

We would like to testify at the February 11, 2015 hearing concerning the Federal Election Commission (FEC) ANPRM 2014-12 (the "Notice"). Professor Susan Grogan is joined in submitting these comments by Jonathan Holtzman, Matthew Walchuck, and Terrence Threweatt. We ask that we be allowed to testify consecutively.

Our comments are attached as a file due to being more than 4000 characters.

Comments provided by :
Grogan, Susan

Comments in response to Federal Election Commission
Advanced Notice of Proposed Rulemaking, #2014-12 / #2014-01
Earmarking, Affiliation, Joint Fundraising, Disclosure and Other Issues (McCutcheon)

I am Susan Grogan, a senior professor of political science at St. Mary's College of Maryland, a public four-year honors college, where I teach courses typically related to American Politics, Constitutional Law, the Supreme Court and judicial system, The Presidency, Parties and Elections, Public Opinion Research, and occasionally Native American Politics and Public Administration. I am the Pre-Law program advisor and the Faculty Advisor of St. Mary's Votes and Pi Sigma Alpha. I began political life as one of the few Republicans in Albany, New York, became a Democrat in the mid-1970's, and am affiliated as an Independent today.

I recently passed up a retirement incentive because, like most Americans approaching retirement age, I cannot yet afford to retire. I don't pay \$100 a month for television that was free not all that long ago, don't have a smart phone because it requires a ridiculously priced phone plan, and teach summer classes to help pay off my mortgage so that I might be able to retire someday.

I also am the Treasurer of We Just Want Stephen Colbert to Come To Our College Super PAC. I founded the Colbert Super PAC almost three years ago as one of a number of Super PACs formed on campuses around the nation in protest of the *Citizens United* decision (*Citizens United v. Federal Election Commission*, 130 S.Ct. 876 [2010]) that spawned Super PACs. This Colbert Super PAC went beyond the short-term campus protest and attempted to improve turnout of informed voters but necessarily doing so on the cheap. My Super PAC, as I am an unacquainted member of the middle class, has never received any donations from any of the relatively few wealthy donors who contribute wholesale to Super PACs and 501(c)s. At the time of our founding, Stephen Colbert had tried to show that anybody could easily start up a Super PAC--within a few minutes to hours. Although I objected that it was a bit more of a hassle than Colbert and his advisor, former FEC Commissioner Trevor Potter, let on, it is another thing for an independent expenditure committee to be a going concern. Successful Super PACs are part of an elite political force well beyond the means of the great silenced majority. Nevertheless, I plan to change the name of the Super PAC and to ramp up its mission in the near future, in the interest of the future, in preparation for a more determined plan of action for 2016. I would consider the overall effort successful if independent expenditure committees were extinct and if fair base and aggregate limits were firmly in place in order to protect what little speech remains to most Americans, what value is left to our vote. Our elected representatives are supposed to be our associated poor mouthpieces, representatives of the many, not grotesque appendages of wealthy donors, representatives of the few—this corruption is a countervailing First Amendment issue. As a citizen, a professor, and a Super PAC Treasurer submitting comments, I look to the future interests of America and as much as possible wish to convey the concerns and frustrations of the great silenced majority, the great number of whom have lost faith not only in the electoral process, but in the overall political system that they now tend to view as corrupt beyond hope.

We would like to testify at the February 11, 2015 hearing concerning the Federal Election Commission (FEC) ANPRM 2014-12 (the "Notice"). Professor Susan Grogan is joined in submitting these comments by Jonathan Holtzman, Matthew Walchuck, and Terrence Threweatt (students from Parties & Elections who have all served as Election Judges in our local county). We ask that we be allowed to testify consecutively.

