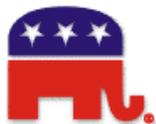


Please see the attached file.

Comments provided by :
Phillippe, John



Republican National Committee

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Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington D.C. 20463

January 15, 2015

Re: Advance Notice of Proposed Rulemaking (“ANPRM”) on Aggregate Biennial
Contribution Limits

Dear Mrs. Rothstein:

In light of the Supreme Court’s decision in *McCutcheon v. FEC*,¹ a case brought by the RNC along with co-plaintiff Shaun McCutcheon, the Commission issued an Interim Final Rule which conforms the Commission’s regulations to the Supreme Court’s holding that the limits on the aggregate amounts that an individual may contribute to federal candidates, political parties, and other political committees in a two-year election cycle (52 U.S.C. §30116(a)(3) (formerly 2 U.S.C. 441a(a)(3)) are unconstitutional.

As the RNC had argued, the Court held that these limits placed unjustifiable, substantial burdens on individuals’ core First Amendment rights. With the Interim Rule finalized, the Commission has no further obligation or reason to modify its regulations or practices. Yet now comes the FEC asking “whether [the Commission] should further modify its regulations or practices in response to certain language from the *McCutcheon* decision.”² With the Court’s decision fully implemented, and against a backdrop of political parties and campaigns seeing their relative influence wane due to the comparative stringency of the regulations under which we seek to exercise our First Amendment rights, the Republican National Committee (“RNC”) by and

¹ 572 US. ___, 134 S. Ct. 1434 (2014)

² Advance Notice of Proposed Rulemaking on Aggregate Biennial Contribution Limits (the “ANPRM”), 79 Fed. Reg. 62361, 62362 (Oct. 17, 2014).

through counsel submits these comments as to why no further action should be taken by the FEC “in response” to *McCutcheon*.³

I. **MCCUTCHEON PROVIDES NO BASIS FOR A FURTHER RULEMAKING.**

To use *McCutcheon* as the basis for potentially initiating another rulemaking would constitute an unjustified and ironic overreach given the Supreme Court’s reasoning in striking down the aggregate limits. Indeed, as an initial matter, it is notable that the Court did not find that the existing regulatory regime is insufficient; to the contrary, the Court struck the challenged limits based on a finding that the “comprehensive regulatory scheme” currently in place sufficiently prevents circumvention of base contribution limits.⁴ The Court in *McCutcheon* struck the challenged regulations (the biennial aggregate limits) based in part on a finding that “statutory safeguards against circumvention have been considerably strengthened since *Buckley* was decided, through both statutory additions and the introduction of a **comprehensive regulatory scheme**.”⁵ Specifically, the Court concluded that the Government failed to demonstrate that the biennial limits prevented circumvention of the base limits, and, in reasoning that directly undermines any rationale for a rulemaking here, that the *existing* regulatory scheme sufficiently limits the opportunity for circumvention of the base limits –

Given the statutes and regulations **currently in effect**, *Buckley*’s fear that an individual might “contribute massive amounts of money to a particular candidate through... un-earmarked contributions” to entities likely to support the candidate, is far too speculative. Even accepting *Buckley*’s circumvention theory, it is hard to see how a candidate **today** could receive “massive amounts of money” that could be traced back to a particular donor uninhibited by the aggregate limits. **The Government’s scenarios offered in support of that possibility are either illegal under current campaign finance laws or implausible.**⁶

Furthermore, the Commission lacks the statutory authority to make many of the contemplated changes. The ANPRM seems to spring from nothing more than one section of the *McCutcheon* decision in which the Court noted that there are “multiple alternatives available to **Congress** that would serve the government’s anticircumvention interest.”⁷ As prominent campaign finance lawyer Bob Bauer noted, “[t]he issues before the Commission, drawn from the *McCutcheon* opinion, are not necessarily in all cases appropriately resolved, if addressed at all, by agency

³ If the Commission were to undertake a rulemaking in response to *McCutcheon*, it would be well-advised to loosen, rather than tighten, its regulatory stranglehold on political party and candidate committees, which are the most transparent, accountable, and grassroots-oriented entities in our political system but which are heavily disadvantaged by the contribution limits and prohibitions applicable to them.

