

# Institute for Justice & Center for Competitive Politics Litigation Backgrounder

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## *SpeechNow.org v. FEC* Protecting Americans' Rights To Organize and Speak About Politics

### The Issue in a Nutshell:

SpeechNow.org is an independent group of citizens who have joined together to protect the First Amendment at the ballot box. Its mission is to protect First Amendment rights by advocating the election of federal candidates who favor free political speech and the defeat of those who favor speech restrictions in the name of campaign finance “reform.”

Unfortunately, the group may be silenced by the very campaign finance laws it opposes.

According to federal law and the Federal Election Commission, any time two or more people pool their resources to support or oppose a federal candidate, they become a “political committee” subject to government regulations and limits. The law forbids anyone from giving SpeechNow.org more than \$5,000 per year and imposes a host of complicated rules on the group.

These limits and red tape make it virtually impossible for new independent citizen groups like SpeechNow.org to raise start-up funding and effectively reach voters.

They are also unconstitutional for a group like SpeechNow.org. SpeechNow.org is not a PAC or a political party, it takes no corporate or union money, and it never donates to or coordinates with candidates. It is simply Americans talking to Americans about an issue of vital public importance: the right to speak freely about politics and whom to elect to secure it.

The First Amendment guarantees individuals the right to speak without limit, so it should be common sense that groups of individuals—like SpeechNow.org—have the same rights.

That is why on February 14, 2008, SpeechNow.org and its members joined with the Institute for Justice and the Center for Competitive Politics to file *SpeechNow.org v. Federal Election Commission* in federal court.

The lawsuit aims to vindicate the First Amendment rights to free speech and association and to pave the way for SpeechNow.org and other groups of citizens to make their voices heard in elections—without being hamstrung by harmful government limits on speech.

## **Introduction: Free Speech and Association vs. Campaign Finance Regulation**

SpeechNow.org, the Institute for Justice and the Center for Competitive Politics are working to vindicate the First Amendment rights to free speech and association so that citizens will once again be free to band together to advocate the election or defeat of candidates—for whatever reasons they choose—without harmful government limits on speech.

The right to free speech, including the right to speak out about who should be elected to public office, is a fundamental American right essential to democratic debate. So too is the right of individuals to band together and pool their resources to make their advocacy more effective. The Founders recognized this, and enshrined the rights to both free speech and association in the First Amendment.<sup>1</sup> Sadly, the ever-growing web of so-called “campaign finance” laws has curtailed these basic American freedoms, making it practically impossible for citizens to join together to effectively advocate for or against political candidates.

SpeechNow.org is a perfect case in point. It is an independent group of citizens who have joined together to protect First Amendment rights at the ballot box. The group’s mission is to protect First Amendment rights by expressly advocating the election of federal candidates who favor free speech and the defeat of those who favor speech restrictions in the name of campaign finance “reform.” It is not a PAC or a political party, it takes no corporate or union money, and it never donates to or coordinates with candidates.

The group has donors lined up and ad scripts written, but according to the Federal Election Commission, SpeechNow.org’s plans are illegal under the very campaign finance laws it opposes.

At issue is whether independent groups of citizens like SpeechNow.org must organize and register with the FEC as “political committees” and drastically limit the size of donations they accept. If so, SpeechNow.org will be silenced.

The First Amendment guarantees individuals the right to speak without limit, so it should be common sense that groups of individuals have the same rights. But according to the FEC, any time two or more people pool their resources to support or oppose a federal candidate, they become a “political committee” subject to government regulations and limits.

If true, it would be practically impossible for Americans to join together and speak effectively to other Americans about whom to elect to office. That is why on February 14, 2008, SpeechNow.org and its members filed *SpeechNow.org v. Federal Election Commission* in the federal district court for the District of Columbia. Represented by the Institute for Justice and the Center for Competitive Politics, SpeechNow.org is challenging the federal election law that requires SpeechNow.org to become a “political committee” in order to speak about candidates.

IJ and CCP also filed a request for a preliminary injunction that would prohibit the FEC from enforcing the law against SpeechNow.org during the litigation and thereby free SpeechNow.org to immediately begin its advocacy for the 2008 election season.

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<sup>1</sup> “Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I.

## SpeechNow.org: Americans Talking to Americans

David Keating founded SpeechNow.org on a simple idea: When politicians pass laws that violate the First Amendment, they deserve to be held accountable at the ballot box. David formed SpeechNow.org to give Americans who believe in free speech a way to join together, pool their resources, and advocate for federal candidates who agree with them—and against those who do not.

