee states that it is a non-profit corporation exempt from taxation under § 501(c)(4) of the Internal Revenue Code, it has no parent corporation, and is not a publicly held corporation that issues stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, a*micus curiae* FRC Action states that it is a non-profit corporation exempt from taxation under § 501(c)(4) of the Internal

Revenue Code, it has no parent corporation, and is not a publicly held corporation that issues stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, a*micus curiae* The Goldwater Institute Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation under § 501(c)(3) of the Internal Revenue Code, which has no parent corporation, and is not a publicly held corporation that issues stock.

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STATUTES AND REGULATIONS

All applicable statutes are contained in the Addendum for the Brief for Appellants SpeechNow.org, except for the following, which is contained in an Addendum attached to this Brief:

26 U.S.C. § 527

GLOSSARY

BCRA	Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.).
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
PAC	Political Action Committee, a political committee as defined by 2 U.S.C. § 431(4)(A).

INTEREST OF *AMICI CURIAE*

The parties have consented to the filing of this brief. *Amici curiae* submit a motion for leave to file this Brief out of time.

Amici curiae believe strongly in the rights of political expression and association by citizens and citizen groups as guaranteed by the First Amendment. Through educational activities, *amici curiae* promote respect for the rights of freedom of speech and of association. *Amici curiae* have defended First Amendment rights in state and federal courts. *Amici curiae* thus have a strong interest in whether citizens may associate and speak freely about the political process and believe that this case is an important opportunity for the Court to bolster the First Amendment and the opportunity of all Americans to protect their individual rights through free speech and association.

The Buckeye Institute for Public Policy Solutions is non-profit research and educational organization formed to support public policies that advance liberty, individual rights, limited government, and a strong economy in Ohio. The Buckeye Institute's 1851 Center for Constitutional Law is dedicated to protecting Ohioans' control over their lives, their families, their property, and ultimately, their destinies. More pointedly, the 1851 Center has an interest in protecting Ohioans' rights (1) to freely engage

in political speech that best effectuates their policy preferences, (2) to freely associate with their fellow citizens to advocate political change; and (3) to be treated equally to their wealthier counterparts when engaging in the political process.

The Concerned Women for America Legislative Action Committee (CWALAC), a non-profit § 501(c)(4) corporation, is the legislative and advocacy arm of Concerned Women for America. CWALAC is committed to reversing the decline in moral values in our nation and encourages its members to speak out on public issues and hold their elected officials accountable.

FRC Action, the non-profit § 501(c)(4) legislative action arm of the Family Research Council, was founded in 1992 to educate the general public and cultural leaders about traditional American values and to promote the philosophy of the Founding Fathers concerning the nature of ordered liberty. FRC Action is dedicated to preserving and advancing the interests of family, faith and freedom in the political arena.

The Goldwater Institute Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, which is a tax exempt educational foundation. The Goldwater Institute advances public policies that further the principles of limited government, economic freedom and

individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the features of our state and federal constitutions that directly and structurally protect individual rights, including the bill of rights. The Goldwater Institute regards the complexity of campaign finance laws and speech regulations as effectively ringing walls around the political establishment, protecting incumbents and sophisticated political organizations from meddling by mere ordinary citizens and their grassroots efforts.

SUMMARY OF ARGUMENT

The 35 years since the Supreme Court first held that pure speech, in the form of independent expenditures, could not be limited because it posed no danger of corruption, have shown that these expenditures continue to present no such danger. Moreover, contributions to fund such pure speech interfere with speech and associational rights and also pose no danger of corruption. Because independent expenditures do not cause corruption, and a corruption standard of "gratitude" or "access" is not only an insufficient basis upon which to sustain an infringement of core associational and speech rights, it cannot exist here because SpeechNow.org's tax status removes "gratitude" or "access" from the corruption equation, the time has come to

visit whether limits to independent expenditure groups are consistent with the First Amendment.

ARGUMENT

This case involves an unincorporated non-profit association, SpeechNow.org, organized under § 527 of the Internal Revenue Code, whose only activity will be to make independent expenditures. J.A. 83-85. SpeechNow.org will accept donations only from individuals and cannot accept corporate donations. J.A. 79, 84. SpeechNow.org is also required by its bylaws to operate wholly independently of any political candidate, committee or party. J.A. 84-85. As such, SpeechNow.org is a completely different creature than the well-known § 527 organizations which operated in the 2004 election cycle. The only characteristic SpeechNow.org shares with the § 527 organizations discussed at length in the district court opinion, see J.A. 379-382, is the section of the tax code under which they are exempt from income tax.

I. The Past 35 Years Provides Four Key Observations That Must Inform An Analysis In This Case.

Thirty-five years ago, the *Buckley* Court held that independent expenditures could not be limited because as pure, independent speech, they posed no danger of corruption. *Buckley v. Valeo*, 424 U.S. 1, 46-67 (1976). Four observations must inform any analysis of the constitutionally of the

contribution limits at issue in this case. First, the district court is correct in that the general regulatory framework for political committees and the limits imposed on them has not changed much since the limits were enacted. J.A. 377-378. Since its passage in 1974, the $5,000 limit on contributions to political committees has not been increased. *See* 2 U.S.C. §§ 441a(a)(1)(C) and 441a(a)(3)(B). This limit applies to *all* political committees; it does not differentiate between committees that make contributions to candidates (which might be susceptible to the corrupting influence of a large contribution), and committees that are formed solely to make independent expenditures without any coordination with a candidate.

Second, in the past 35 years, the Court has continually slammed the door on the notion that independent expenditures cause corruption or its appearance. Ironically, the Government's case that independent expenditures are corrupting has become even harder to make since the passage of the Bipartisan Campaign Finance Reform Act (BCRA), designed to stop the money flow through "holes" in the dam.

Third, each time the Supreme Court, most recently in *McConnell v. FEC*, 540 U.S. 93 (2003), revisited *Buckley's* conclusion about the lack of corruption surrounding independent expenditures, it reaffirmed the continuing truth of this observation. *See McConnell* at 221-22 (reaffirming

Buckley's holding that limits on independent expenditures fail to serve any substantial government interest); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614-19 (1996)(same); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)(same).

Fourth, the ever-increasing restrictions on political participation have forced citizens desiring to participate in the political process to seek out other avenues of involvement. The issue in this case – limits on contributions to organizations making only independent expenditures – has lain dormant for 35 years but has renewed importance in light of the increasing restrictions on political speech. The critical right of association, which has become the neglected step-child in First Amendment campaign finance jurisprudence, cries out again for attention in this case. Campaign finance "reformers" have long been fighting political organization, in the forms of corporations, parties, PACs, and non-profits, and through them, their fundamental right of association. Most recently, the fight has turned to § 527 groups that raise money without federal limits (so called "soft money"). The reformers see only "organized money." But what they ignore is that associations of citizens "can help people find and sort through their shifting and conflicting policy preferences, and, by organizing, can help give power to people who are not economically powerful on their own." Mark

Schmitt, *Mismatching Funds*, Democracy: A Journal of Ideas, Spring 2007, ¶ 23 (last visited August 31, 2009) <http:www.newamerica.net/publications/articles/2007/mismatching_funds_5013>.