⁴ *McCutcheon*, 134 S. Ct. at 1446.

⁵ *Id.* at 1446 (emphasis added).

⁶ *Id.* at 1439 (ellipses in original, emphasis added).

⁷ *Id.* at 1458.

action.”⁸ After all, “[i]t is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”⁹

The FEC must tread cautiously, not only due to the limits of its authority but also because the proposals in the ANPRM seek to impose additional restrictions on core First Amendment activity. The First Amendment “is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”¹⁰ The First Amendment protects, with equal force, on the one hand, a lone pamphleteer or street corner orator in the Thomas Paine mold, and, on the other, someone who spends substantial amounts of money in order to communicate his political ideas through sophisticated means – either way, he is participating in an electoral or policy debate that we have recognized is integral to the operation of the system of government established by our Constitution.¹¹

Moreover, as a matter of administrative law, “[w]hen an agency interprets its own authority, more intense scrutiny is appropriate.”¹² As the Third Circuit Court of Appeals opined in *Hi-Craft Clothing Co. v. N.L.R.B.*, the reasoning behind this higher scrutiny is “grounded in the unspoken premise that government agencies have a tendency to swell, not shrink, and are likely to have an expansive view of their mission.”¹³ Even under *Chevron’s* deferential framework, an agency must “stay[] within the bounds of its statutory authority,” and operate “within the bounds of reasonable interpretation.”¹⁴

In fact, some of the issues being raised in connection with the ANPRM have no basis in the *McCutcheon* decision or the Act, and appear to be an attempt to impose additional, burdensome regulations reflecting policy preferences, via agency rulemaking, after Congress considered but declined to act legislatively. Implicit in the ANPRM’s asking “whether [the Commission] should further modify its regulations or practices in response to certain language from the *McCutcheon* decision,” is an assumption that it is appropriate for the Commission to *sua sponte* and unilaterally venture where neither Congress nor the Supreme Court desired to go. But policy preferences, particularly where they reflect the will of neither Congress nor the Supreme Court,

⁸ Bob Bauer: The FEC, the Internet Squabble and the February Hearing, More Soft Money Hard Law (Oct. 31, 2014), available at: <http://www.moresoftmoneyhardlaw.com/2014/10/fec-internet-squabble-february-hearing/>

⁹ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (invalidating an agency rule on the grounds that it went beyond the statute).

¹⁰ *McCutcheon*, 134 S. Ct. at 1448 (citing *Cohen v. California*, 403 U.S. 15 (1971)).

¹¹ *Id.* at 1448.

¹² *Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910, 916 (3d Cir. 1981) (rejecting an agency’s expansive interpretation of its authority). See also *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 499 (1960) (The Court declined the opportunity to expound a detailed delineation of the respective functions of court and agency, explaining that, “[w]e think the [agency]’s resolution of the issues here amounted not to a resolution of interests which the Act left to it for case-by-case adjudication, but to a movement into a new area of regulation which Congress had not committed to it. Where Congress has in the statute given the [agency] a question to answer, the courts will give respect to that answer, but they must be sure the question has been asked.”).

¹³ *Id.* at 916.

¹⁴ *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (U.S. 2013). See also *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014) (holding that the Clean Air Act neither compels nor permits the EPA to adopt an interpretation of the Act that effectively amounts to a rewriting of the statutory thresholds for regulation).

provide insufficient justification for imposing additional burdens on activities protected by the First Amendment. For example, in their Statement on the Rulemaking in Response to *McCutcheon v. FEC*, Vice Chair Ravel and Commissioners Walther and Weintraub make the following assertion:

We know there is growing public concern about the deluge of undisclosed spending to sway our votes. We share this concern.... [And in] *McCutcheon* the Supreme Court gave the Commission a clear mandate to look for new solutions to tackle a kind of corruption that the old rules failed to adequately address.¹⁵

