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October 27, 2015

BY ELECTRONIC MAIL

Robert M. Knop, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments in response to "Rulemaking Petition: Contributions From Corporations and Other Organizations to Political Committees," 80 Fed. Reg. 45115 (July 29, 2015)

Dear Mr. Knop:

On behalf of our client, Freedom Partners Chamber of Commerce, we submit these comments on the above-referenced rulemaking petition. Freedom Partners Chamber of Commerce is a nonprofit, nonpartisan 501(c)(6) chamber of commerce that promotes the benefits of free markets and a free society. Freedom Partners Chamber of Commerce has a membership base that represents several hundred businesses, large and small, and covers a diverse range of industries and geographies. Its goal is to educate the public about the critical role played by free markets in achieving economic prosperity, societal well-being, and personal happiness. Freedom Partners Chamber of Commerce seeks to build support for a fiscally responsible government, and policies that support entrepreneurship, spur job creation, and increase opportunities for all, with a focus on four issue areas: health care reform, federal spending, energy policy, and cronyism. Freedom Partners Chamber of Commerce is also associated with Freedom Partners Action Fund, a so-called Super PAC established in accordance with the Commission's guidance in Advisory Opinion 2010-09 (Club for Growth).

The Commission's announcement regarding this so-called "rulemaking petition" is short on detail, and cites to one self-styled "petitions for rulemaking" filed by Make Your Laws Advocacy and Make Your Laws PAC. That "petition" is even more thread-bare, and only raises general issues, and even then only does so in the most obvious fashion. The petition's main goal, is to impose separate reporting requirements on corporations that make political contributions to political committees. This is beyond the statutory authority of the Commission. Indeed, such thoughts have already been put to rest in *Buckley v. Valeo*, where the Supreme Court held that imposing so-called "donor disclosure" outside of the political committee definition is both

beyond the statute and unconstitutional. 424 U.S. 1, 79-80 (1976) (the term "political committee" may encompass only organizations that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate").

Nothing is offered in the petition of any substance. Critically, there is also no proposed rule text. This flaw – which is true regarding the entire "petition" – precludes the public from offering any meaningful comment. The Administrative Procedure Act demands much, much more before the Commission may act. *See* 5 U.S.C. § 553(b)-(c) (mandating adequate notice of proposed rule and meaningful opportunity to comment on the rule's content). Instead, the petition offers only hints, and even those raise precisely the same vagueness and overbreadth problems noted by the Supreme Court in *Buckley*, and invokes open-ended language similar to that struck by the D.C. Circuit in Buckley that was not appealed. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). Ultimately, the petition seeks to impose political committee requirements on non-political committees that contribute to political committees, a goal that is both beyond the statute and is unconstitutional. We oppose any effort to do so.

To help elucidate our views, we hereby refer the Commission to our previous comment filed on January 15, 2015 in response to the Commission's "Aggregate Biennial Contribution Limits" Advance Notice of Proposed Rulemaking," and incorporate the same by reference herein. A copy of our prior comments are attached hereto for ease of reference by the Commission. To the extent the Commission provides draft regulatory text in the future, we ask to be afforded an opportunity to provide meaningful comment at that time.

Respectfully submitted,

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January 15, 2015

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VIA COURIER

Amy L. Rothstein, Esq.
Assistant General Counsel
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999 E Street, N.W.
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Re: Comment in Response to Advance Notice of Proposed Rulemaking on "Aggregate Biennial Contribution Limits," 79 Fed. Reg. 62361 (Oct. 17, 2014), Notice 2014-12 for 11 CFR Part 110

Dear Ms. Rothstein:

On behalf of our clients, Freedom Partners Chamber of Commerce and Freedom Partners Action Fund, we submit these comments on the Advance Notice of Proposed Rulemaking ("ANPRM") on "Aggregate Biennial Contribution Limits," issued on October 9, 2014. Freedom Partners Chamber of Commerce is a nonprofit, nonpartisan 501(c)(6) chamber of commerce that promotes the benefits of free markets and a free society. Freedom Partners Chamber of Commerce has a membership base that represents several hundred businesses, large and small, and covers a diverse range of industries and geographies. Its goal is to educate the public about the critical role played by free markets in achieving economic prosperity, societal well-being, and personal happiness. Freedom Partners Chamber of Commerce seeks to build support for a fiscally responsible government, and policies that support entrepreneurship, spur job creation, and increase opportunities for all, with a focus on four issue areas: health care reform, federal spending, energy policy, and cronyism. Some of its individual members are politically active, supporting candidates directly and engaging in other political activity. Freedom Partners Chamber of Commerce is also associated with Freedom Partners Action Fund, a Super PAC established in accordance with the Commission's guidance in Advisory Opinion 2010-09 (Club for Growth).

The ANPRM requests comments on whether, in light of the Supreme Court's recent decision in *McCutcheon v. FEC*, new or revised regulations should be considered with regard to earmarking of contributions, affiliation, joint fundraising committees, and the Commission's ability to collect and present campaign finance data. The ANPRM includes what some appear to read as an amorphous catch-all, asking generally whether the FEC should "make any other

regulatory changes in light of the decision" in *McCutcheon*. Although the actual text of the Commission-approved ANPRM asks about the Commission's efforts to collect and present campaign finance data, some Commissioners now have unilaterally recast the Commission-approved text, and have invited comment on the disclosure of activities of private citizens, even those that may be subjectively "intended to influence" voters. *See* Statement of Vice Chair Ann N. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub in Rulemaking in Response to *McCutcheon v. FEC* at 2.

Of course, such a standard has no place in the regulation of political speech or other related activity, and has been unambiguously rejected by the Supreme Court. As the Court observed in the seminal case of *Buckley v. Valeo*, the Act—including specifically its disclosure requirements—"must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" 424 U.S. 1, 45 (1976). *See also NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (internal quotation marks and citations omitted)).

Contrary to the pejorative characterization by some Commissioners regarding those "groups that hide their donors," the Act does not require and the Constitution does not permit the government to compel the sort of intrusive disclosure that has been suggested. The Supreme Court limited the statute to reach only those groups whose major purpose is the nomination or election of a federal candidate, so as to avoid the regulation of issue advocacy.[1] 424 U.S. 1, 79 (1976). But for years, the Commission has sought unsuccessfully to work around *Buckley*, and regulate constitutionally protected issue advocacy. Recent matters reveal that some Commissioners are still of the view that issue advocacy can establish that a group is a "political committee."

Worse, such thinking is at odds with the FEC's loss years ago before the D.C. Circuit in *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975). That loss made clear that such far-reaching regulatory notions are improper, as the D.C. Circuit struck the sort of all-encompassing view of "disclosure" still sought by some "reform" lobbyists and some at the Commission. Specifically,

[1] As the *Buckley* Court explained:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.

Id. (Footnotes omitted).

the D.C. Circuit struck a provision which predicated disclosure of general donors to organizations that merely discussed the voting records of candidates. *Buckley*, 519 F.2d at 828. That the Supreme Court specifically noted the lack of appeal, *see Buckley*, 424 U.S. at 11, n.7, and that Congress removed the offending provision and to date has not attempted similar legislation, demonstrates that any effort by the FEC to impose a similar rule is beyond its statutory authority. *See Cook Cottage Savings Ass 'n v. Commission*, 499 U.S. 554, 562 (1991) (when Congress revises a statute its decision to leave certain sections unamended constitutes at least acceptance, if not explicit endorsement, of the preexisting construction and application of the unamended terms.).