SpeechNow.org is organized to amplify the voices of individual Americans and maintain independence from candidates, political parties, corporations and unions. It accepts contributions only from individuals; it does not accept donations from corporations and labor unions. It never donates to candidates or political parties and does not coordinate its speech with candidates and parties.<sup>2</sup>

In short, SpeechNow.org is Americans talking to Americans about an issue of vital public importance: the right to speak freely about politics and whom to elect to secure it.

Indeed, without the right to speak freely about politics and politicians, the right to vote and to participate in the political system—the very right to self-government—is largely meaningless. The U.S. Supreme Court has “long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas.”<sup>3</sup> But that marketplace, to truly reflect the principles underlying the First Amendment, must remain free and unregulated. As the Supreme Court has said, “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>4</sup> The notion that some voices may be limited, that some topics or terms are off limits, that citizens may discuss issues but not candidates, has no place in a free society. Instead, debate on all matters of public concern must be “uninhibited, robust, and wide-open.”<sup>5</sup>

As a long-time political activist and leader of grassroots organizations, David has seen first-hand how burdensome campaign finance regulations stifle the marketplace of political ideas. SpeechNow.org’s strategy is to counter those regulations and secure greater protection for First Amendment rights by influencing elections. SpeechNow.org believes the best way to send a message to politicians who fail to respect the First Amendment is to convince people to vote against them—and to elect more speech-friendly representatives. Advocating during elections increases public and media awareness on important issues at a time when people are most attuned to political debate.

But effective political advocacy does not come cheap. For example, SpeechNow.org wishes to begin advertising in two races with an initial budget of \$122,500 for production and airtime buys for television ads in two markets. The group’s plan is to aim that initial advertising at two incumbents in Congress who have voted for restrictions on political speech, one a Republican in the House of Representatives, the other a Democrat in the Senate. To have greater influence on more congressional elections—or the White House—would take much more funding.

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<sup>2</sup> SpeechNow.org’s charter also requires it to fully disclose all donations and expenditures to the Federal Election Commission within 48 hours of any speech urging the election or defeat of any federal candidate.

<sup>3</sup> *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981).

<sup>4</sup> *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

<sup>5</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

And for citizens of more modest means acting alone, such as Brad Russo and Scott Burkhart, being heard is even more difficult. Brad and Scott believe in free speech and are opposed to campaign finance regulation, but lack the resources to reach a mass audience on their own. They can try to write or speak out alone, but their voices will likely be lost in the cacophony of an election. They can contribute money to political candidates, but candidates generally have their own agendas and often do not address issues important to many citizens. Brad and Scott would prefer to contribute to SpeechNow.org so that, in combination with others, they can advance the message of free speech.

SpeechNow.org can give citizens like Brad and Scott a stronger voice by pooling their limited resources with larger contributions. With seed funding from a few larger-dollar donors, SpeechNow.org can start buying ads, getting more attention and finding more supporters—who together can speak more effectively than any could alone. Indeed, SpeechNow.org’s model of political advocacy can be applied to any issue or set of issues a group of citizens cares about, such as the environment, health care or taxes.

Unfortunately, from the start, SpeechNow.org found its efforts hampered by the very campaign finance laws it opposes.

### **Asking for Permission to Speak**

According to the Federal Election Campaign Act<sup>6</sup> and the FEC, any time two or more people pool their resources to support or oppose a federal candidate, they become a “political committee” subject to government regulations and limits. By law, the group becomes a political committee once it accepts more than \$1,000 in contributions or makes more than \$1,000 in expenditures—barely enough to put up a website and register a post office box before government regulation kicks in.

The most onerous regulation is a contribution limit that prevents political committees from accepting any donation greater than \$5,000 per donor per calendar year. Political committees also must register with the government and make detailed reports of contributions and expenditures.

If forced to organize and register as a political committee, supporters of SpeechNow.org would lose their associational rights guaranteed by the First Amendment. They could speak without limit only if acting alone.

In an era where an ad in a major paper or a modest TV buy in a small market costs \$50,000 or more, this would leave effective advocacy available only to the very wealthy. The ability of more modest donors to speak and be heard would be lost.

Groups like SpeechNow.org need the seed funding of donors who can give more than \$5,000 to get off the ground, run initial ads and attract more supporters—who in turn might want to see proof the outfit is effective or a going concern before donating. Raising enough for even a modest ad campaign in \$5,000 or smaller increments is a nearly impossible challenge for a new group without any infrastructure or public visibility. Moreover, David Keating started and runs SpeechNow.org as a volunteer in his spare time, making complying with onerous administrative

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<sup>6</sup> Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. §§ 431-434, 441a (2007).

and reporting requirements an even bigger challenge. In short, for a start-up like SpeechNow.org, limiting its ability to raise funds quickly and imposing needless red tape practically guarantees failure before the group even starts.