We should begin by insisting that no one be denied an opportunity to testify at this hearing, that there be no limits imposed on how many persons may choose to testify at the same time in aggregate, that there be no time limits imposed on individuals or groups who do choose to testify at this hearing because, since *McCutcheon v. FEC* (*Shawn McCutcheon v. Federal Election Commission*, 134 S.Ct. 1434 [2104]), any such limitation on how much we may spend speaking directly or by the proxy of cash would infringe upon First Amendment rights and prevent us from overwhelming the opposition by the sheer mass of our speech intending to drown out theirs. The point we are making is that all sorts of reasonable limits are commonly placed on political speech.

The FEC's Notice specifically asked for comments regarding Earmarking, Affiliation, Joint Fundraising Committees, and Disclosure. The Notice more generally "requests 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 v. FEC*." In addition, I wish to comment on pertinent remarks made by FEC commissioners in the meeting approving this ANPRM and to refer to language of other submissions in the record or docket of this ANPRM and the *McCutcheon v. FEC* decision and its precedents to which this ANPRM responds.

In General

Rigorous financial disclosure regimes are necessary for meaningful quantitative studies of elections. And as citizens of the United States, we are deeply concerned with the meteoric rise in the cost of winning a Federal campaign.

Although an individual's aggregate contributions may no longer be limited, the FEC's charge to limit contributions to particular campaigns remains intact and as such the FEC ought to crystallize its rulemaking regime around this point. Recent developments in campaign finance have obfuscated what ought to be demonstrably evident connections between contributors and campaigns, limiting the FEC's ability to ensure that individual donation limits are being adhered to as well as stymying what ought to be a comprehensive disclosure system.

The proliferation of PACs designed to support a particular candidate's election by serving as a second fundraising or advertising arm of the candidate's campaign committee is proof of the inadequacy of the current system for regulating earmarking of donated funds. The current criteria set out at 52 FR 760, 765. Section 110.1(h) are easily flouted as PACs affiliated with a particular candidate often spend in concordance with the candidate's wishes, even if the spending does not directly go to the candidate's campaign. At the minimum, regulations on PACs ought to be revised to prevent a majority of a PAC's funds from going to a single candidate if the PAC is designated as a multicandidate or non-authorized PAC. Additionally, the FEC ought to develop guidelines for more rigorous and thoroughgoing analysis of affiliations between advocacy groups.

Earmarking Provisions

The FEC defines earmarking in the Notice as 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 a candidate's authorized committee. However, the FEC also claims that, in regards to enforcement, "funds are considered to be 'earmarked' only when there is 'clear documented evidence of acts by donors that

resulted in their funds being used' as contributions." The FEC asks "Should the Commission revisit the manner in which it enforces its earmarking regulations to encompass the 'implicit agreements' addressed by the Court?"

The Commission absolutely must expand rules to require enforcement of implicit earmarking agreements. It is virtually impossible to regulate earmarking of funds otherwise. The present enforced definition is unenforceable in practice.

It is most reasonable to expect a high degree of familiarity between donors and recipients, meaning candidates or their committees. These agreeable parties also have mutually assumed expectations shared well in advance of the deal. Based on information previously disseminated by candidates and their campaigns, donors seldom would have a reasonable need to require written contracts or other clearly defining documentation in order to justify donations that are essentially auto-earmarked (implicitly) for one or more specific candidates or authorized committees. This would especially be so after the recipient explains FEC enforcement policies to the donor regarding earmarking of funds. As it is, donors and fundraisers with knowledge of the FEC's current enforcement practice would easily adapt themselves to leaving behind no paper trail as a standard business practice designed to circumvent earmarking requirements, operating on handshakes and verbal agreements and suffering subsequent memory loss if necessary per the examples of Watergate, Iran-Contra, and the partial recall of most other criminal minds caught in a tight spot.