Similarly, Vice Chair Ann Ravel issued a statement about the ANPRM that is alarming in its premise, beginning, “the Commission is now accepting wide-ranging public comment on issues fundamental to campaign finance – including disclosure and corruption in the political process... citizens from across the political spectrum are invited to express their views, submit proposed policy solutions, and otherwise formally participate in the Commission’s policymaking process.”¹⁶

While the RNC (as a frequent commenter) fully appreciates the Commission’s openness to public input, to proceed with a rulemaking would indicate that the Commission has lost sight of the limits of its authority – the FEC is an administrative agency constrained in its policymaking by the Act and the Constitution. And the search for “policy solutions” that have no pertinence to the *McCutcheon* decision – and in light of Congress’s clear objective of recently avowed policy goal of strengthening political parties and its refusal to pursue the policy alternatives hypothesized in *McCutcheon* (or to take any other steps “in response” to the decision) would run a grave and unwarranted danger of crossing constitutional and statutory lines.¹⁷ *McCutcheon* articulated no such mandate.

Moreover, the Court in *McCutcheon* could not have been clearer that the government “may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.”¹⁸

“Many people... would be delighted to see fewer television commercials touting a candidate’s accomplishments or disparaging an opponent’s character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades--despite the profound offense such spectacles cause--it surely protects political campaign speech despite popular opposition. Indeed, as we have emphasized, the First Amendment ‘has its fullest and most urgent application precisely to the conduct of campaigns for political office.’”¹⁹

¹⁵ Statement on the Rulemaking in Response to *McCutcheon v. FEC* by Vice Chair Ravel and Commissioners Walther and Weintraub at 1, 2.

¹⁶ Statement of Vice Chair Ann M. Ravel Encouraging Public Comments to Increase Disclosure and Address Corruption in the Political Process, at 1.

¹⁷ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 101 (2014).

¹⁸ *McCutcheon*, 134 S. Ct. at 1441 (internal citations omitted).

¹⁹ *Id.* at 1441 (internal citations omitted).

To proceed with a rulemaking using the language from *McCutcheon* as a basis for stricter regulation would seriously risk running afoul of the Administrative Procedure Act. There is simply no grounds for concluding that such a rulemaking would be “necessary to carry out the provisions of” the Federal Election Campaign Finance Act.²⁰ For these reasons, and for those explained below with respect to the specific regulatory topics raised in the ANPRM, the Commission should make no further regulatory changes in the wake of the *McCutcheon* decision and the Commission’s Interim Final Rule.

II. THE ISSUES RAISED IN THE ANPRM ARE BARELY IMPLICATED BY MCCUTCHEON, AND THE EXISTING REGULATIONS IN THESE AREAS ARE MORE THAN SUFFICIENT.

The ANPRM asks “whether [the Commission] should further modify its regulations or practices in response to certain language from the *McCutcheon* decision.”²¹ The referenced “language” consists of some hypothetical alternative approaches purportedly to preventing corruption or the appearance thereof. However, as the dissenting Justices in *McCutcheon* pointedly note –

“The plurality... does not show, or try to show, that these hypothetical alternatives could effectively replace aggregate contribution limits. Indeed, it does not even ‘opine on the validity of any particular proposal,’ – presumably because these proposals themselves could be subject to constitutional challenges.”²²

These constitutionally suspect alternatives – which touch upon the Commission’s regulations on earmarking, affiliation, and joint fundraising activities – are a dubious solution in search of a cognizable problem. Indeed, it is clear from the Court’s opinion that these alternatives were not intended to be prescriptive for the Commission at this point in time, but were in fact options that Congress possibly could have exercised (and perhaps still could) if the true justification for the aggregate limits really were an anti-circumvention interest (an interest the Government all but abandoned in oral argument).²³ The existence of these narrower alternatives served as evidence of the unconstitutionality of the aggregate limits. The biennial aggregate contribution limits were a “substantial mismatch between the Government’s stated objective and the means selected to achieve it.”²⁴ If Congress desires to find a narrower means to serve this purported interest, it has the prerogative to do so. The Commission does not.