Such views are also at odds with *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996), where the Commission argued essentially the same idea, and lost. There, the Commission's effort to recast and broaden the major purpose test to include generalized "electoral activity" was rejected. The Commission has since acknowledged the validity and national application of *GOPAC*. *See* 2007 Political Committee E&J, 72 Fed. Reg. 5595, 5601 (citing *GOPAC* as an example of guidance). Despite this public recognition, some continue to tread down the same path, and the latest salvos are more of the same effort to avoid the limitations of the Act as set forth in *Buckley*. We oppose any such efforts. After all, as the Supreme Court observed: "'[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Davis v. FEC*, 554 U.S. 724, 755 (2008) (*quoting Buckley*, 424 U.S. at 64).

Equally troubling is the disingenuousness in the presentation of amounts spent in connection with elections, presumably to create a "problem" in need of a "solution." Whether comparing a non-presidential election (2006) with a presidential election year (2012), ignoring the intervening *Citizens United* decision, or ignoring how the cited amounts compare to overall spending are but just a few examples that tilt the presentation. The actual facts tell an entirely different story: during the 2012 election cycle, $6.9 billion was spent. Of that, $300 million was spent by non-profits who were not obligated to disclose their donors and members. *See* FEC Press Release, FEC Summarizes Campaign Activity of the 2011-2012 Election Cycle (Apr. 19, 2013, rev. Mar. 27, 2014). In other words, what is being singled out is a mere fraction of the total spending on elections. And even that spending was disclosed: advertising included "paid for by" and authorization statements, and reports were filed disclosing to the public who paid for such communications. Certainly, half of the Commission and several elected Democrats have made clear that they prefer even more "disclosure" of this sort of spending. But to continue to lament a "lack of disclosure," and pejoratively claim that some are "hiding" —when citizens are disclosing in full compliance with applicable law—is simply ridiculous. Similarly, to claim that such a small amount of overall spending somehow creates "corruption in the political process" is ludicrous.

And what is current law? With respect to the reporting of independent expenditures, it is clear: donors to groups that make independent expenditures but are not political committees need only be disclosed if such funds were given to support the independent expenditures. In the words of the Act:

> Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2), and shall include-
>
> (A) the information required by subsection (b)(6)(B)(iii), indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved;
>
> (B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and
>
> (C) the identification of each person who made a contribution in excess of $200 to the person filing such statement **which was made for the purpose of furthering an independent expenditure**.

52 U.S.C. § 30104(c)(2) (formerly 2 U.S.C. § 434(c)(2)) (emphasis added). Commission regulations contain the same standard:

> If a signed report or statement is submitted, the report or statement shall include:
>
> (i) The reporting person's name, mailing address, occupation, and the name of his or her employer, if any;
>
> (ii) The identification (name and mailing address) of the person to whom the expenditure was made;
>
> (iii) The amount, date, and purpose of each expenditure;
>
> (iv) A statement that indicates whether such expenditure was in support of, or in opposition to a candidate, together with the candidate's name and office sought;
>
> (v) A verified certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents; and
>
> (vi) The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure.

11 C.F.R. § 109.10(e)(1).

A review of the Commission's own forms confirms this reading of the law. In fact, the Commission's first iteration of its independent expenditure form did not even provide for a field for a group's underlying donors. *See* Independent Expenditure Report of Young Republican Federation of Virginia (filed January 24, 1977). Although subsequent iterations included a field for contributions made to the reporting entity, such fields were rarely filled in, confirming the long-standing view that only contributions made for independent expenditures need be disclosed. *See* Independent Expenditure Report of Catholics for a Pro-Life Congress (filed November 17, 1978); *cf.* Independent Expenditure Report of Bay Area Concerned Women (filed October 20, 1980) (listing a contributor who made contributions that totaled the exact amount of the independent expenditure, presumably because the funds were contributed to support that independent expenditure). More recent versions support the same point. *See* Independent Expenditure Report of League of Conservation Voters (filed November 5, 1996); *cf.* Independent Expenditure Report of California League of Conservation Voters (filed August 3, 2012) (disclosing a receipt from the League of Conservation Voters, without any further contributor itemization).