Making large donations as a simple matter of exercising one's political speech is the common complaint asserted by opponents to relevant FEC rules on contribution limits. However, making such donations without also having in mind an expected return of commensurate value would be considered irrational and unreasonable economic behavior. A fundamental precept of capitalist microeconomics is that all choices—such as whether or not to make a large contribution to a candidate, authorized committee, Super PAC, or 501(c)—are made on the frontier, a function where all choices are considered to be optimal alternatives expected to accrue maximum benefit. The formulation of the optimization problem is to solve for the objective of maximizing benefit such that all given constraints are met. A solution that is formulated as unconstrained solves as "unbounded," which is not considered a feasible solution. Thus, to assert that significant donations are not implicitly earmarked toward some cause would contradict the most fundamental premise of capitalism: that certain individuals are greedily allowed to amass exceptional wealth under the premise that such capitalist structure also provides the maximum politico-economic benefit for us all—in other words, within limits, greed is optimal and in politics is no exception. This trickle down benefit to the masses, as it has been called, thus formulates as a set of constraints that limit greed. Therefore, it is unreasonable to assume that political contributions occur in isolation from the optimizing expectations of donors who are making political investments based on expected values rather than explicit contractual values. That is, they are making an investment they expect to statistically yield a return. It is not that they expect a return for every political contribution but that they expect a net return over the long run. This statistical concept of expected value is standard fare in business, particularly regarding investments in securities. This would explain why the larger contributors singly and all together tend to invest contributions in the party opposed to tax increases in principle. To understand what is at stake: For every one percent reduction in the tax rate, a person who has a taxable income of \$10,000,000 would receive a benefit from lowering the tax rate in perpetuity having a net present value of \$200,000 at a discount rate of five percent, which is well above Treasury Yields, what Treasuries have earned for some time. For this person, it would be worth investing via campaign contributions up to the \$200,000 net present value of the expected cash flows generated specifically by the savings returned by such an anticipated tax cut—or more if the tax cut or income were larger, at the rate of \$200,000 per percent tax cut per \$10 million in net taxable income. In

this case, the tax cut would only serve the interest of the wealthy persons who donated expecting to receive the benefit while the country is left with a huge budget deficit because the wealthy currently pay a lower tax rate than some of their wage-earning employees. It should be no surprise presently that political contributions from the wealthy are at a record high, while the taxes the wealthy pay are at a record low. This has contributed to a record budget deficit and the need to cut government services and programs. It is also the main contributor to the widening disparity in income levels and wealth. This evidently is not quid pro quo according to Chief Justice Roberts' idea of corruption which resembles old machine politics. This is the modern era and we are accustomed to calculating our expected returns for all such investments. Whether the cash flows expected to accrue are a result of a political contribution that is expected to earn some benefits or a stock investment in Ford Motor Company that is expected to earn some dividends makes absolutely no difference. There is no contract guaranteeing the return for the political contribution just as there is none guaranteeing the dividends and stock value trends of Ford Motor Company. It is a political investment like any other having calculable expected returns. Tap a few buttons on your financial calculator app.

In regard to earmark revisions, my recommendation to the FEC is to toss the old earmarking rule and replace it with a streamlined enforceable rule. Significant donations—I would suggest no less than the \$200.00 threshold that triggers reporting requirements for independent expenditure committees, if not all donations—should be considered “implicitly earmarked” by default, including all funds funneled into elections through 501(c)s by their own expenditures or via Super PACs. Where earmarked donations are formally considered to occur between the donor and candidate by FEC definition, enforcement should also be expanded to make both the candidate and the donor culpable in the case of illegal contributions.

A structural analysis of *Citizens United v. FEC* and *McCutcheon v. FEC* and the precedent cited for these in *Buckley v. Valeo* (*Buckley v. Valeo*, 96 S.Ct. 612 [1976]), all three being the “Decisions,” involves a balancing of First Amendment rights with the governmental interest in curtailing corruption or the appearance of corruption. As articulated by the United States Supreme Court in *Buckley v. Valeo* and numerous subsequent cases, the governmental interest in regulating campaign finance and the purpose of federal campaign finance law and the agency Congress directed to implement and enforce that law, the Federal Election Commission, is the prevention of corruption and the appearance or perception of corruption in our electoral processes.