The contribution limits and red tape imposed on political committees are one way federal campaign finance regulations favor the political establishment—by making it virtually impossible for new independent citizen groups to raise start-up funding and effectively reach voters. Indeed, not a single citizen PAC of any consequence has formed in the past 10 years that is not affiliated with a corporation, candidates or a labor union.

To determine if SpeechNow.org had to register as a political committee, David sought guidance from the FEC soon after creating the group. In recent years, the FEC has conducted lengthy investigations into the activities of many citizen groups, culminating in millions of dollars in civil penalties.<sup>7</sup> For SpeechNow.org, proceeding without an okay from the FEC could expose it to severe penalties, including fines and jail time, for its speech.<sup>8</sup>

SpeechNow.org argued to the FEC that because it is an independent group of citizens, it should not be regulated as a political committee. Unlike some so-called “527s,” SpeechNow.org accepts only contributions from individuals; it does not accept corporate or union money. Unlike a PAC, it never donates to or coordinates its activities with candidates or political parties. It will also report its donations and expenditures under the regulations that apply to “independent expenditures”—that is, expenditures on political speech by those with no connection to politicians.

Therefore, SpeechNow.org raises none of the concerns that, in the courts and in the court of public opinion, have been the basis for regulating political speech in the name of campaign finance reform. With no link to candidates or parties, there is not even a risk of the appearance of corruption. Corporate and union contributions are banned. And SpeechNow.org’s contributions and spending will be fully disclosed to the public within 48 hours of spending \$10,000 or more.

SpeechNow.org is different from other groups that engaged in independent expenditures in another important way. Earlier groups generally claimed they were only running “issue” ads, while the FEC countered that these “sham” ads were thinly veiled “express advocacy” for or against candidates. SpeechNow.org, by contrast, fully intends to expressly favor or oppose candidates—bringing greater clarity and honesty to public debate—and believes it has a constitutional right to do so.

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<sup>7</sup> Among those fined were: America Coming Together (\$775,000), <http://eqs.nictusa.com/eqsdocs/000061A1.pdf>; Progress for America Voter Fund (\$750,000), <http://eqs.nictusa.com/eqsdocs/00005AA7.pdf>; The Media Fund (\$580,000), <http://eqs.nictusa.com/eqsdocs/000066D5.pdf>; Swift Boat Veterans and POWs for Truth (\$299,500), <http://eqs.nictusa.com/eqsdocs/00005900.pdf>; League of Conservation Voters (\$180,000), <http://eqs.nictusa.com/eqsdocs/00005905.pdf>; and Moveon.org Voter Fund (\$150,000), <http://eqs.nictusa.com/eqsdocs/000058F4.pdf>.

<sup>8</sup> *See, e.g.*, 2 U.S.C. § 437g(d)(1)(A) (2007) (“Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure . . . aggregating \$25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both”).

Unfortunately, on January 22, 2008, the general counsel's office of the FEC issued a draft "advisory opinion" claiming that SpeechNow.org is a political committee.<sup>9</sup> However, FEC Chairman David M. Mason wrote another opinion that found SpeechNow.org was exempt from the contribution limits on political committees.<sup>10</sup> Lacking a quorum at the time, the commission could not officially adopt the staff draft opinion or the Chairman's opinion, nor could it approve SpeechNow.org's operational plan by the legal deadline of January 28. Under the FEC's rules, the failure to issue a binding advisory opinion by the deadline amounts to a denial of the request. That leaves SpeechNow.org without legal protection and therefore vulnerable to a future enforcement action if it speaks.

### **Supreme Court Cases: A Presumption for Independent Speech**

Under well-established U.S. Supreme Court precedent, the First Amendment guarantees individuals the right to speak without limit, so it should be common sense that groups of individuals—like SpeechNow.org—have the same rights. No one should have to sacrifice the First Amendment right to associate in order to exercise the First Amendment right to speak.