Simply put, *McCutcheon v. FEC* concerned contribution limits, which were found to be unconstitutional. It did not concern government-mandated disclosure of the affairs of private citizens, and it certainly does not empower an unelected bureaucracy to chase what the "reform" lobbyists call "dark money." And, contrary to what some Commissioners have suggested, the Commission's mandate is not to "prevent corruption of the political process." As the Supreme Court has made clear, the Commission's already limited regulatory power can only be used to prevent corruption or its appearance. *Citizens United v. FEC*, 558 U.S. 310, 357-8 (2010) ("Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. . . . When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption."). And this is not the sort of amorphous "corruption in the political process" claimed by half the Commission. That view has already been rejected by the Supreme Court, which made clear that only *quid pro quo* corruption or its appearance is sufficient. *Davis*, 554 U.S. at 741 (2008) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." (internal quotations omitted)). In fact, in *Davis*, the Commission argued for the broader mandate of generalized corruption still espoused by half the Commission. But the Court unequivocally rejected that argument, and in so doing, prohibited the Commission from considering it now. And, contrary to rhetoric about "disclosure has been upheld," *Davis* struck disclosure. 554 U.S. 724 (striking disclosure related to the so-called Millionaire's Amendment). *See also Buckley*, 424 U.S. 1 (limiting reach of disclosure).

The Commission is not a legislature; Commissioners do not stand for election or reelection; they do not have constituencies or people they represent. They are tasked with

humbly administering the laws as passed by Congress, and they lack any sort of roving power to simply "take action." In fact, the Commission has been told repeatedly that they lack such roving power. *See, e.g., EMILY's List v. FEC*, 581 F.3d 1 (D.D.C. 2009); *Unity'08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). The Commission must take such binding judicial precedent to heart, as "declining to follow the Supreme Court is not an option." *North Carolina Right to Life v. Leake*, 525 F.3d 274, 302 (4th Cir. 2008).

In sum, we unequivocally oppose any effort to use the Commission's loss in *McCutcheon* as a spring-board to launch a rulemaking or consider other more onerous legal norms regarding additional disclosure requirements. We also oppose any effort to use *McCutcheon* as an opportunity to expand the Commission's regulatory footprint in the other areas listed in the ANPRM. The ANPRM observes that the *McCutcheon* 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.'" But the ANPRM seems to gloss over the critical language in that quote: that those are options "available to Congress," and not the FEC acting alone in the first instance. In other words, to the extent there are additional opportunities to create legal norms of the sort listed in *McCutcheon*, those are up to Congress, and not the FEC. The FEC is an agency of limited jurisdiction, and lacks any sort of roving plenary power to pass extra-statutory rules. To the extent that other avenues of constitutional regulation exist, it is up to Congress—and Congress alone—to initiate such inquiries.

* * *

Turning to each of the articulated issues in the ANPRM in order:

1. Earmarking

The ANPRM asks whether or not the Commission's current earmarking regulation ought to be modified, specifically to encompass so-called "implicit agreements." The answer is no, since the current regulation already prevents circumvention of contribution limits, and to pursue more amorphous theories raises serious First Amendment and Due Process issues, which the Commission must avoid. *See Arizona v. Inter-Tribal Counsel of Ariz., Inc.*, 570 U.S. __, 133 S. Ct. 2247, 2259 (2013) ("validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt").

First, the ANPRM does not accurately portray the Court's ruling in *McCutcheon*. There, the Court recognized that the existing Commission regulations already "disarm" the possibility of circumvention of contribution limits applicable to individual candidates. *McCutcheon*, 134 S. Ct. at 1453. Similarly, the ANPRM mischaracterizes the Commission's enforcement history.