It is a short step from fighting money organized by citizens to fighting political organizations of citizens themselves. *Id.* at ¶23. This case clearly demonstrates that we have made that step and are fighting about political organization, or the fundamental right of political association itself. Thus, this case is not about "shadow" § 527 organizations with alleged ties to candidates raising unlimited money during the 2004 election cycle. Rather, this case involves citizens desiring to come together – to "associate" under the First Amendment – in order to speak out on political issues.

II. Contribution Limits To Independent Expenditure Groups Restrict Both The Freedom Of Speech And The Freedom Of Association, Both Of Which Are Essential To The Proper Functioning Of Our Democracy.

"The pivotal importance of First Amendment freedoms to the proper functioning of a republican form of government has long been recognized . . . [These] freedoms are designed to insure the proper functioning of the democratic process and to protect the rights of individuals and minorities within that process." *West Virginians For Life v. Smith*, 919 F. Supp. 954, 958 (S.D.W.Va. 1996). The two First Amendment freedoms at issue in the

case are the right of citizens to speak and the right to associate for political purposes. *See Buckley*, 424 U.S. at 15 (finding both speech and associational freedoms implicated by contribution limits).

The protection of political speech is a necessary prerequisite for limited representative government. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 398 n.17 (D.C. Cir. 1981). Thus, in a nation which has a limited, representative form of government, "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Buckley*, 424 U.S. at 16. A "major purpose of th[e First] Amendment was to protect the free discussion of governmental affairs. . . including discussions of candidates," *id.* at 15, including such expression in the form of independent expenditures. *Id.* at 51.

Contribution limits adversely affect our system of representative government by restricting the resources available for political dialogue. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981)("The contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue. . . ."). Contribution limits also threaten the right to freedom of association.

The "First Amendment protects political association as well as political expression." *Buckley*, 424 U.S. at 15. As a result, citizens have the "freedom to associate with others for the common advancement of political beliefs and ideas." *Id.* The rationale for protecting political association is that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* (*quoting NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *see also North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 295 (4th Cir. 2008)(Associating "allow[s] ordinary citizens to receive the benefits that result from economies of scale in trying to convince the electorate of a political message."). Contribution limits to groups making only independent expenditures thus restrict not only the ability to speak out about political issues, but also the ability to "associate with others for the common advancement of political beliefs and ideas. . . ." *Buckley*, 424 U.S. at 15 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)). Thus, both the speech and association aspects of the contribution limit at issue in this case need to be examined.

III. Independent Expenditures Are Both Direct Speech And Associational Speech And Therefore, Contribution Limits To Independent Expenditure Groups Must Survive Strict Scrutiny.

Buckley noted that its "decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom,' *Kusper v. Pontikes*, 414 U.S. at 57, that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'" *Buckley*, 424 U.S. at 25 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)(parallel citations omitted)).

"[T]he primary First Amendment problem raised by . . . contribution limitations is their restriction of one aspect of the contributor's freedom of political association." *Buckley*, 424 U.S. at 24. In *NCPAC*, the Court rejected the government's argument that contribution limits to PACs should be afforded lesser scrutiny because "speech by proxy," rather than direct speech, was involved. *NCPAC*, 470 U.S. at 495. It is the *direct* infringement on contributors' First Amendment rights of political association that distinguishes the association burden from the arguably indirect burden on speech rights. James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 2 Regent Univ. L. Rev. 235, 241 n.35 (1998-99). This is because while contribution limits may arguably involve "speech by proxy," there is no "association by proxy." *Id.* Therefore, the restriction

on the freedom of political association through contribution limits to independent expenditure groups, like all restrictions on political speech, requires strict scrutiny. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)(*WRTL II*).

A. Infringing The Right Of Association In This Case Does Not Further The Government's Interest In Preventing Corruption Under The *NCPAC* Standard Or The District Court's Expanded Corruption Standard.

Since "[t]here can be no doubt that the expenditures in this case" involve political speech and associational rights "at the core of the First Amendment," the Government is required to demonstrate a sufficiently compelling interest to limit the contributions at issue in this case. *NCPAC*, 470 U.S. at 493. The corruption standard applied here will determine whether the step-child right of political association remains neglected or is embraced.

This court ought not to expand the reformers' efforts to have a shifting, ever-increasing "prophylaxis-upon-prophylaxis" approach to regulating citizens' core First Amendment rights. The "Supreme Court has long recognized 'the governmental interest in preventing corruption and the appearance of corruption' in election campaigns," and it has invoked this interest as a reason for upholding contribution limits. *WRTL II*, 551 U.S. at 452 (quoting *Buckley*, 424 U.S. at 26-27, 45). The Court has been reluctant

to broaden the Government's interest to include other prophylaxis rationales when contributions to candidates are not involved. *Id.* (finding "the corruption interest cannot justify regulating" ads that are not the functional equivalent of express advocacy).

The expanded view of corruption upon which the Supreme Court in several post-*Buckley* cases and in *McConnell* uses to justify restrictions on speech should not apply here for several reasons. First, since none of these cases involved limits on independent expenditures, *NCPAC* still applies. Second, whether to change the corruption prevention rationale that has been applied to independent expenditure speech is for the Supreme Court, not the district court, to decide. Third, given that the Supreme Court has pulled back efforts to impose a broad corruption prevention rationale in *WRTL II*, and its pronouncement that "enough is enough," 551 U.S. at 478-79, it is unlikely that the Supreme Court would broaden the *NCPAC* standard to include "gratitude," "access," or "an appearance of corruption" for contributions to groups that make their expenditures independently of any candidate or party involvement.

1. There is no evidence in this case, nor in the past 35 years, of corruption under the *NCPAC* standard resulting from independent expenditures.

Like the *Buckley* Court, the Court in *NCPAC* also found that independent expenditures by political committees did not raise the specter of corruption or its appearance, explaining that

> [c]orruption is the subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo*: dollars for political favors. But here the conduct proscribed is not contributions to the candidate, but independent expenditures in support of the candidate . . .
>
> [P]recisely what the "corruption" may consist of we are never told with assurance. The fact that candidates and elected officials may alter or reaffirm their own positions on issues can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

NCPAC, 470 U.S. at 497-98. *NCPAC* recognized that PACs are not corrupting simply because they are *groups of citizens* desiring to pool their resources in the political process; in other words, the structure of PACs does not, *ipso facto*, make them corrupting. *Id.* at 497. The Court held that the fact that PACs might be able to make *greater* independent expenditures due to the collective efforts of their members did not alter the calculus: because independent expenditures were made without the knowledge of candidates, there was no danger of a *quid pro quo* between a PAC and an (unknowing)

candidate, regardless of the amount of the expenditure. *Id.* at 497-98. Because there was no danger of corruption, the statute did not advance any compelling interest and was found unconstitutional. *Id.* at 500-501.