The Appellants were wise enough to limit themselves to a narrow one-sided argument, not invoking the corruption side of the equation nor any public benefits they might otherwise imagine mitigating or supplanting the government's concerns about the corruption that would result from lifting contribution limits. Yet, the complete structure of the speech act in *McCutcheon v. FEC* unavoidably is present nonetheless and it is disjointed. There is a logical disjunction in the speech act of a donor. A speech act is an utterance that may consist of several performances at once that typically involves the act of saying something, what one does saying it, and how one means to affect one's audience (Kent Bach, Routledge Encyclopedia of Philosophy entry, <http://online.sfsu.edu/kbach/spchacts.html>). The act of speech of a donor making a contribution is further complicated here in that the saying has a spatial structure consisting of three phases we might call thought or initiation, process or translation, and utterance or saying.

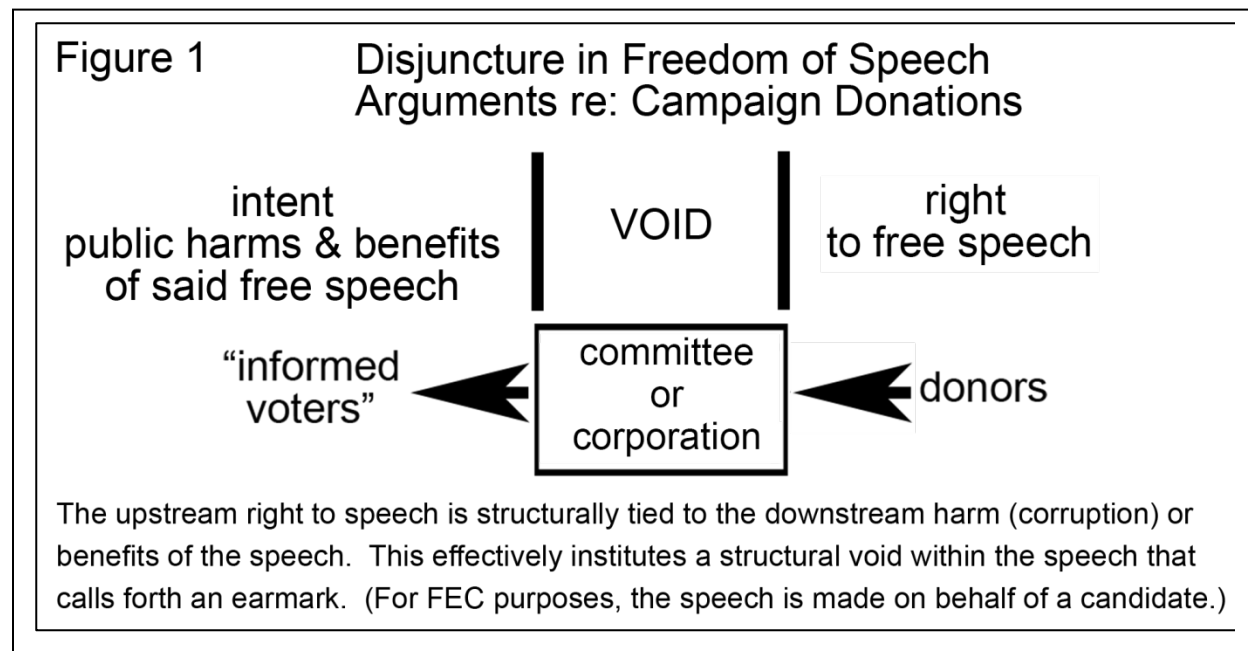
Appellants in *McCutcheon v. FEC* (and *Citizens United*) frankly assert that Appellant's freedom of speech as a donor has suffered harm in light of contribution limits imposed in the Federal government's interest in reducing corruption—something the FEC was created to address which remains its stated mission today. Thus, the point of the action, the First Amendment claim, is just upstream of a corporation or

committee where the donor wishes to transfer a contribution (stage 1—thought or initiation). However, the government’s interest in curtailing corruption occurs on the other side of the equilibrium equation, on the downstream side of the corporation or committee (stage 3—utterance or saying) but the funds must be first converted into recognizable form or media (stage 2—process or translation). The last stage, the downstream side where the ultimate saying occurs is also where the donor would expect to reap the benefits motivating the speech act as a consequence of the influence of his saying.