For example, the ANPRM cites MUR 5445 (Geoff Davis for Congress) to support the claim funds will only be deemed "earmarked" where there is "clear documented evidence of acts by donors that resulted in their funds being used" as contributions. But this distorts this MUR, where the complainant offered absolutely no evidence of any sort of earmarking, whether direct or implied, and instead only relied on publicly-available disclosure reports which showed certain contributors gave to both a campaign and PACs that also gave to that campaign. Not surprisingly, a complainant must offer more than this, and certainly, this MUR cannot be read as creating some sort of problem that cries out for a solution. Other cited MURs fare no better. For example, in MURs 4831 & 5274 (Missouri Democratic State Committee), the Commission found that there was probable cause to believe that a violation occurred, thus undercutting the ANPRM's implication that the Commission's existing earmarking rules are too lax or otherwise in need of strengthening.

Second, regarding the ANPRM's question regarding requiring PACs to support a certain number of candidates, such an approach oversteps the Commission's authority. Congress has already defined what is required to qualify as a multicandidate PAC, and has set appropriate contribution limits for both non-multicandidate and multicandidate PACs. 52 U.S.C. § 30116(a)(1)-(a)(2), (a)(4) (formerly 2 U.S.C. § 441a). *See also* AO 2012-09 (rejecting challenge to statutory requirements for multicandidate committee). Congress realized that individuals might give both to candidates and PACs, and that certain PACs might only give to a handful of candidates. Such non-multicandidate PACs are accordingly afforded a lesser contribution limit to campaigns as compared to those PACs that qualify as multicandidate PACs. *Compare* 52 U.S.C. § 30116(a)(1) *with* § 30116(a)(2). Given that Congress has already enacted such a comprehensive statutory scheme, it is not for the Commission to second-guess such decisions or create additional thresholds and limits.

Finally, to go the direction suggested in the ANPRM raises serious First Amendment and Due Process concerns. After all, those who attempt to circumvent the limits *via* so-called "giving in the name of the other" face criminal sanctions. Legal norms must therefore be clear, and cannot turn on subjective and easily imagined winks and nods. Similarly, the Supreme Court has recognized the First Amendment speech and associational interests present in campaign contributions. To now impose additional restrictions on the ability of a PAC to contribute funds raises precisely the constitutional problems addressed by the Court in *McCutcheon*. Worse, the Commission would be going it alone, absent a specific grant of statutory authority.

2. Affiliation

The ANPRM asks whether the Commission's current affiliation factors are adequate to prevent the circumvention of the base limits adequate. The simple answer is yes. The Commission's approach has functioned reasonably well for decades, and there is no evidence

that the current rules do not go far enough. In fact, at least one current Commissioner has criticized OGC's occasionally creative interpretation of the "establish, maintain, finance or control" test. *See* MUR 5338 (The Leadership Forum), Statement of Reasons of Chair Ellen Weintraub and Commissioner Scott Thomas at 3 (rejecting a so-called "transitive theory of affiliation"). If anything, the Commission could clarify and/or summarize how it has applied the various factors in specific cases, providing the public with a resource in lieu of researching over thirty years of enforcement matters and advisory opinions.

3. Joint Fundraising Activities

The ANPRM asks whether the Commission can or should revise its joint fundraising rules. It cannot revise them in the way suggested by the ANPRM. Congress has specifically provided for joint fundraising committees, and to the extent it wished to place limits on the ability to raise certain funds *via* such committees, Congress has already set such limits. 52 U.S.C. § 30125(b)(2)(C) (formerly 2 U.S.C. § 441i) (prohibiting involvement of national parties, federal candidates and officeholders, and state parties acting jointly when raising so-called "Levin funds"). Thus, joint fundraising committees are recognized in the statute, are required to disclose, and are subject to applicable base limits. Whether one gives money directly to a number of campaigns, or through a joint fundraising committee, is a distinction without a difference: the applicable base limits apply to each participating committee. To the extent the Court in *McCutcheon* spoke of limiting the number of participants, it was clear that this was a decision for Congress to make: "if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee," then Congress could alter the law. 572 U.S. ___ (slip op at 34) (emphasis added). This does not empower the FEC to do so.