Similarly, limits on contributions to groups like SpeechNow.org (which make no contributions to candidates) do not further an interest in preventing corruption or its appearance. This is due in part because of the very definition of an independent expenditure. By law, an independent expenditure cannot be coordinated with a candidate. It follows, therefore, that there is little danger that a *quid pro quo* will occur from an expenditure that is made independently of a candidate because without coordination, there is no ability to cut a *quid pro quo* deal.

Furthermore, a lack of coordination results not just in a truly "independent" expenditure; in some cases it can lead to a counterproductive expenditure. The independent expenditure might not be "on message," or it might attack the opposing candidate.[1] Ideological groups, more than the

[1] "I think all of us have been faced with a situation where we turn on the television or somebody brings our attention to an ad, running supposedly in our favor, supporting us, and saying, well, wait a minute, that is not the message I am trying to convey, that is not what we have chosen to be the themes of the campaign. An outside group has decided that is what the themes of the campaign ought to be." *Hearing on Campaign Contribution Limits*, Committee on Rules and Administration (106th Cong. 9)(March 24, 1999)(testimony of former Senator Dan Coats).

candidates or parties themselves, are more likely to "go negative."[2] This third party independent expenditure may cause the public to view the candidate as a mudslinger or negative campaigner, a label which is especially troubling to a candidate trying to run a "positive campaign." Finally, because ideological groups are concerned about particular issues, they may have no qualms about highlighting a vote or position that the candidate has decided might cause slippage in the polls were he to mention it. For example, a group might want to highlight a candidate's pro-free speech vote on flag burning when the candidate has decided to downplay this vote because it might harm his reelection chances. A group running any one of these types of ads probably won't curry favor or access from the favored candidate, but instead may become persona non grata. *Buckley* put it best:

> [S]uch independent expenditures [unlike contributions] may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate. . . not only undermines the value of the expenditure to the candidate, but also

[2] Negative ads are widely viewed by consultants as effective, but carry with them the potential to become controversial in their own right. Robert F. Bauer, *A Report From the Field: Campaign Professionals on the First Election Cycle Under the Bipartisan Campaign Reform Act*, 5 Election Law Journal 105, 111 (2006). For this reason, when political parties cannot be certain of staying on their candidate's message, they attempt first to "do no harm" by avoiding negative campaigning. *Id.* Ideological groups are under no such constraint.

> alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

424 U.S. at 47.

Given the difficulties of proving actual corruption exists in this case, the fallback argument is usually that the limits may be upheld based on the appearance of corruption. This too is an insufficient basis upon which to infringe upon the important right of association in this case. *See United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 475 (1995)(*NTEU)*(quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)(Kennedy, J., plurality opinion)(internal quotations omitted) ("When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."); *cf. Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1010 n.8 (9th Cir. 2003)(finding newspaper articles lamenting the level of negative campaigning to be insufficient proof of the appearance of corruption); *Kruse v. City of Cincinnati*, 142 F.3d 907, 911, 918 (6th Cir. 1998)(striking down expenditure limit despite existence of poll).

Appearances can be deceiving; in this case, they bear no relation to the rights at issue. Trends in public perception of corruption have been shown to have little to do with the campaign finance system. The percentage of the population describing government as corrupt decreased even as soft money contributions skyrocketed. Nathaniel Persily and Kelli Lammie, *Symposium: The Law of Democracy: Campaign Finance After McCain-Feingold: Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. Pa. L. Rev. 119, 148-49 (2004). Furthermore, data suggest that an individual's perception of corruption derives to some extent from that citizen's (1) position in society (race, income, education level); (2) opinion of the incumbent President and performance of the economy; (3) attitudes concerning taxation and "big government"; and (4) the propensity to trust other people, in general. *Id.* at 174. These data support past extensive economic, public policy, and social science literature which unmistakably show that legislative voting is driven by personal ideology, constituent desires, and party loyalty not by *quid pro quo* corruption. *See* Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 679 (1997); Bradley Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L. J. 45, 58-59 (1997).

Given *Buckley's* observations about how the nature of independent expenditures did not implicate *quid pro quo* corruption or its appearance, it is not surprising that after nearly 35 years, there is still no more than speculation about corruption that may result from independent expenditures. *See, e.g., Leake*, 525 F.3d at 294 ("Since the Supreme Court's views on the dangers of independent expenditures have not changed, North Carolina's evidence is still insufficient."); *Arkansas Right to Life PAC v. Butler*, 29 F. Supp.2d 540, 546 (W.D. Ark. 1998)("We are hard pressed to find any such 'demonstrable' evidence in the record before us that large contributions to independent expenditure committees has attributed to actual or perceived corruption in Arkansas' political process."). This is not enough. *NTEU*, 513 U.S. at 475 (refusing to defer to the government's speculation, insisting that burdens on nonpolitical expression require "a justification far stronger than mere speculation about serious harms.").

Also, not surprisingly, the district court opinion cites no evidence of corruption involving independent expenditures, nor does it cite any corruption resulting from "access" to officeholders, assuming that this is an acceptable rationale for infringing on citizens' core First Amendment rights. Rather, the lower court simply lumps SpeechNow.org in with other § 527 organizations, with alleged "close ties" to candidates and parties to try to

show that it poses a danger of corruption. Demonstrating that large amounts of spent money could lead to "gratitude" is not enough. *Leake*, 525 F.3d at 294-295 (finding that the fact that money spent was successful "can hardly be termed corruptive" nor can robust advocacy alone be "sufficient to demonstrate corruption."). And as will be shown, the legal requirements imposed on SpeechNow.org to maintain its tax status is in fact evidence that its political expenditures are not corrupting.

2. The facts of this case show that there is no danger of corruption from SpeechNow.org participating in the political process.

SpeechNow.org's tax status removes any danger of corruption through "access." To qualify under § 527, an organization must be both organized and operated primarily for an exempt political function under § 527(e)(1).[3] Organizations like SpeechNow.org generally have no need for access to officeholders because lobbying is not an exempt function under § 527. Thus, a § 527 organization that lobbies substantially can fail to qualify as a § 527 political organization, and a PAC that lobbies to any extent can have taxable income. Therefore, an organization like SpeechNow.org has no

[3] Section 527(e)(2) defines the term "exempt function" to mean the function of influencing or attempting to influence the selection, nomination, election or appointment of any individual to any public office or office in a political organization.

need for, and is, in fact, legally deterred from obtaining "access" to obtain legislative goals.

