Please find attached the Comments of Free Speech Coalition, Inc., Free Speech Defense and Education Fund, Inc., and United States Justice Foundation.

Comments provided by :
Morgan, Jeremiah

**BEFORE THE FEDERAL ELECTION COMMISSION**

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| In re: | ) | |
| Advance Notice of Proposed Rulemaking | ) | Notice 2014-12 |
| Aggregate Biennial Contribution Limits | ) | |
| (Federal Register, October 17, 2014) | ) | |

**FREE SPEECH COALITION, INC.,**
**FREE SPEECH DEFENSE AND EDUCATION FUND, INC., AND**
**UNITED STATES JUSTICE FOUNDATION**
**COMMENTS ON ADVANCE NOTICE OF PROPOSED RULEMAKING**
**AGGREGATE BIENNIAL CONTRIBUTION LIMITS (79 Fed. Reg. 62361)**
(January 15, 2015)

The **Free Speech Coalition, Inc.** ("FSC"), founded in 1993, and tax-exempt under section 501(c)(4) of the Internal Revenue Code ("IRC"), is a nonpartisan group of ideologically diverse nonprofit organizations and the for-profit organizations which help them raise funds and implement programs. FSC's purpose is to help protect the First Amendment rights of those organizations through the reduction or elimination of excessive federal, state, and local regulatory burdens which have been placed on the exercise of those rights.

**The Free Speech Defense and Education Fund, Inc.** ("FSDEF"), established in 1996, is the education and litigation sister organization of FSC. FSDEF is tax-exempt under IRC section 501(c)(3). It seeks to protect human and civil rights secured by law, study and research such rights, and educate its members, the public, and government officials concerning such rights by various means, including publishing papers, conducting educational programs, and supporting public interest litigation.

**United States Justice Foundation** ("USJF") is tax-exempt under IRC section 501(c)(3). It is an educational and legal action organization dedicated to instruct, inform, and educate the public on significant legal issues.

## INTRODUCTION

On April 2, 2014, the Supreme Court of the United States held that the biennial aggregate contribution limits of the Federal Election Campaign Act (52 U.S.C. § 30116(a)(3)) violated the First Amendment. *See* McCutcheon v. FEC, 572 U.S. ___, 134 S.Ct. 1434 (2014).[1] Thereafter, the FEC repealed the regulations that implemented the statutes invalidated by the McCutcheon decision. *See, e.g.*, 79 *Fed. Reg*. 77373 (Dec. 24, 2014).

On October 17, 2014, the Federal Election Commission ("FEC") unanimously approved the publication of the Advance Notice of Proposed Rulemaking ("ANPRM") in the Federal Register, "request[ing] comments on whether to begin a rulemaking to revise other regulations **in light of certain language** from the Supreme Court's recent decision **in McCutcheon**…." *See* 79 *Fed. Reg*. 62361 (emphasis added). The Notice set the deadline for public comments on January 15, 2015, with a public hearing on February 11, 2015.

## REQUEST TO TESTIFY

For the reasons set out below, the hearing now scheduled for February 11, 2015 should be cancelled. If the hearing is not cancelled, The Free Speech Coalition, Inc., the Free Speech Defense and Education Fund, Inc., and U.S. Justice Foundation hereby request the opportunity for counsel to testify on their behalf on these matters at the hearing on February 11, 2015 (during the afternoon portion of the hearing, if possible).

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[1] These commenters, along with several other parties, filed an *amicus curiae* brief in the Supreme Court in the McCutcheon case on May 13, 2013, http://www.lawandfreedom.com/site/election/McCutcheon_amicus.pdf.

## ARGUMENT

### I. The McCutcheon "Suggestions" Were Directed at Congress, and Provide No Authority for the FEC to Engage in the Proposed Rulemaking.

Having responded to the McCutcheon decision by conforming its regulations to it, the Commission now "seeks comment on whether it should further modify its regulations or practices in response to **certain language** from the *McCutcheon* decision." (Emphasis added). In particular, the Commission states that "the Supreme Court indicated that there are 'multiple alternatives **available to Congress** that would serve the Government's interest in preventing circumvention while avoiding 'unnecessary abridgment of First Amendment rights.'" 79 *Fed. Reg*. 62362. *See* McCutcheon at 1458 (emphasis added). The Commission is not the Congress, and thus, the language upon which the Commission rests its notice simply does not support any Commission action other than the action that it has already taken — to conform its regulations to the McCutcheon ruling.

The failure of the Commission to acknowledge that the Court's reference was to Congress, not the Commission, is abundantly clear in light of the fact that the McCutcheon Court seven times mentioned actions that Congress might take, and that each such possible action was at the discretion of Congress, not at the discretion of the Commission.