A. Earmarking

The Act provides that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise

²⁰ 52 U.S.C. §30107(a)(8)

²¹ 79 Fed. Reg. at 62362.

²² *McCutcheon*, 134 S. Ct. at 1479 (internal citations omitted).

²³ *Id.* at 1459.

²⁴ *Id.* at 1446.

directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.”²⁵ The Commission has interpreted “earmarked” to mean, “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of a clearly identified candidate or candidate’s authorized committee.”²⁶ This regulation is “broad[], and “further limits the opportunity for circumvention of the base limits via ‘un-earmarked contributions to political committees likely to contribute to a particular candidate’”.²⁷

The District Court in *McCutcheon* did not explain what it meant by parties “implicitly agreeing” to serve as conduits for a single contributor’s interests.²⁸ But the mere fact that a contributor makes a contribution knowing that, at the sole discretion of the recipient party committee, some portion of his contribution *might* be transferred to another party committee that, at the sole discretion of that party committee *might* use it to make a coordinated expenditure on behalf of a candidate that the contributor might want to support, does not give rise to corruption or the appearance thereof.

If the Commission were to read the current earmarking regulation to cover that scenario, then almost every contribution made to any PAC or party committee would be considered “earmarked” – but how would the contributor know for whom he had “earmarked” his contribution? So there must be a limiting principle, and that is what the current regulation provides. For the Commission to “enforce” the earmarking regulation to go beyond the requirement that there be evidence of earmarking would impermissibly shift the burden to the contributor (who would potentially be facing both civil and criminal penalties) to prove that his contribution was *not* earmarked – all in the name of a solution to a problem that no evidence suggests even exists.

Currently, a person may contribute to a candidate’s authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as “the contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of that candidate for the same election; and [t]he contributor does not retain control over the funds.”²⁹ The Court acknowledged that “[t]he FEC might strengthen [the existing earmarking rules at 11 CFR §110.1(h)] by, for example, defining how many candidates a PAC must support in order to show that ‘a substantial portion’ of a donor’s contribution is not rerouted to a certain candidate.”³⁰

To be clear, the Court said that the FEC “might” make such a change – not that the FEC “should,” “must” or “really ought to” make such a change. While strengthening the earmarking regulations or enforcement approach may sound appealing in theory, in practice it is unrealistic

²⁵ 52 U.S.C. 30116(a)(8) (formerly 2 U.S.C. §441a(a)(8)).

²⁶ 11 C.F.R. §110.6(b).

²⁷ *McCutcheon*, 134 S. Ct. at 1447.

²⁸ 893 F. Supp. 2d, at 140.

²⁹ 11 C.F.R. §110.1(h).

³⁰ *McCutcheon*, 134 S. Ct. at 1459.

and unworkable, impermissibly infringes on protected First Amendment activity, and is slightly hypocritical (to argue that there is too much money in politics but argue for a regulation that provides that the more candidates a PAC supports the more contributions it can accept and use to make contribution to more candidates).

On what basis would the Commission decide how many candidates is enough? Does it matter if the recipient candidates are “powerful” committee chairman, or rank-and-file members, or back-benchers? Do the candidates have to be of the same political party? What about independents or third party candidates... challengers or incumbents? Under such a regulation, what would happen to a new PAC that raises \$500 each from 10 donors, and of that \$5,000 spends \$1,500 on fundraising and administrative costs, and wants to contribute the remaining \$3,500 to two candidates – would the donors’ contributions be considered earmarked to those two candidates? What if that PAC were formed to promote a particular issue, but it is a niche issue and the PAC can only identify one candidate who shares its view on that issue, and contributes the entire \$3,500 to that candidate – would the donor’s contributions to the PAC be considered earmarked?

These questions raise grave concerns about the constitutionally protected right of individuals to associate with candidates and PACs, and PACs with candidates. And to what end? There is no reason to think *McCutcheon* exacerbated any earmarking danger. To proceed with a rulemaking would be to regulate First Amendment activity based on wild speculation about what could conceivably happen in the future – the very definition of “arbitrary and capricious.”