Furthermore, there is evidence that ideological PACs that make both contributions and independent expenditures "rarely give money to members of Congress for the sake of securing access to the legislative process." Paul S. Herrnson, CONGRESSIONAL ELECTIONS, CAMPAIGNING AT HOME AND IN WASHINGTON 109-110 (1995). Thus, "[t]here is . . . less of a danger of *quid pro quo* corruption, such as the sort one might presume from large contributions given directly to candidates, when a contribution is given to a PAC that does not itself wield legislative power." *Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998); *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994).

Furthermore, since *Buckley's* observation that independent expenditures do not corrupt, the political landscape has changed, making it even less likely that corruption from independent expenditures can result. There are two main reasons for this.

First, the politics of today is qualitatively different from past election cycles, largely because of changes in the regulation of money in politics. Schmitt, *Mismatching Funds*, Democracy: A Journal of Ideas, Spring 2007, ¶19. Due in part to BCRA, which put parties and candidates out of the

business of raising soft money, "much more money moves through channels that are not controlled by or coordinated with candidates or parties, for example, which means – in theory – that it is less corrupting than money raised directly by elected officials." *Id.* Additionally, this money tends to be more ideologically driven rather than driven by access. *Id.* While this change makes a big difference in the tone of the debate – more "negative" ads – it also has a salutary impact – less potential for corruption because "ideologues are less likely to be angling for pure influence." *Id.*

"Outside groups" are less "shadow organizations" and more competitors of political parties because the leadership of these outside groups is wary of party and other "traditional" political outlooks. Bauer, *A Report From the Field*, 5 Election Law Journal at 106-107. In recent years, there has been a "sea-change in the relationship of large donors to political organizations." *Id.* at 112. The change in the donors' expectations has been described as "profound." *Id.* An increasing number of donors are ideological and give to like-minded groups because they want to control their message and elect people who share their views, not to gain access. *See id.* at 107. These donors are increasingly ideological, and their involvement is driven by political viewpoints, not by self-interest. *Id.* Donors want the ability to shape their message, even if it means going

against traditional political strategy. *See id.* These donors do not want to compromise their ideological politics. *Id.* at 115. It is less likely, then that these expenditures could be corrupting since their message is more important to the donors than gaining access or favor of candidates.

This sea-change also buttresses the *Buckley* Court's acknowledgment about "the importance of freedom of association," 424 U.S. at 295, because the making of a contribution "is beyond question a very significant form of political expression" and political association. *Citizens Against Rent Control*, 454 U.S. at 299. The new breed of donors is not content to make a contribution; the new donor associates in order to control his own speech.

3. Even under the district court's expanded corruption rationale, gratitude and access arising out of independent expenditures do not constitute corruption.

From the district court's opinion, it is apparent that the definition of corruption goes way beyond that applied in *NCPAC* and includes any "undue influence on an officeholder's judgment." J.A. 389. Under the district court's theory, even though an independent expenditure is legally "independent" and thus not a coordinated expenditure (which would result in an in-kind contribution to the candidate), the candidate-as-officeholder might be so grateful for the independent expenditure that his judgment is "unduly influenced." Such a broad view of corruption as applied to

independent expenditures is not only unsupported by Supreme Court precedent, it proves too much.

The Framers already thought of "gratitude" and undue influence. A *Federalist* paper dealt with the charge that Members of Congress would "be most likely to aim at the ambitious sacrifice of the many to the aggrandizement of the few." *The Federalist No. 57* (Alexander Hamilton or James Madison). But the author specifically listed "gratitude," or a sense of honor or appreciation to the public for his election, as one of the reasons this would *not* happen. "[W]hat is to restrain the House of Representatives from making legal discriminations in favor of themselves and a particular class of the society? . . . Duty, *gratitude*, interest, ambition itself, are the chords by which they will be bound to fidelity and sympathy with the great mass of the people." *Id.* (emphasis added).

The Framers saw gratitude as beneficial, stating that those "who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it," *id.*, with a confidence in "the vigilant. . . spirit which actuates the people of America" and the belief that legislators who would remain in office will be those who are grateful to the "great mass

of the people" who put them in office. *Id.* The checks and balances are already built into "the genius of the whole system." *Id.*[4]

Gratitude can be created in many ways. If "gratitude" creates the appearance of corruption, then surely the Congressional practice of vote swapping must be outlawed. An officeholder could feel gratitude towards members of the media for favorable coverage, towards celebrities for invitations to appear on talk shows and in comedy skits. It is easy to see how encompassing and unconstitutionally broad a "corruption through gratitude" standard can be. *See Leake*, 525 F.3d at 295 ("Of course, candidates may be influenced by the impact that such independent expenditures have on the electorate – but this is the entire purpose of allowing free political discourse.").

The district court also found access and the sale of access are forms of corruption which are addressed by the contribution limits to independent expenditure political groups. J.A. 389. This standard is problematic because it ignores the fact that seeking to influence policy is what the freedom of speech and of association is all about. Without access, we cannot make our wishes known, hold officeholders accountable, and ask the government for

[4] Otherwise, "[i]f it were reasonable to presume corruption from the fact that a public official voted in a way that pleased his contributors, legislators could constitutionally ban all contributions except those from the public official's opponents, a patent absurdity." *Russell*, 146 F.3d at 569.

help. "Access" to officeholders, therefore, is itself a right protected by the First Amendment.

Nor can it be presumed that corruption exists if people who support or oppose a candidate get "access" to the official or his opponent. *See FEC v. Colorado Republican Campaign Committee*, 41 F. Supp.2d 1197, 1209 (D. Colo. 1999)(*"Buckley* . . . recognized that money, in many cases, may grant access to a candidate. It did not, however, conclude that such access is akin to corruption or the appearance of corruption."). If that were true, then lobbying would be corrupting unless officials provided equal time for all views.[5]

Citizens get access for many reasons besides making contributions or independent expenditures. Celebrities from entertainment and sports, as well as editorial boards of prominent news organizations, get special access to elected officials. Special access can also be gained through other avenues: friendships, kinship, and social status. Some individuals gain

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[5] Citizens and groups seeking "access" to officeholders spend more on lobbying than on independent expenditures. For 2008, the total spent on federal lobbying was $3.3 billion, Center for Responsive Politics, *Influence & Lobbying* (visited August 20, 2009) <www.opensecrets.org/lobby/index.php>, while PACs spent only $135.2 million on independent expenditures in the 2008 election cycle. Federal Election Commission, *Growth in PAC Financial Activity Slows* (visited August 20, 2009) <www.fec.gov/press/press2009/20090415PAC/20090424PAC.shtml>

access through non-monetary influence by promoting candidates with endorsements, slanting movies and television programs, and so on.