Similarly, Congress has already made the policy choice regarding transfers among party committees. The FEC lacks the power to second-guess that policy choice, and cannot alter the statute *via* regulatory fiat. But regardless of the ability of parties to transfer funds amongst themselves, funds contributed to the parties in the first instance are subject to limits. And to the extent Congress wished to limit the ability of parties to transfer funds, it has spoken to that very issue. 52 U.S.C. § 30125(b)(2)(C) (formerly 2 U.S.C. § 441i) (prohibiting involvement of national parties, federal candidates and officeholders, and state parties acting jointly when raising so-called "Levin funds").

To the extent the Commission wishes to review its joint fundraising regulations, it could focus on three areas: (1) the naming of such committees; (2) the timing of the various reporting obligations; and (3) simplifying the rules and exempting out smaller grassroots events. First, current regulations require what can become unwieldy disclaimers that list each participating committee in excruciating detail. *See* AO 2013-13 (Freshman Hold'em JFC) (rejecting request to shorten certain disclaimers). The Commission ought to consider relaxing such requirements, so as to avoid overloading solicitations and the like with excessive information that can only

serve to confuse the general public. In fact, years ago the Reports Analysis Division would send conflicting letters, sometimes claiming that a joint committee had to contain the name of any participating campaign, and sometimes claiming that the use of a campaign's name was forbidden.

Which leads to the second point: Joint committees are authorized committees of each participant. Yet the Commission's adherence to this premise has been schizophrenic in the reporting context. On the one hand, when a joint committee receives funds, it discloses those funds on its next regular report. Yet when the funds are transferred to each participant, the participating committees have to report the funds again, with cumbersome itemization. Worse, the Commission has required that participants file 48-hour notices on certain funds, even when a contributor did not first make the contribution within the requisite 48-hour reporting window. *See* MURs 6078, *et al.* (Obama for America). At a minimum, the Commission ought to provide some sort of written summary of such reporting nuances, nuances that have tripped up even the most sophisticated political participants. But really, the Commission ought to insist on internal logical consistency that flows from the premise that joint committees are authorized by each participating committee.

Finally, the Commission ought to consider simplifying its joint fundraising regulations, and exempting from them smaller events. The purpose of a joint fundraising committee is simple: it provides a way for participating committees to conduct one event without running afoul of any applicable contribution limitations among the participants. Certainly, joint committees are critical for larger events, but the threat of excessive contributions occurring at smaller events of the sort held in a personal residence for a handful of campaigns does not present a credible threat of excessive contributions. It is these sorts of events that ought to be explicitly exempted from joint fundraising obligations, due to the practical reality that such events do not raise enough funds to justify the cumbersome and detailed reporting required of joint committees.

4. Disclosure

The plain language of the ANPRM asks whether the Commission could improve its own collection and presentation of campaign finance data. As explained above, it does not ask about additional disclosure by private citizens, and thus that is beyond the scope of the present ANPRM. Similarly, *McCutcheon* was a case that concerned contribution limits, not disclosure, and cannot serve as a springboard for new disclosure regulations. Regardless, we oppose any effort by the FEC to impose additional reporting obligations on the general public, as the decision to do so rests with Congress, and not the FEC. That some in Congress sought to impose such new burdens but failed only strengthens the point, and that the DISCLOSE Act failed not once but twice demonstrates Congress' unwillingness to impose more regulation. It is not within

the FEC's authority to do through regulation what the Congress was unwilling to do through legislation.