Finally, national party committees such as the RNC would be especially unlikely participants in any “implicit” earmarking scheme. In the 2014 election cycle, as of the post-General Election reporting period, the RNC had raised over \$172 million and spent less than \$244,000 on coordinated expenditures and federal candidate contributions. That the RNC spent only 0.142% of the contributions received (a ratio likely to end up even smaller when year-end activity is taken into account) demonstrates the futility of trying to use the RNC as a conduit without earmarking, as already defined and enforce. Thus, the current earmarking regulation and enforcement approach are more than adequate to address the unlikely scenarios that have been hypothesized, particularly with respect to party committees.

B. Affiliation

Furthermore, as part of the statutory scheme, the Act “treats, for purposes of the [contribution] limitations, as a single political committee, all political committees which are established, financed, maintained, or controlled by a single person or group of persons.”³¹ The purpose of this rule is “the protection of contribution limitations.”³² It “forecloses what would otherwise be

³¹ See 52 U.S.C. § 30116(a)(5) (formerly 2 U.S.C. § 441a(a)(5)) (“All contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or any other group of such persons, shall be considered to have been made by a single political committee.”). However, as Congress made clear, a political committee of a national organization is not prohibited from contributing to a candidate or committee merely because of its affiliation with a national multicandidate political committee which has made the maximum contribution it is permitted to make to a candidate or committee.” Legislative History of Federal Election Campaign Act Amendments of 1976 at 1051-52.

³² Final Rule, Leadership PACs, 68 Fed. Reg. 67013, 67016 (Dec. 1, 2003).

a particularly easy and effective means of circumventing the limits on contributions to any particular political committee.”³³ In effect, the rule eliminates a donor’s ability to create and use his own political committees to direct funds in excess of the individual base limits. It thus blocks a straightforward method of achieving the circumvention that was the underlying concern in *Buckley*.³⁴

In 1977, the Commission first promulgated regulations implementing this provision (which had been part of the 1976 Amendments).³⁵ In 1989, the Commission revised its regulations governing whether committees are commonly established, financed, maintained, or controlled and therefore affiliated to “resolve a number of issues that have been raised during the administration and enforcement of this provision since it was promulgated in 1977,” and added factors addressing common, overlapping, or consecutive members, officers, and employees, and financing arrangements.³⁶ The Commission also explained that it would “examine the factors in evaluating the overall relationship between the committees and their sponsoring organizations to determine whether there is evidence that the committees are commonly established, financed, maintained, or controlled, and therefore affiliated.”³⁷

In *McCutcheon*, the Court recognized that these regulations, 11 CFR §100.5(g)(4) and 11 CFR §110.3(a)(3), especially when coupled with 11 CFR § 110.1(h), are sufficient to preclude the so-called “100 PAC scenario,” which purports to describe how a donor might try to circumvent the base contribution limits. The Court certainly did not “give the Commission a mandate to look for new solutions to tackle a kind of corruption that the old rules failed to adequately address.” And as to the “suspicious patterns of PAC donations” that seems to be the sole basis in the ANPRM for re-visitation of the affiliation factors, “if an FEC official cannot establish knowledge of circumvention (or establish affiliation) when the same ten donors contribute \$10,000 each to 200 newly created PACs, and each PAC writes a \$10,000 check to the same ten candidates – the dissent’s ‘Example Three’ – then that official has not a heart but a head of stone.”³⁸

Moreover, the Court’s decision in *Citizens United v. FEC*, which recognized that a donor can spend unlimited money expressly advocating for the election of a candidate (so long as it is done independently of the candidate), eliminates the impetus that would have fueled the so-called “100 PAC scenario.” So whereas before a donor might have wanted to donate \$5,000 to 100 different PACs, in the hopes that each of those PACs would contribute \$2,600 to the donor’s preferred candidate, now the donor could spend \$500,000 on an independent expenditure in

³³ *McCutcheon*, 134 S. Ct. at 1446-47 (internal citations omitted). After Congress passed the 1974 Amendments to the Act, which for the first time imposed limits on contributions to candidate committees, large unions and corporations began creating hundreds of new PACs through their locals and subsidiaries. See 122 Cong.Rec. 6710-23 (1976) (excerpt of presentation by Common Cause).