The district court discounts the "independence" of groups like SpeechNow.org, saying that "'[i]ndependence' does not prevent candidates, officeholders, and party apparatchiks from being made aware of the identities of large donors, and 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,' both in terms of the sale of access and the circumvention of the soft money ban." J.A. 390-391 (quoting *McConnell*, 540 U.S. at 156 n.51).

But efforts to equate access with corruption would be to make our government non-representative. *See Leake*, 525 F.3d at 295 ("It goes without saying that it is not a sin to be serious about 'impacting the political process' – in fact, the First Amendment is largely about providing every citizen with just that opportunity."). It would eliminate the accountability of elected officials to citizens who band together in expressive associations to amplify their voices. *Buckley*, 424 U.S. at 22. It would make elected officials like the unelected judiciary, with lifetime appointments, no ex parte access, and no discussion without all sides represented. Elected officials are not platonic guardians to govern the people; they are supposed to be

accountable to the people. *Republican Party of Minnesota v. White*, 536 U.S. 765, 805-06 (2002)(Ginsburg, J., dissenting, joined by Stevens, Souter, and Breyer, JJ.)("Legislative and executive officials serve in representative capacities. They are agents of the people. . . .").

It strains the imagination to see how it is not corrupting for one individual to make unlimited independent expenditures, but when two citizens band together to fund political speech, their combined voice somehow becomes corrupting. If a citizen truly wanted to gain access, would not an independent expenditure be more effective in achieving these things if the citizen were to make it by himself and take all the credit for helping the candidate instead of sharing it with others? *See* Schmitt, *Mismatching Funds*, Democracy: A Journal of Ideas, Spring 2007, ¶32 ("Restrictions have the effect of increasing the power of those who are unrestricted."). As the "gratitude" is spread out over a larger number of individuals, would not the amount of alleged "undue influence" also diminish?

IV. There Are Significant Burdens In Launching An Independent Expenditure Group That Is Regulated As A PAC And Subject To Contribution Limits.

The *Buckley* Court recognized that "[g]iven the important role of contributions in financing political campaigns, contribution restrictions

could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. The right to free speech encompasses the right to effective speech *and* to participation in an effective organization. Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U.Pa. L.Rev. 1609, 1630 (1974)(citing *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

As shown above, there is no compelling interest in limiting contributions to independent expenditure groups like SpeechNow.org. Moreoever, restricting the amount a citizen may contribute to such a group creates very significant operational burdens further burdening associational rights. Treating SpeechNow.org as a political committee, even though it does not make any contributions to candidates, prevents SpeechNow.org from effectively organizing and imposes burdensome requirements.

Under the current statutory framework, independent expenditures can only be funded with "hard money," that is, money raised in accordance with source and amount limitations. "Hard money" is generally harder to raise

and scarcer in quantity. Bauer, *A Report From the Field*, 5 Election Law at 108.

It is well accepted that substantial amounts of "seed money" are usually necessary to initiate a large fundraising effort. Comment, *The Constitutionality of Restrictions on Individual Contributions to Candidates in Federal Elections*, 122 U.Pa. L.Rev. at 1631 n.175; *see also* Bauer, *A Report From the Field*, 5 Election Law Journal at 107 ("[R]eforms appear likely to slow the rate of entries, by raising the price of admission."). While unregulated § 527 organizations can accept large donations, an independent expenditure PAC is limited to raising contributions in amounts of $5,000. In light of this, some have noted that new political committees, including those formed around single issues, may suffer due to these limits because they are unable to raise seed money. *Id.* at 112-113. This seed money is especially important to groups like SpeechNow.org because unlike PACs connected to corporations and unions, they are not able to use treasury funds to set up and run their PACs. 11 C.F.R. § 114.5(b).

New political committees are also at a disadvantage when it comes to actually raising money. The success of Internet fundraising in 2004 and 2008 does not necessarily translate into success for new political committees. Internet fundraising suffers from unpredictability, and rises and

falls with the pace and intensity of events and issues. Bauer, *A Report From the Field*, 5 Election Law Journal at 113. New political committees might very well have a tough go of it trying to start-up in a non-election year.

Direct mail, which has in the past been successful, carries with it high costs. *Id.* A new political committee funded by small contributions simply does not have the resources to begin a successful direct mail program.

Seed money, in addition to providing start-up capital, also serves to encourage others to associate. Many are reluctant to give to new organizations because they are fearful that the organization will fail. Just a few donations from respected citizens might provide the confidence some donors require.

Being forced to conduct independent expenditure activity under the PAC structure is yet another barrier to association. The Supreme Court has recognized that PAC regulations "impose administrative costs that many small entities may be unable to bear." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 254 (1986)(plurality opinion). Speaking through a political committee requires "significant efforts." *Id.* at 252. The FEC's guide for "Nonconnected Committees" is 134 pages long (http://www.fec.gov/pdf/nongui.pdf), and its supplement is another 11 pages (http://www.fec.gov/pdf/nongui_supp.pdf). In light of these complex

requirements, political committees are forced to retain experienced legal counsel, accountants, and consultants to handle all aspects of compliance, reporting and even the electronic filing of reports. This "[d]isclosure is not costless. It imposes burdens on those who must comply with complex laws," and it "may place a heavy penalty on groups that face retaliation when their support for unpopular positions becomes public, and it may undermine the ability of disliked or distrusted groups to influence policy in ways consistent with their interests." Elizabeth Garrett, *Voting with Cues*, 37 U. Rich. L. Rev. 1011, 1011 (2003).

A new political committee, with scarce resources, may not be able to afford the counsel and services necessary to avoid administrative fines and investigations. *See Federal Election Commission Enforcement Procedures: Hearing Before the Comm. on House Admin.* (108th Cong. 129)(October 16, 2003)(statement of Rep. Doolittle)("I think of my first race for the State Senate and I got a friend to be my treasurer. I would never do that to a friend today. . . . But today, you would have to go to a professional and you are going to pay. . . . someone to do this today because they incur liabilities. And you know this is just one of the things that raises the cost of campaigns. . . .").

These burdens placed on political committees by a complex regulatory structure also serve to limit the number of citizens that want to

associate with them. A focus group conducted by a bipartisan commission studying California's campaign finance laws in 2000 reached the following conclusion:

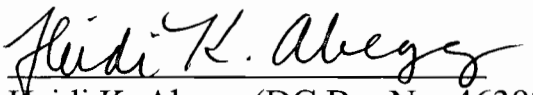
> The unintended consequence of this is that the price of admission into politics becomes too high. People do not want to become candidates or treasurers because of the potential liability. Thus the regulations have injured grassroots democracy and have essentially professionalized politics so that you have to have lawyers and accountants on your campaign staff.