What is within the FEC's purview is ensuring that those who wish to not disclose personal details out of fear of physical, economic or other harm have a publicly-available process by which they can avail themselves. *See NAACP v. Alabama*, 357 U.S. 449 (1958) (First Amendment protects identity of membership); *Talley v. California*, 362 U.S. 60 (1960) (protecting ability to distribute leaflets without requisite disclaimers, even where no threat of harm was shown); *McIntyre v. Ohio*, 514 U.S. 334 (1995) (protecting ability to distribute anonymous leaflets). Currently, there is no clear process for private citizens to avail themselves of such protections. The one group probably most associated with this issue is the Socialist Party, which had to originally litigate the issue, and only then did it secure a series of Advisory Opinions. *See* AOs 1975-44, 1976-17, 1980-121, 1990-13, 1996-46, 2003-01, 2009-01, 2012-38. But what about others? Is the only avenue litigation? Or can others seek similar advisory opinions? If so, how can that occur in practical terms? In other words, if one wishes to speak anonymously, how can one secure an advisory opinion without first revealing one's identity? And even if one does ask for an advisory opinion, what sort of evidence needs be presented? *See* AO 2013-17 (Tea Party Leadership Fund) (request for advisory opinion seeking exemption from disclosure failed 3-2). Certainly, the standard cannot be bloody noses and broken bones, as courts have recognized that economic harm can be sufficient. *See Buckley v. Valeo*, 424 U.S. 1, 74 (minor parties "need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties").

With respect to what the ANPRM actually asks—what can the FEC do better—one need look no farther than (1) the closed MUR files, and (2) its own disclosure forms. First, for years, the FEC did not make all its past enforcement matters available on its website. Although they are now supposedly all on the website, older MURs (particularly ones that pre-date McCain-Feingold) cannot be readily searched, as they were simply scanned into a format that could be placed online. This is not an issue with the Commission's IT department, but instead is one caused by the classic "garbage in, garbage out" problem, where the underlying substantive documents have not been harmonized with the system. Although this was a vast improvement over not having them on the web at all, the time has come for the Commission to take seriously its duty to provide to the public the full record of its enforcement history in a way that can be searched by ordinary citizens. In fact, unlike virtually every other area of administrative law, there is no annotated code for Federal election law, where the Act is supplemented with citation to its implementing regulations, advisory opinions, enforcement matters, and other interpretive guidance. Today, one must look to the statute, and separately make sense of the regulations, and then plow through over thirty years of advisory opinions and enforcement matters to answer what ought to be otherwise basic questions. The public deserves better.

Second, the Commission's disclosure forms are out of date. Instead of focusing on issues beyond its statutory power, the Commission ought to focus on those matters squarely within its jurisdiction and responsibility, and its own forms it at the heart of that responsibility. For example, the Commission's statement of organization ought to expressly recognize the existence of Super PACs (currently, it does not, and registrants are supposed to know that an aging advisory opinion instructs to file an additional letter noting that a committee is a Super PAC). The forms also ought to reflect the existence of so-called *Carey* committees. *Carey v. FEC*, No. 11-259 (RMC) (June 14, 2011). Finally, the Commission ought to revisit Form 3X.

5. Other issues

a. Internet

At least one Commissioner has publicly expressed an interest in revisiting the Commission's various long-standing exemption regarding the internet. *See* MUR 6729, Statement of Vice Chair Ann M. Ravel at 1 ("A re-examination of the Commission's approach to the Internet and other emerging technologies is long overdue."). We firmly oppose any such effort.

b. Media

In addition to the recent musings regarding regulating the internet, there has been significant media coverage of the FEC's so-called "media exemption." As then-Chairman Lee Goodman and other Commissioners have pointed out, the Commission has not been particularly consistent it is consideration of who/what is and who/what is not the media for purposes of campaign finance regulation. *See* MUR 6703 (WCVB, Channel 5), Statement of Reasons of Commissioners Lee E. Goodman, Caroline C. Hunter and Matthew S. Petersen. And the Supreme Court has made clear that the identity of a speaker as "media" or "non-media" is insufficient to justify different regulatory treatment. In the words of the Court, "prohibited . . . are restrictions distinguishing among different speakers, allowing speech by some but not by others." *Citizens United*, 130 S. Ct at 899. Similarly, "the Government may commit a constitutional wrong when by law it identifies certain preferred speakers . . . [t]he First amendment protects speech and speakers, and the ideas that flow from each." *Citizens United*, 130 S. Ct. at 899. *See also Bellotti*, 439 U.S. at 798 (Burger, C.J., concurring) ("the history of the Clause does not suggest that the authors contemplated a 'special' or 'institutional' privilege"). To date, the Commission has not reviewed its current approach to the "media exemption" with an eye toward harmonizing it with binding judicial precedent.