More than 30 years ago, the Supreme Court laid down the standard for evaluating individual contribution limits. In *Buckley v. Valeo*, the court held that limits on contributions made directly to political candidates or to groups that give money to political candidates could be justified as necessary to prevent *quid pro quo* corruption—the trading of political favors for campaign contributions.<sup>11</sup> While there is little evidence that such corruption is common, the Court held that even the appearance of *quid pro quo* corruption was enough to uphold contribution limits when money made its way directly into the hands of politicians.<sup>12</sup>

At the same time, the Court made perfectly clear that when individuals spend money independently of candidates, this spending does not create a risk of corruption. First, when the spending is independent, there can be no trading of favors for contributions. Moreover, as the Court held, "Unlike contributions [to candidates], such independent expenditures may well provide little assistance to the candidate's campaign, and indeed may prove counterproductive."<sup>13</sup> Candidates like to control the terms of the debate, and independent speech can change those terms. Indeed, that's why independent speech is so valuable: It brings issues into the debate that candidates might otherwise prefer to ignore.

Because independent expenditures pose no risk of corruption, individuals are allowed to spend as much of their own money as they want on independent ads.<sup>14</sup> So why should SpeechNow.org's independent ads be treated any differently? Independent speech does not somehow become "corrupting" when individuals pool their money to pay for it.

Indeed, that is exactly what the FEC Chairman reasoned when he issued a separate opinion on SpeechNow.org's request.

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<sup>9</sup> AO 2007-32 (SpeechNow.org), available at <http://saos.nictusa.com/aodocs/966935.pdf>.

<sup>10</sup> Dissenting Opinion of Chairman David M. Mason in Advisory Opinion Request 2007-32, available at <http://saos.nictusa.com/aodocs/967169.pdf>.

<sup>11</sup> *Buckley*, 424 U.S. at 26-29.

<sup>12</sup> *Id.* at 27.

<sup>13</sup> *Id.* at 47.

<sup>14</sup> *Id.* at 47-51.

Thankfully the Supreme Court has also long recognized the First Amendment right to association and the importance of like-minded people being able to band together for effective advocacy.<sup>15</sup> It has repeatedly held that when political spending does not raise the threat of corruption, groups have exactly the same right to speak that individuals have. In *Citizens Against Rent Control v. City of Berkeley*, for example, the Court struck down a California law that applied contribution limits to ballot initiative committees. Just like SpeechNow.org’s activity, Citizens Against Rent Control’s speech was completely independent of political candidates. To the Court, the First Amendment violation was obvious: “To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.”<sup>16</sup> This restraint, in turn, “plainly impairs freedom of expression.”<sup>17</sup>

*Buckley*, *Citizens Against Rent Control*, and other campaign finance cases establish a presumption in favor of the First Amendment’s guarantees of free speech and association, allowing only limited exceptions to prevent corruption or its appearance.

SpeechNow.org is an independent group of citizens who simply want to advocate for or against candidates on the basis of their stand on free speech. And advocating for or against candidates isn’t “corrupting,” it is our constitutional right. Indeed, the whole point of political speech is to influence elections—to convince fellow citizens that on important issues, some candidates are better than others.

If SpeechNow.org is silenced, it would be practically impossible for Americans to join together and speak effectively to other Americans about whom to elect to office. It would be clear that so-called “campaign finance” regulations are really “speech and association” regulations.

## Clients

The Institute for Justice and the Center for Competitive Politics represent SpeechNow.org as an organization, as well as five of SpeechNow.org’s individual supporters: David Keating, Ed Crane, Fred Young, Brad Russo and Scott Burkhardt.

David Keating is the president and treasurer of SpeechNow.org, which he manages in his spare time. He has pledged \$5,500 to SpeechNow.org. Professionally, he is the executive director of the Club for Growth. Ed Crane is a founding member of SpeechNow.org, and has pledged \$6,000 to SpeechNow.org. Ed is also the founder and president of the Cato Institute. Unfortunately, under the FEC’s ruling, both David and Ed’s contributions would exceed the maximum contribution limit.

Fred Young is the former president of Young Radiator Company. He believes in SpeechNow.org’s mission, and has pledged \$110,000 to help get SpeechNow.org off the ground. Like both David and Ed, Fred is prevented from doing so by the \$5,000 contribution limit. Fred’s contribution also raises a different problem with the law. In addition to limiting how much an individual may contribute to any single political committee, the law also limits the total amount

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<sup>15</sup> *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (recognizing that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . .”).

<sup>16</sup> *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981).

<sup>17</sup> *Id.* at 299.

of individual contributions to multiple political committees and total contributions to political committees, parties and candidates.<sup>18</sup> Currently, these limits are set at \$42,700 and \$108,200 respectively every two years.<sup>19</sup>

Brad Russo of Washington, D.C., and Scott Burkhardt of Chapel Hill, N.C., are passionate supporters of free speech and opponents of campaign finance laws that curb it. Both believe in the mission of SpeechNow.org and want to support it financially, but lack the resources of wealthier donors. Brad found SpeechNow.org through word-of-mouth and Scott found it online. They want to join with SpeechNow.org's larger-dollar donors so that their contributions can effectively advance the cause of free speech.