³⁴ *McCutcheon*, 134 S. Ct. at 1446-47 (internal citations omitted).

³⁵ See Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971, House Document No. 95-44, January 12, 1977, pp. 69.

³⁶ Final Rule, Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34098 (Aug. 17, 1989).

³⁷ *Id.* at 34099. In 1986 the Commission began a rulemaking to address affiliation; however, in 1989 the Commission determined to maintain its existing approach, noting that “the Commission has concluded that this complex area is better addressed on a case-by-case basis.”

³⁸ *McCutcheon*, 134 S. Ct. at 1456.

support of that candidate.³⁹ As Acting Assistant Attorney General Mythili Raman recently testified before Congress, in the wake of the *Citizens Untied* decision, “[w]e anticipate seeing fewer cases of conduit contributions directly to campaign committees or parties, because individuals or corporations who wish to influence elections or officials will no longer need to attempt to do so through conduit contribution schemes that can be criminally prosecuted. Instead, they are likely to simply make unlimited contributions to Super PACs or 501(c)s.” Statement of Mythili Raman, Hearing on Current Issues in Campaign Finance Law Enforcement before the Subcommittee on Crime and Terrorism of the Senate Committee on the Judiciary, 113th Cong., 1st Sess., 3 (2013).

In sum, since the Court recognized the sufficiency of the Commission’s current affiliation regulations, which are consistent with the Act and its legislative history, the Commission should not revisit its affiliation factors. The Court’s language is not an invitation to promulgate new rules but rather a reason not to.

C. Joint Fundraising

Joint fundraising refers to the solicitation of contributions through the combined effort of two or more political committees.⁴⁰ “[A] joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules. Under no circumstances may a contribution to a joint fundraising committee result in an allocation that exceeds the contribution limits applicable to its constituent parts; the committee is in fact required to return any excess funds to the contributor.⁴¹

The RNC is a participant in several joint fundraising efforts. Joint fundraising efforts are convenient for donors who wish to support several candidates and committees at a particular time, as they can do so with one contribution that will be allocated among the participants in accordance with the base limits and subject to full disclosure. The hypothetical scenario posited by the D.C. District Court – a donor gives a \$500,000 check to a joint fundraising committee composed of a candidate, a national party committee, and “most” of the party’s state party committees, and the committees divide up the money so that each one receives the maximum contribution permissible under the base limits, but then each transfers its allocated portion to the same single committee, and that committee uses the money for coordinated expenditures on behalf of a particular candidate – just does not happen as a practical matter, and it is no more likely to after *McCutcheon* than it had been before. State party committees support candidates

³⁹ *Id.* at 1454.

⁴⁰ Notice of Proposed Rulemaking, Transfers of Funds; Collecting Agents; Joint Fundraising, 46 Fed. Reg. 48074 (Sept. 30, 1981).

⁴¹ *McCutcheon*, 134 S. Ct. at 1455 (internal citations omitted). However, entities participating in joint fundraising activities under 11 C.F.R. §102.7 are subject to burdensome requirements borrowed from a series of AOs from the 1970s, promulgated without any explanation. *See* Transfers of Funds; Collecting Agents; Joint Fundraising, Transmittal of Rules to Congress, 48 Fed. Reg. 26296 (Jun. 7, 1983); *see also* Minutes of a Regular Meeting of the Federal Election Commission on Jan. 28, 1982 (Agenda Document 82-24) (discussing staff revisions to the proposed regulations), Revised Proposed Joint Fundraising and Collecting Agent Regulations, Memorandum to the Commission from Charles N. Steele, General Counsel and Susan E. Propper, Jan. 5, 1982 (Agenda Document 82-3). Irrespective of this provision, all funds raised by party committees and candidates through joint fundraising activity are subject to the Act’s contribution limits and reporting requirements, and are fully disclosed.

in their own states; a state party chairman who spent lots of money on out-of-state candidates wouldn't keep his job for very long. And coordinated spending limits restrict the amount of money that a single state party can spend on behalf of a particular candidate: in 2014, the coordinated spending limit for most House candidates is \$47,200.