Given that the Appellants allege that contribution limits designed to curb corruption impinge upon their First Amendment rights, the Appellants seeking relief either implicitly or explicitly also argue the downstream side when they argue against contribution limits that extend there to realize their justification or purpose. Again, this is the whereabouts of the government’s interest in corruption and as well any other influence on the public audience the Appellant intends by the speech act. It would be irrational that donors would contribute funds to be expended on the behalf of candidates without meaning to influence the public. This disjunction where a fundraising committee or corporation sits in the void between the upstream initiation of speech and the downstream utterance creates a structural void or gap between the action of the donor Appellant’s First Amendment claim and the broad benefits or harms that occur as a consequence of that claimed free speech act, which is a rationally invested political contribution. Even if Appellants irrationally claim to not have the influence of the public in mind, Appellants cannot avoid that the overall purpose of candidates and campaigns is to influence the public and that this can be construed as either downstream harms or benefits or both as a consequence of the upstream donation considered an act of free speech.

A common public benefit claimed by proponents to supplant allegations of corruption on the downstream side is that voters will be more informed/there will be more informed voters (Luke Wachob, “The McCutcheon Supreme Court Case is a Victory for Free Speech,” *Forbes*, March 4, 2014). For purposes of illustration, Figure 1 assumes more informed voters in place of the government interest in stemming corruption. Proponents of contribution limits would replace this with the negative benefit of expected corruption or harm. For our example, the new donations, which would only occur if certain contribution limits were removed, allegedly would create more “informed voters.” And it is true that in most cases, the portent is to inform voters about candidates. That voters are truly “informed” by this process is not expected, of course, since the parties speaking are only interested parties that promote their own interest as the truth, rather than the disinterested truth regardless of party affiliation. However, the relevant point here is that the downstream benefit or harm is unavoidably there and attached to the contribution from the time the contribution is made. It must since these cases are all decidedly optimized such that government interest in stemming corruption downstream must be balanced against the First Amendment claims of Appellants upstream which must be consistently applied to the same speaker. That is, it would be arbitrary to judge whether Appellant’s free speech act was corrupting based upon some other person’s speech and that Appellant rationally has expectations of influencing the public downstream by making the donation. This disjunction in rights and government interest in corruption and Appellant’s desire to influence the public tied to the speech act creates or implies the presence of a structural void between the terms and across the committee or corporation handling the funds and translating them into media meaningful to the public as illustrated in Figure 1. Thus, it is evident that the structure of Appellants’ claims frames the situation such that all contributions must be implicitly earmarked to a positive or negative cause across the committee or corporation in order to make the rationale of the *McCutcheon v. FEC* decisions logical. This is speaking of most cases where the downstream speech is or will be on behalf of candidates or candidate committees.