### **Legal Strategy**

The Institute for Justice and the Center for Competitive Politics believe that SpeechNow.org's activities are fully protected by the First Amendment. *SpeechNow.org v. FEC* challenges the constitutionality of applying the Federal Election Campaign Act's requirements for political committees, including individual contribution limits, biennial aggregate contribution limits and burdensome registration and reporting requirements, on groups like SpeechNow.org and its supporters. The case aims to vindicate the rights to free speech and association of independent groups of citizens who wish to advocate for or against candidates for public office.

Additionally, IJ and CCP have filed a motion for a preliminary injunction that, if granted, will allow SpeechNow.org to accept contributions immediately and begin running ads while the case is pending.

### **Legal Team**

The Institute for Justice's legal team is led by Senior Attorney Steve Simpson. Simpson litigates free speech, economic liberty and property rights cases nationwide. Simpson is lead counsel in two challenges to Colorado's campaign finance laws on behalf of a group of citizens in Parker North, Colo., and the Independence Institute. Simpson is joined by William H. Mellor, president and general counsel of the Institute for Justice, Senior Attorney Bert Gall, and Staff Attorney Paul M. Sherman.

The Center for Competitive Politics' legal team is led by Chairman and Co-founder Bradley A. Smith. Smith is a former chairman of the Federal Election Commission and the author of *Unfree Speech: The Folly of Campaign Finance Reform*. Smith is joined by Stephen M. Hoersting, vice president and co-founder of the Center for Competitive Politics, and Legal Associate Michael P. Darner.

### **The Institute for Justice**

The Institute for Justice litigates in support of fundamental individual liberties, including free speech. IJ's headquarters and state chapters have challenged or are challenging restrictions on political speech across the nation, including:

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<sup>18</sup> See, 2 U.S.C. § 441a(a)(3); 11 C.F.R. § 110.5(b)(1).

<sup>19</sup> Price Index Increases of Expenditure and Contribution Limitations: Notice of Expenditure and Contribution Limitation Increases, 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007).

- *San Juan County v. No New Gas Tax*,<sup>20</sup> in which the Institute for Justice secured a unanimous opinion from the Washington Supreme Court halting efforts by the government to treat on-air radio commentary about an initiative campaign as “in-kind” contributions subject to regulation under state campaign finance laws.
- *Sampson v. Coffman*, in which IJ is challenging Colorado’s campaign finance laws in federal court on behalf of six neighbors in Parker North, Colo., sued by political opponents for speaking out against the annexation of their neighborhood to a nearby town.
- *Independence Institute v. Coffman*, in which IJ represents a Colorado non-profit think tank taken to court for speaking out against two tax-raising referenda.
- *Martin v. Brewer*, in which IJ is challenging Arizona’s so-called “Clean Elections Act,” which punishes candidates who reject the political welfare of public funding by burying them in red tape, giving extra money to their publicly funded opponents and setting stricter limits on how much they may raise.

### **The Center for Competitive Politics**

The Center for Competitive Politics’ (CCP) mission is to promote and protect the First Amendment’s political rights of speech, assembly, and petition by educating the public and government on the actual effects of money in politics and the results of a more free and competitive electoral process. CCP’s key activities include filing amicus briefs and representing parties in litigation, testifying before legislative audiences and government agencies, conducting original research, and communicating with the media. CCP legal briefs, testimony, and studies have been cited by Justices during oral argument in the United States Supreme Court and by legislators on the floors the House of Representatives and the United States Senate, as well as being frequently quoted in the media.

### **For More Information:**

Lisa Knepper  
 Director of Communications  
 Institute for Justice  
 901 N. Glebe Road, Suite 900  
 Arlington, VA 22203  
 lknepper@ij.org  
 (703) 682-9320

Mike Schrimpf  
 Communications Director  
 Center for Competitive Politics  
 124 West Street S., Suite 201  
 Alexandria, VA 22314  
 mschrimpf@campaignfreedom.org  
 (703) 894-6824

David Keating, President  
 SpeechNow.org  
 PO Box 18773  
 Washington, DC 20036  
 david@speechnow.org  
 (301) 717-7410

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<sup>20</sup> *San Juan County v. No New Gas Tax*, 160 Wash. 2d 140, 157 P.3d 831 (2007).