MUR 6211 (Krikorian for Congress) is illustrative of this problem. That matter concerned a 501(c)(4) non-profit and a newspaper, both of which solicited funds for a federal candidate in the same manner. The Office of General Counsel recommended that the

Commission find that there was reason to believe that the 501(c)(4) violated the law, but no reason to believe that the newspaper did. They did so even though each entity engaged in precisely the same activity. Worse, the Commission split in part, agreeing that the newspaper was exempt from regulation, but splitting with respect to the non-profit. Such a recommendation and supporting vote cannot be squared with *Citizens United*. Ultimately, the so-called "media exemption" is not simply a statutory carve out, provided simply by the benevolence of Congress. Instead, "[t]here is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations." *Citizens United*, 130 S. Ct. at 905.

c. *Purge all regulations of that which is unconstitutional per WRTL, Davis, CU, McCutcheon, Emily's List, Unity '08, and SpeechNow*

Over the past several years, the Commission has been handed a string of losses by the Supreme Court and the D.C. Circuit Court of Appeals. *See Wisconsin Right to Life, Inc. v. FEC*, 551 U.S. 449 (2007); *Davis v. FEC*, 554 U.S. 724 (2008); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. __ (2014); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *Unity '08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). Such cases struck not only the rule that was at issue in a particular case, but undercut and at times outright rejected some of the basic tenets of the Commission's thinking on a variety of issues. The Commission has still not conducted any sort of across-the-board review of its regulations to ensure it is acting in accordance with these binding mandates.[2]

One example is the corporate "facilitation" of contributions. The statutory authority upon which the Commission's "facilitation" regulations were based was already lacking, and the regulation has no place in the post-*Citizens United* world. *See* MUR 6211, Statement of Reasons of Commissioners Hunter, McGahn and Petersen at 1 ("the continuing viability of the Commission's facilitation regulation is at best suspect") and 3 (the regulations "no longer appear to be valid"). Simply put, the Commission's "facilitation" regulations run counter to *Citizens United* as they serve as a ban on otherwise independent political activity. Despite self-serving statements by some Commissioners regarding a desire to put things out for comment, hear from the public and the like, there has been absolutely no effort to hear from the public on this and related issues. Ultimately, the Commission needs to take its losses in court seriously, and not

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[2] Similarly, there have been a number of court decisions taking the executive branch and its agencies to task for exceeding their authority or otherwise unlawfully expanding their own power, of the wish the Commission ought to be mindful. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012); *Sackett v. EPA*, 132 S. Ct. 1367 (2012); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Arizona v. United States*, 132 S. Ct. 2492 (2012); *Gabelli v. SEC*, 133 S. Ct. 1216 (2013); *Arkansas Fish & Game Commission v. United States*, 133 S. Ct. 511 (2012); *PPL Corp. v. Commissioner of Internal Revenue*, 133 S. Ct. 1897 (2013); *Horne v. USDA*, 133 S. Ct. 2053 (2013); *Sekhar v. United States*, 133 S. Ct. 2720 (2013); *NLRB v. Canning*, 573 U.S. __ (2014); *Burwell v. Hobby Lobby*, 573 U.S. __ 2014.

maintain rules and policies that are in constitutional doubt. *See Arizona v. Inter-Tribal Counsel of Ariz., Inc.*, 570 U.S. __, 133 S. Ct. 2247, 2259 (2013) ("validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt").

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We respectfully request an opportunity to testify at any Commission hearing related to the ANPRM, including the one scheduled for February 11, 2015.

Respectfully submitted,

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