The only possible objection left to certifying all contributions as “implicitly earmarked” is the FEC wording “clearly identified candidate or a candidate’s authorized committee.” Since this phrasing invites obfuscation of intents and purposes—that is, it is another obvious loophole that needs to be closed—FEC rules should be revised to specify that fundraising that will or might be spent on behalf of candidates or candidate committees cannot occur without having been first “clearly identified” to the FEC in advance of fundraising, preferably by filing such intent with the FEC in advance of fundraising which would remain in place for the entire election cycle or until a designated candidate drops from the race. Left over funds could be redistributed so long as donor base limits are not exceeded. This policy is just an example where the FEC has many options regarding what to do with left over funds and similar details. What is clear is that committees and corporations should not be allowed to fundraise for political campaign purposes until they have clearly stated what the funds will be used for and specifically in whose behalf the funds are to be spent if on behalf of candidates, whether supported or attacked. This provision would also protect donors from unscrupulous operatives who might attempt to redirect funds for purposes the donor would find objectionable. It might be possible to allow declarations of support for a group of candidates in toto but the fundraisers and donors still would need to observe base limits per candidate and funds must be immediately designated upon receipt. This would avoid circumventing the reporting requirements and render an earmarking rule that is enforceable, which it clearly is not at present by design. As a consequence of *McCutcheon v. FEC*, donors are able to donate to many candidates far above aggregate limits but are limited in so as far as they can financially usurp a particular candidate. That is, the FEC regulations should be rewritten such that all contributions are viewed as implicitly earmarked and thus are subject to base limits if the purpose of the recipient is to promote or attack a candidate as would be declared in advance to the FEC by this revision. That contributions would be subject to the base limits was an assumption of the Court that it used to support its decision that aggregate limits are unnecessary; the FEC should heed the Court’s rationale and revise its earmarking rules to bring all donations spent on the behalf of candidates or candidate committees under the auspices of FEC base contribution limits.



“Clearly documenting” contributions as earmarked simply is not necessary for donors to have a clear understanding as to how their funds will be used. I have never heard of a donor giving sizable

amounts—not even to my small four-year Liberal Arts College—without first having a good sense about how the donated funds will be utilized. It is implausible to consider that wealthy individuals make large donations singly and in aggregate without implicit assurances that the considered success of the ultimate recipients would provide them with an EXPECTED economic interest of equal or greater value that they inevitably tie to candidates. Besides, most candidates and authorized committees have a very limited scope that is reasonably safe for a donor to read and clearly assume, especially in regard to what candidates are to be supported or attacked. Further, I do not believe the FEC has either the resources or the wherewithal to enforce earmarking adequately if it must acquire “clear documentary evidence.”

That all contributions are implicitly earmarked would allow the FEC to revise its rules to change the financial fundraising structure, limiting the fundraising ability of Super PACs—which most people would consider a very good thing—and also apply earmarks to 501(c) political contributions such that base contribution limits can be applied to these particular organization types that presently circumvent base contribution limits and disclosure whether or not they are so-called truly independent of official campaign planning. That is, the FEC would focus on the base limits applied to the donor earmarked for a candidate such that the Super PAC or 501(c) would have to have clearly declared in advance of fundraising what candidate(s) they intend to support or attack. Such declarations would be in place for the remainder of a campaign cycle.

In summary, it is plain common sense that enforcement of earmarks needs be broadly applied to implicit earmarking agreements as originally defined by the FEC less the “clearly identified” loophole if earmarking is to be enforceable in practice. Also, to be enforceable and as a consequence of arguments made and implied by Appellants in the Decisions, all (or all significant) contributions should simply be assumed to be earmarked. This avoids loopholes of argumentation and makes the rule simpler to administer and enforce. The more lax enforcement policy currently in place is entirely inappropriate, unethical as it renders the rule intentionally meaningless as it is easily circumvented, and not in the general interest of the government. Nor does it serve the financial or political interest of the majority of U.S. citizens whose speech is simply lost in the sheer magnitude of an elite minority of loud-spending peers who disassociate candidates from voters in this way. The FEC should also expand who is culpable when infractions of FEC earmarking regulations occur to include candidates as far as possible and donors in all circumstances.

Affiliation and Joint Fundraising Committees

We have no comments on affiliation and joint fundraising committees at this time.

Disclosure Provisions

The Notice says that “The Supreme Court observed that disclosure requirements may...deter actual corruption and avoid the appearances of corruption by exposing large contributions and expenditures to the light of publicity. ...Particularly due to developments in technology—primarily the internet—the Court observed that disclosure offers much more robust protection against corruption because [r]eports and databases are available on the FEC’s Web site almost immediately after they are filed.” The FEC then asks: “Given these developments in modern technology, what regulatory changes or other steps should the Commission take to further improve its collection and presentation of campaign finance data?”