Bipartisan Comm'n on the Political Reform Act of 1974, *Overly Complex and Unduly Burdensome: The Critical Need to Simplify the Political Reform Act* at 62, (last visited August 27, 2009) <http://www.fppc.ca.gov/pdf/McPherson.pdf >; *see also* Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, at 27, Institute for Justice, October 2007 (last visited August 29, 2009) <http://www.ij.org/publications/other/campaign-finance-red-tape.html> (documenting an experiment demonstrating the difficulty of compliance with PAC regulation and how this deterred political association). Treating SpeechNow.org as a PAC without a compelling justification leads to an ineffective organization, which in turn, negatively impacts the rights of free speech and association.

CONCLUSION

In the last 35 years "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *NCPAC*, 470 U.S. at 498. This hypothetical does not warrant burdening citizens from associating to speak out on matters of political importance. "The First Amendment protects political association as well as political expression." *Buckley*, 424 U.S. at 15. These "two rights overlap and blend; to limit the right of association places an impermissible restraint on the right of expression." *Citizens Against Rent Control*, 454 U.S. at 300. This Court should protect the step-child of First Amendment campaign finance jurisprudence – the right of association – with the same degree of protection afforded to the favorite son – the freedom of speech. Consequently, the Court should reverse the district court's decision denying SpeechNow.org's motion for preliminary injunction.

Respectfully submitted,



Heidi K. Abegg (DC Bar No. 463935)
Alan P. Dye (DC Bar No. 215319)
WEBSTER, CHAMBERLAIN & BEAN
1747 Pennsylvania Ave, NW
Suite 1000
Washington, DC 20006
(202) 785-9500
Email: habegg@wc-b.com, adye@wc-b.com

Attorneys for *Amici Curiae*

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This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(2) because this brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Heidi K. Abegg
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2009, I caused a true and correct copy of required number of copies of the foregoing BRIEF OF *AMICI CURIAE* to be served upon the following by overnight delivery:

Robert W. Bonham, III
David B. Kolker
Steve N. Hajjar
Kevin Deeley
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463

Counsel for Appellee

William H. Mellor
Steven M. Simpson
Robert W. Gall
Robert P. Frommer
Paul M. Sherman
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203

Counsel for Appellants

Stephen M. Hoersting
Bradley A. Smith
CENTER FOR COMPETITIVE POLITICS
124 West Street South, Suite 201
Alexandria, VA 22314

Heidi K. Abegg

Heidi K. Abegg
Counsel for *Amici Curiae*

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ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

In The

United States Court of Appeals

FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

SPEECHNOW.ORG; DAVID KEATING; FRED M. YOUNG, JR; EDWARD H. CRANE III; BRAD RUSSO; SCOTT BURKHARDT,

Plaintiffs – Appellants,

v.

FEDERAL ELECTION COMMISSION,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ADDENDUM

***Heidi K. Abegg**
Alan P. Dye
Webster Chamberlain & Bean
1747 Pennsylvania Avenue, NW
Suite 1000
Washington, D.C. 20006
(202) 785-9500

Counsel for Amici Curiae

Dated: August 31, 2009

*** CURRENT THROUGH PL 111-62, APPROVED 08/19/ 2009 ***

TITLE 26. INTERNAL REVENUE CODE
SUBTITLE A. INCOME TAXES
CHAPTER 1. NORMAL TAXES AND SURTAXES
SUBCHAPTER F. EXEMPT ORGANIZATIONS
PART VI. POLITICAL ORGANIZATIONS

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26 USCS § 527

§ 527. Political organizations.

(a) General rule. A political organization shall be subject to taxation under this subtitle [*26 USCS §§ 1* et seq.] only to the extent provided in this section. A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(b) Tax imposed.

(1) In general. A tax is hereby imposed for each taxable year on the political organization taxable income of every political organization. Such tax shall be computed by multiplying the political organization taxable income by the highest rate of tax specified in section 11(b) [*26 USCS § 11(b)*].

(2) Alternative tax in case of capital gains. If for any taxable year any political organization has a net capital gain, then, in lieu of the tax imposed by paragraph (1), there is hereby imposed a tax (if such a tax is less than the tax imposed by paragraph (1)) which shall consist of the sum of--

(A) a partial tax, computed as provided by paragraph (1), on the political organization taxable income determined by reducing such income by the amount of such gain, and

(B) an amount determined as provided in section 1201(a) [*26 USCS § 1201(a)*] on such gain.

(c) Political organization taxable income defined.

(1) Taxable income defined. For purposes of this section, the political organization taxable income of any organization for any taxable year is an amount equal to the excess (if any) of--

(A) the gross income for the taxable year (excluding any exempt function income), over

(B) the deductions allowed by this chapter [*26 USCS §§ 1* et seq.] which are directly connected with the production of the gross income (excluding exempt function income), computed with the modifications provided in paragraph (2).

(2) Modifications. For purposes of this subsection--

(A) there shall be allowed a specific deduction of $ 100,

(B) no net operating loss deduction shall be allowed under section 172 [*26 USCS § 172*], and

(C) no deduction shall be allowed under part VIII of subchapter B [*26 USCS §§ 241* et seq.] (relating to special deductions for corporations).

(3) Exempt function income. For purposes of this subsection, the term "exempt function income" means any amount received as--

(A) a contribution of money or other property,

(B) membership dues, a membership fee or assessment from a member of the political organization,

(C) proceeds from a political fundraising or entertainment event, or proceeds from the sale of political campaign materials, which are not received in the ordinary course of any trade or business, or

(D) proceeds from the conducting of any bingo game (as defined in section 513(f)(2) [*26 USCS § 513(f)(2)*]).

to the extent such amount is segregated for use only for the exempt function of the political organization.

(d) Certain uses not treated as income to candidate. For purposes of this title, if any political organization--

(1) contributes any amount to or for the use of any political organization which is treated as exempt from tax under subsection (a) of this section,

(2) contributes any amount to or for the use of any organization described in paragraph (1) or (2) of section 509(a) [*26 USCS § 509(a)*] which is exempt from tax under section 501(a) [*26 USCS § 501(a)*], or

(3) deposits any amount in the general fund of the Treasury or in the general fund of any State or local government,

such amount shall be treated as an amount not diverted for the personal use of the candidate or any other person. No deduction shall be allowed under this title for the contribution or deposit of any amount described in the preceding sentence.

(e) Other definitions. For purposes of this section--

(1) Political organization. The term "political organization" means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.

(2) Exempt function. The term "exempt function" means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a) [*26 USCS § 162(a)*].