The Court stated that “[i]f Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, [Congress] could require that funds received by those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees).”⁴² However, not even Congress may “regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others.”⁴³ Anyway, the FEC clearly cannot re-write the statute.

The Commission of course lacks the statutory authority to limit the size of joint fundraising committees, or to require that funds received by participants in a joint fundraising effort be spent only by their recipients. Such “policy solutions” would need to come from Congress. Congress has not identified a problem that such prescriptions would solve. It certainly has never found reason to act on a supposition that circumvention via joint fundraising committees is “especially likely to occur.” Furthermore, with respect to political party committees, just a few weeks ago, Congress showed exactly the opposite – that allowing the RNC, DNC and national congressional and senatorial campaign committees to accept substantially larger contributions was a desirable policy outcome.⁴⁴ For the FEC to substitute its judgment for Congress’s would be the height of agency overreach.

D. Disclosure

The inclusion of a discussion on “Disclosure” in an ANPRM in Response to *McCutcheon v. FEC* is puzzling to say the least. The RNC (the plaintiff in the case), did not challenge any disclosure provision. National party committees, state party committees, federal candidates, and federally registered PACs already disclose their receipts and disbursements, and those reports and databases are available on the FEC’s web site almost immediately after they are filed.⁴⁵ Furthermore, it is unclear how the *McCutcheon* decision, the scope of which was limited to contributions that were, are, and will continue to be subject to contribution limits, source prohibitions, and full disclosure, has anything to do with the purported “deluge of undisclosed spending.”

If the Commission wishes to consider new disclosure rules, *McCutcheon* does not even provide a fig leaf for the effort. To the contrary, the Court’s opinion cited the robust disclosure regime that already exists as one of the legal developments in the time since *Buckley* that rendered the aggregate limits under BCRA unconstitutional.⁴⁶ Many observers have pointed out that the elimination of the aggregate limits and the new, higher contribution limits for national parties are

⁴² *Id.* at 1458-59.

⁴³ *Id.* at 1441.

⁴⁴ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 101 (2014).

⁴⁵ *McCutcheon*, 134 S. Ct. at 1460.

⁴⁶ *Id.* at 1460.

likely to steer more money to the parties and candidates, and it will all be fully disclosed. Thus, *McCutcheon* itself was a victory for those who value disclosure; by contrast, it was assuredly not an invitation for the FEC to go where neither Congress nor the Court has said it should go. In short, nowhere in the text or reasoning of the opinion can be found a justification for expanding the already rigorous disclosure requirements of FECA.

III. CONCLUSION

Given its existing rulemaking backlog, the Commission should not waste resources on a rulemaking that would replace the invalidated regulations with other regulations intended to “level the playing field” or to limit the amount of money in politics, even assuming it has the authority to do so, and even further assuming that the regulations could pass constitutional muster. In short, the *McCutcheon* Interim Rule suffices. The Commission lacks the authority to pursue the alternatives put forth in the ANPRM. And finally, in deciding how to allocate its resources, the Commission should prioritize in accordance with where there is the greatest need for clear regulatory guidance rather than being driven by policy preferences.

On behalf of the RNC, I respectfully request the opportunity to testify at the public hearing on the ANPRM. As not only the national party committee plaintiff in *McCutcheon* but also as the governing body of the Republican Party at the national level, the RNC is uniquely positioned to weigh in on the *McCutcheon* decision and the lack of any basis for further regulatory response to it. We appreciate the opportunity to comment on these issues and specifically as to why, based on the law and on the RNC’s experience with the regulatory topics at issue here, further rulemaking “in response” to *McCutcheon* would be unjustified.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Phillippe Jr.", written in a cursive style.

John R. Phillippe Jr.
Chief Counsel