The obvious comment is that the Commission needs to obtain all the data before worrying about what new digital platform or application to employ next to make the partial data appear more accessible and aesthetically pleasing. We generally turn to OpenSecrets.org and similar private watchdogs to look up such data rather than the FEC because, besides updating their data bases with FEC data on a timely basis, watchdogs provide additional information beyond the minimal data required by FEC rules. That these sites are typically easier to navigate than the FEC's Web site is a minor point. As long as OpenSecrets.org and other groups can retrieve FEC data on a timely basis as they do very well now, the rest of us do not need the Commissioners wasting tax dollars on new look-good enhancements such as a more responsive website, a mobile ready application, and so on such that the Commission, while traditionally hobbled by partisan dysfunction, can publicly pretend it agreed to accomplish something (of relatively little importance). To improve the disclosure to which the Court's technological comment is subordinate, we need the Commissioners spending limited FEC resources on collection of all the data necessary to make disclosure a viable mitigating factor, accomplishing something that would make a real difference in the efficacy of disclosure and whatever technology is used to disseminate the disclosed data. This requires the Commissioners to promulgate new disclosure rules to make the FEC Web site, its technology, and that of private watchdogs and other groups meaningful and effective. This entails closing the loop hole on 501(c) dark money contributions by which some donors are circumventing reporting requirements required already by the FEC for other political organizations. This is not far-reaching new legislation. It is only making existent FEC regulation consistent—consistently applied to all donors, expenditures, and organizations that involve themselves in campaigns.

That some Commissioners do not seem to understand the importance of this consistency and full disclosure to the majority of the American people and excuse their duties away blaming Congress is bewildering. How can you expect members of Congress to pass a law curbing their own corruption if they are corrupt, as most Americans believe? All regulatory agencies promulgate regulations under their aegis where Congress does not for whatever basket of reasons. Some members of Congress may not have voted for the Disclose Act, H.R. 5175 (S.3628-Senate) simply because Congress had already passed a law delegating that authority to the FEC. The FEC promulgated disclosure rules for independent expenditure committees; it makes sense for the FEC, not Congress, to pass rules regulating the same for 501(c)s. It's the same donors, the same money, for the same purpose. The trend, of obvious motivations, is that contributions have dramatically shifted from Super PACs to 501(c)4s which are otherwise performing the same function as Super PACs solely for the purpose of circumventing the FEC's Super PAC reporting requirements. The shift in the direction of contributions has been facilitated by a burst in 501(c) creation, often by people already associated with a Super PAC, to facilitate donor evasion of disclosure. That donors would want to circumvent reporting requirements explicitly to avoid exposure to public scrutiny is the same rationale that the Court relied on when it claimed disclosure aided by modern technology would make aggregate limits unnecessary.

As part of preparing these comments, I consulted the FEC audio tape of the meeting that approved this Notice. It was particularly shameful to hear several FEC commissioners shirk their responsibility to regulate campaign finance, specifically refusing to draft FEC disclosure regulations. At least two gave the excuse that they did not see it proper for the FEC to impose rules where Congress had failed to pass a law. One Commissioner even rendered a rather vague opinion of Congressional attempts to do so after the Disclose Act failed to pass—as if that supports his defection from the FEC's mission.

The FEC is a regulatory agency. Congress can pass laws. The FEC promulgates rules or regulations under the authority of laws passed by Congress, the Federal Election Campaign Act of 1971 (FECA) and the Bipartisan Campaign Reform Act of 2002. The obvious response to FEC Commissioners who are derelict in their duties to protect us from corruption as the FEC was formed to do after the corruption that

spawned Watergate is that there is a fundamental distinction between Congress failing to pass a law requiring certain kinds of campaign finance disclosure and passing legislation exempting those elements from disclosure, which did not occur. Disclose legislation passed the House. The Senate failed to achieve the 60 votes needed to invoke cloture and bring such legislation to a vote.