First, the Court noted that there "are multiple alternatives available to Congress that would serve the Government's anticircumvention interest." *Id*. at 1458

Second, the Court acknowledged that, if Congress considered the "ability of party committees to transfer money freely" was "problematic," it "might tighten its permissive transfer rules." *Id*. at 1458

Third, the Court observed that "if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees." *Id.* at 1458-59

Fourth, the Court pointed out that Congress had already "adopted [some] transfer restrictions," and that these have been upheld by the courts, indicating that Congress would not be unmindful of the possibility of adding to those restrictions. *Id.* at 1459

Fifth, in the alternative, the Court expressed its opinion that Congress "might also consider a modified version of the aggregate limits, such as one that prohibits donors who have contributed the current maximum sums from further contributing to political committees that have indicated they will support candidates to whom the donor has already contributed." *Id.* at 1459

Sixth, in sum, the McCutcheon Court concluded saying that it did "not mean to opine on the validity of any particular proposal[,] [t]he point being that there are **numerous alternative approaches available to Congress** to prevent circumvention of the base limits." *Id.* at 1459 (emphasis added).

Capping this inventory of anticircumvention tools potentially available to Congress, the McCutcheon Court suggested that there are other alternatives that may be even more effective, such as making changes in the Government's disclosure policies which "Congress" might resort to as even more effectual than tinkering with specific anticircumvention rules. *Id.* at 1460.

The October 9, 2014 statement of (now) Chairman Ravel and Commissioners Walther and Weintraub is particularly misleading in describing the Court's suggestions as "problems the Court identified" and claiming that "the Supreme Court gave the Commission a clear mandate to look for new solutions to tackle the kind of corruption that the old rules failed to adequately address." Those whose task it is to enforce the law must ensure that they operate only within the scope of their authority granted by Congress.

In short, there really is nothing whatsoever in the McCutcheon opinion that provides any basis for the Commission to undertake any rulemaking beyond what it has already done. To the contrary, McCutheon undercuts the rationale for any such rulemaking by its specific references to Congress, not to the Commission. Thus, the Supreme Court in McCutcheon did not contemplate action by this Commission to take any steps beyond conforming its regulations to the Court's decision that the aggregate limit was unconstitutional and unenforceable. The ANPRM should be dismissed.

## II. No Further Rulemaking is Authorized or Justified.

The ANPRM claimed that "[t]he [McCutcheon] Court identified [four] mechanisms that could be implemented or amended to prevent circumvention of the base limits…." 79 *Fed. Reg*. 62362. Those mechanisms are: (i) earmarking regulations;[2] (ii) affiliation factors;[3] (iii)

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[2] While the McCutcheon Court noted that "[o]ther alternatives" to the aggregate contribution limits that it was invalidating "might focus on earmarking" (McCutcheon at 1459), it stated that "[m]any of the scenarios that the Government and the dissent hypothesize … are already prohibited by the earmarking rules." *Id*. The Court went on to make the only suggestion focused on the FEC (instead of Congress): "The FEC might strengthen those rules further by, for example, defining how many candidates a PAC must support in order to ensure that a 'substantial portion' of a donor's contribution is not rerouted to a certain candidate." *Id*., citing 11 C.F.R. § 110.1(h)(2). However, even this one suggestion would appear to

joint fundraising committee regulations;[4] and (iv) disclosure regulations.[5] *Id*. Again, the ANPRM misreads McCutcheon. A rulemaking would need to identify a circumvention problem in an area constitutionally addressed by FECA, where current regulations are inadequate, and no such area has been identified. In the absence an articulated rationale, any regulatory changes would be inherently suspect under the Administrative Procedures Act. "Put simply, the APA requires that an agency's exercise of its statutory authority be reasonable and reasonably explained." Mfrs. Ry. Co. v. Surface Transp. Bd., 676 F.3d 1094, 1096 (D.C. Cir. 2012).

McCutcheon provides no basis for finding any such circumvention, but rather explains that the government provided "highly implausible" hypotheticals: "These scenarios, along with others that have been suggested, are either illegal under current campaign finance laws or divorced from reality." McCutcheon at 1452-56. The Court noted that the government had no

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require a statutory change.

[3] The McCutcheon Court noted only that the FEC already has circumstantial affiliation factors in 11 C.F.R. § 100.5(g)(4), and that the "FEC has in the past initiated enforcement proceedings against contributors with such suspicious patterns of PAC donations." McCutcheon at 1454. Nothing suggested that the FEC's regulations on this point were inadequate, and in fact, FEC's enforcement demonstrates that new limits were not needed to prevent circumvention. Moreover, although identified by the FEC as a suggestion from McCutcheon, this was merely part of the Court's discussion, not a "suggestion," to be acted upon.

[4] The McCutcheon Court's suggestions with respect to new restrictions on joint fundraising were specifically directed to Congress, and did not note any deficiency in the FEC's current regulations.

[5] The McCutcheon Court's discussion of disclosure of campaign finance data focused on its ready availability on the Internet, making no suggestions about regulatory changes or improving the collection and presentation of the data. Again, the ANPRM misstates the Court's discussion as a suggestion for FEC action, when, in fact, it was not.

evidence of circumvention in the 30 States that have base limits without aggregate contribution limits; nor did the Court identify any other special mechanism that allowed the states to enforce the base limits. *Id*. at 1451 n.7. "The improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns." *Id*. at 1456.

**CONCLUSION**

For the reasons set out above, not only should the FEC not propose any changes to its current regulations along the lines suggested in the ANPRM, the ANPRM should be dismissed.

Respectfully submitted,

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