(3) Contributions. The term "contributions" has the meaning given to such term by section 271(b)(2) [*26 USCS § 271(b)(2)*].

(4) Expenditures. The term "expenditures" has the meaning given to such term by section 271(b)(3) [*26 USCS § 271(b)(3)*].

(5) Qualified state or local political organization.

(A) In general. The term "qualified State or local political organization" means a political organization--

(i) all the exempt functions of which are solely for the purposes of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any State or local public office or office in a State or local political organization,

(ii) which is subject to State law that requires the organization to report (and it so reports)--

(I) information regarding each separate expenditure from and contribution to such organization, and

(II) information regarding the person who makes such contribution or receives such expenditure,

which would otherwise be required to be reported under this section, and

(iii) with respect to which the reports referred to in clause (ii) are (I) made public by the agency with which such reports are filed, and (II) made publicly available for inspection by the organization in the manner described in section 6104(d) [*26 USCS § 6104(d)*].

(B) Certain State law differences disregarded. An organization shall not be treated as failing to meet the requirements of subparagraph (A)(ii) solely by reason of 1 or more of the following:

(i) The minimum amount of any expenditure or contribution required to be reported under State law is not more than $ 300 greater than the minimum amount required to be reported under subsection (j).

(ii) The State law does not require the organization to identify 1 or more of the following:

(I) The employer of any person who makes contributions to the organization.

(II) The occupation of any person who makes contributions to the organization.

(III) The employer of any person who receives expenditures from the organization.

(IV) The occupation of any person who receives expenditures from the organization.

(V) The purpose of any expenditure of the organization.

(VI) The date any contribution was made to the organization.

(VII) The date of any expenditure of the organization.

(C) De minimis errors. An organization shall not fail to be treated as a qualified State or local political organization solely because such organization makes de minimis errors in complying with the State reporting requirements and the

public inspection requirements described in subparagraph (A) as long as the organization corrects such errors within a reasonable period after the organization becomes aware of such errors.

(D) Participation of Federal candidate or office holder. The term "qualified State or local political organization" shall not include any organization otherwise described in subparagraph (A) if a candidate for nomination or election to Federal elective public office or an individual who holds such office--

(i) controls or materially participates in the direction of the organization,

(ii) solicits contributions to the organization (unless the Secretary determines that such solicitations resulted in de minimis contributions and were made without the prior knowledge and consent, whether explicit or implicit, of the organization or its officers, directors, agents, or employees), or

(iii) directs, in whole or in part, disbursements by the organization.

(f) Exempt organization which is not political organization must include certain amounts in gross income.

(1) In general. If an organization described in section 501(c) [*26 USCS § 501(c)*] which is exempt from tax under section 501(a) [*26 USCS § 501(a)*] expends any amount during the taxable year directly (or through another organization) for an exempt function (within the meaning of subsection (e)(2)), then, notwithstanding any other provision of law, there shall be included in the gross income of such organization for the taxable year, and shall be subject to tax under subsection (b) as if it constituted political organization taxable income, an amount equal to the lesser of--

(A) the net investment income of such organization for the taxable year, or

(B) the aggregate amount so expended during the taxable year for such an exempt function.

(2) Net investment income. For purposes of this subsection, the term "net investment income" means the excess of--

(A) the gross amount of income from interest, dividends, rents, and royalties, plus the excess (if any) of gains from the sale or exchange of assets over the losses from the sale or exchange of assets, over

(B) the deductions allowed by this chapter [*26 USCS §§ 1* et seq.] which are directly connected with the production of the income referred to in subparagraph (A).

For purposes of the preceding sentence, there shall not be taken into account items taken into account for purposes of the tax imposed by section 511 [*26 USCS § 511*] (relating to tax on unrelated business income).

(3) Certain separate segregated funds. For purposes of this subsection and subsection (e)(1), a separate segregated fund (within the meaning of section 610 of title 18 or of any similar State statute, or within the meaning of any State statute which permits the segregation of dues moneys for exempt functions (within the meaning of subsection (e)(2)) which is maintained by an organization described in section 501(c) [*26 USCS § 501(c)*] which is exempt from tax under section 501(a) shall be treated as a separate organization.

(g) Treatment of newsletter funds.

(1) In general. For purposes of this section, a fund established and maintained by an individual who holds, has been elected to, or is a candidate (within the meaning of paragraph (3)) for nomination or election to, any Federal, State, or local elective public office for use by such individual exclusively for the preparation and circulation of such individual's newsletter shall, except as provided in paragraph (2), be treated as if such fund constituted a political organization.

(2) Additional modifications. In the case of any fund described in paragraph (1)--

(A) the exempt function shall be only the preparation and circulation of the newsletter, and

(B) the specific deduction provided by subsection (c)(2)(A) shall not be allowed.

(3) Candidate. For purposes of paragraph (1), the term "candidate" means, with respect to any Federal, State, or local elective public office, an individual who--

(A) publicly announces that he is a candidate for nomination or election to such office, and

(B) meets the qualifications prescribed by law to hold such office.

(h) Special rule for principal campaign committees.

(1) In general. In the case of a political organization which is a principal campaign committee, paragraph (1) of subsection (b) shall be applied by substituting "the appropriate rates" for "the highest rate".

(2) Principal campaign committee defined.

(A) In general. For purposes of this subsection, the term "principal campaign committee" means the political committee designated by a candidate for Congress as his principal campaign committee for purposes of--

(i) section 302(e) of the Federal Election Campaign Act of 1971 (*2 U.S.C. 432(e)*), and

(ii) this subsection.

(B) Designation. A candidate may have only 1 designation in effect under subparagraph (A)(ii) at any time and such designation--

(i) shall be made at such time and in such manner as the Secretary may prescribe by regulations, and

(ii) once made, may be revoked only with the consent of the Secretary.

Nothing in this subsection shall be construed to require any designation where there is only one political committee with respect to a candidate.

(i) Organizations must notify Secretary that they are section 527 organizations.

(1) In general. Except as provided in paragraph (5), an organization shall not be treated as an organization described in this section--

(A) unless it has given notice to the Secretary electronically that it is to be so treated, or

(B) if the notice is given after the time required under paragraph (2), the organization shall not be so treated for any period before such notice is given or, in the case of any material change in the information required under paragraph (3), for the period beginning on the date on which the material change occurs and ending on the date on which such notice is given.

(2) Time to give notice. The notice required under paragraph (1) shall be transmitted not later than 24 hours after the date on which the organization is established or, in the case of any material change in the information required under paragraph (3), not later than 30 days after such material change.

(3) Contents of notice. The notice required under paragraph (1) shall include information regarding--

(A) the name and address of the organization (including any business address, if different) and its electronic mailing address,

(B) the purpose of the organization,

(C) the names and addresses of its officers, highly compensated employees, contact person, custodian of records, and members of its Board of Directors,

(D) the name and address of, and relationship to, any related entities (within the meaning of section 168(h)(4) [*26 USCS § 168(h)(4)*]),

(E) whether the organization intends to claim an exemption from the requirements of subsection (j) or section 6033 [*26 USCS § 6033*], and

(F) such other information as the Secretary may require to carry out the internal revenue laws.

(4) Effect of failure. In the case of an organization failing to meet the requirements of paragraph (1) for any period, the taxable income of such organization shall be computed by taking into account any exempt function income (and any deductions directly connected with the production of such income) or, in the case of a failure relating to a material change, by taking into account such income and deductions only during the period beginning on the date on which the material change occurs and ending on the date on which notice is given under this subsection. For purposes of the preceding sentence, the term "exempt function income" means any amount described in a subparagraph of subsection (c)(3), whether or not segregated for use for an exempt function.

(5) Exceptions. This subsection shall not apply to any organization--

(A) to which this section applies solely by reason of subsection (f)(1),

(B) which reasonably anticipates that it will not have gross receipts of $ 25,000 or more for any taxable year, or

(C) which is a political committee of a State or local candidate or which is a State or local committee of a political party.

(6) Coordination with other requirements. This subsection shall not apply to any person required (without regard to this subsection) to report under the Federal Election Campaign Act of 1971 (*2 U.S.C. 431* et seq.) as a political committee.

(j) Required disclosure of expenditures and contributions.

(1) Penalty for failure. In the case of--

(A) a failure to make the required disclosures under paragraph (2) at the time and in the manner prescribed therefor, or

(B) a failure to include any of the information required to be shown by such disclosures or to show the correct information,

there shall be paid by the organization an amount equal to the rate of tax specified in subsection (b)(1) multiplied by the amount to which the failure relates. For purposes of subtitle F [*26 USCS §§ 6001* et seq.], the amount imposed by this paragraph shall be assessed and collected in the same manner as penalties imposed by section 6652(c) [*26 USCS § 6652(c)*].

(2) Required disclosure. A political organization which accepts a contribution, or makes an expenditure, for an exempt function during any calendar year shall file with the Secretary either--

(A) (i) in the case of a calendar year in which a regularly scheduled election is held--

(I) quarterly reports, beginning with the first quarter of the calendar year in which a contribution is accepted or expenditure is made, which shall be filed not later than the fifteenth day after the last day of each calendar quarter, except that the report for the quarter ending on December 31 of such calendar year shall be filed not later than January 31 of the following calendar year,

(II) a pre-election report, which shall be filed not later than the twelfth day before (or posted by registered or certified mail not later than the fifteenth day before) any election with respect to which the organization makes a contribution or expenditure, and which shall be complete as of the twentieth day before the election, and

(III) a post-general election report, which shall be filed not later than the thirtieth day after the general election and which shall be complete as of the twentieth day after such general election, and

(ii) in the case of any other calendar year, a report covering the period beginning January 1 and ending June 30, which shall be filed no later than July 31 and a report covering the period beginning July 1 and ending December 31, which shall be filed no later than January 31 of the following calendar year, or

(B) monthly reports for the calendar year, beginning with the first month of the calendar year in which a contribution is accepted or expenditure is made, which shall be filed not later than the twentieth day after the last day of the month and shall be complete as if the last day of the month, except that, in lieu of filing the reports otherwise due in November and December of any year in which a regularly scheduled general election is held, a pre-general election report shall be filed in accordance with subparagraph (A)(i)(II), a post-general election report shall be filed in accordance with subparagraph (A)(i)(III), and a year end report shall be filed not later than January 31 of the following calendar year.

(3) Contents of report. A report required under paragraph (2) shall contain the following information:

(A) The amount, date, and purpose of each expenditure made to a person if the aggregate amount of expenditures to such person during the calendar year equals or exceeds $ 500 and the name and address of the person (in the case of an individual, including the occupation and name of employer of such individual).

(B) The name and address (in the case of an individual, including the occupation and name of employer of such individual) of all contributors which contributed an aggregate amount of $ 200 or more to the organization during the calendar year and the amount and date of the contribution.

Any expenditure or contribution disclosed in a previous reporting period is not required to be included in the current reporting period.

(4) Contracts to spend or contribute. For purposes of this subsection, a person shall be treated as having made an expenditure or contribution if the person has contracted or is otherwise obligated to make the expenditure or contribution.

(5) Coordination with other requirements. This subsection shall not apply--

(A) to any person required (without regard to this subsection) to report under the Federal Election Campaign Act of 1971 (*2 U.S.C. 431* et seq.) as a political committee,

(B) to any State or local committee of a political party or political committee of a State or local candidate,

(C) to any organization which is a qualified State or local political organization,

(D) to any organization which reasonably anticipates that it will not have gross receipts of $ 25,000 or more for any taxable year,

(E) to any organization to which this section applies solely by reason of subsection (f)(1), or

(F) with respect to any expenditure which is an independent expenditure (as defined in section 301 of such Act).

(6) Election. For purposes of this subsection, the term "election" means--

(A) a general, special, primary, or runoff election for a Federal office,

(B) a convention or caucus of a political party which has authority to nominate a candidate for Federal office,

(C) a primary election held for the selection of delegates to a national nominating convention of a political party, or

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

(7) Electronic filing. Any report required under paragraph (2) with respect to any calendar year shall be filed in electronic form if the organization has, or has reason to expect to have, contributions exceeding $ 50,000 or expenditures exceeding $ 50,000 in such calendar year.

(k) Public availability of notices and reports.

(1) In general. The Secretary shall make any notice described in subsection (i)(1) or report described in subsection (j)(7) available for public inspection on the Internet not later than 48 hours after such notice or report has been filed (in addition to such public availability as may be made under section 6104(d)(7) [*26 USCS § 6104(d)(7)*]).

(2) Access. The Secretary shall make the entire database of notices and reports which are made available to the public under paragraph (1) searchable by the following items (to the extent the items are required to be included in the notices and reports):

(A) Names, States, zip codes, custodians of records, directors, and general purposes of the organizations.

(B) Entities related to the organizations.

(C) Contributors to the organizations.

(D) Employers of such contributors.

(E) Recipients of expenditures by the organizations.

(F) Ranges of contributions and expenditures.

(G) Time periods of the notices and reports.

Such database shall be downloadable.

(l) Authority to waive. The Secretary may waive all or any portion of the--

(1) tax assessed on an organization by reason of the failure of the organization to comply with the requirements of subsection (i), or

(2) amount imposed under subsection (j) for a failure to comply with the requirements thereof,on a showing that such failure was due to reasonable cause and not due to willful neglect.