There are many reasons for voting against cloture beyond mere opposition to the substance of a bill. One Senator might want to uphold this long-held tradition of the body. Another might, on principle, never want to close off debate. Congressional scholars spend their lives trying to determine why members of Congress take the actions they do. Inferring that the failure to enact Disclose-type legislation means Congress does not want the Commission to impose additional reporting requirements is simply wrong. Congress has not passed a law exempting any organizations from disclosure. Nor has Congress rescinded FECA. FECA is still Congress' directive to the FEC, not the contrary imaginary directives spawned in the imaginations of some FEC Commissioners.

Further, the Commissioners' stating that the FEC has no business passing a disclosure rule appears to be intentionally disingenuous. Perhaps the Commissioners are only unaware of the provisions of a major piece of recent campaign finance legislation? The incontrovertible facts are that the Disclose Act the particular Commissioners cite in order to excuse their own inaction and which Congress did in fact fail to pass contained numerous provisions in addition to disclosure. "Most of its language was designed to limit corporate speech. Included were provisions to expand the definition of 'independent expenditures' thus bringing more activity under government control, require CEOs to personally acknowledge their approval of a communication that their corporation funded, and appear in political advertisements similar to what candidates must do, and expand the existing and effective prohibition on political expenditures by government contractors and foreign nationals. These provisions, extraneous to disclosure and clearly designed to restrict corporate speech, made opposing the legislation an easy choice." (Thomas J. Spulak, King & Spalding Law Partner, Government Advocacy and Public Policy Practice Group <http://goo.gl/avGWz7>) The Disclose Act was not a simple disclosure provision. Thus, that Congress did not pass the Disclose Act is not a good excuse from any perspective for the FEC to fail to promulgate a disclosure rule that would close the loop hole circumventing reporting requirements, spawning dark money. Dark money circumvents FEC reporting requirements already in place that require other types of organizations and candidates to report the same. The Courts have consistently held that disclosure is constitutional. To say no simply because Congress did not pass the Disclose Act appears to involve a bit of a sham on the part of some FEC Commissioners who apparently are willing to obscure the true circumstances, apparently for ideological reasons inconsistent with the mission the Federal Election Commission was assigned.

If the FEC cannot tell us precisely who is donating what, in its entirety, then the First Amendment rights of over 200 million Americans of voting age who might have reason to speak against such specific speech acts conducted by the proxy of money that mean to influence our standard of living, health, and wellbeing are de facto denied. Politics involves the allocation of resources and decisions about who pays for what. We are condemned by dark money seeking to influence the electoral process in order to anonymously affect the political decision-making that affects our lives. Our First Amendment rights are harmed when candidates and political leaders are compelled to serve donors rather than voters. As voters, we have the First Amendment right to associate ourselves with particular candidates and public officials with whom we wish to associate by our vote—this is a speech act. The value or amount of our speech in this association is limited and otherwise harmed when large sums of money from elite or unknown sources disassociate candidates and elected officials from us.

In reaching its decision in *McCutcheon v. FEC*, possibly due to the negligence of the FEC to speak of its own inadequacies, the Supreme Court wrongly assumed that the Commission has a data base listing the donors of all significant contributions that could be effectively used to “offer more robust protection against corruption.” However, the Commission does not have such a data base, not in entirety, which effectively is not at all. The plurality opinion in *McCutcheon* relied on the idea of this data base that the justices wrongly perceived to exist in order to reason that aggregate contribution limits are unnecessary. After the decision, the FEC has arbitrarily, and with undue haste, done further damage by acting upon the *McCutcheon* decision as it bypassed typical rulemaking administrative procedures. The Commission should have enacted disclosure requirements with the same sense of urgency in order to comply with the assumptions that formed the basis of the Supreme Court decision.

The FEC does not have the data base which the public needs and Court plurality relied upon to make its decision that would allow watch groups, what is left of the free press, and citizens to exercise our First Amendment rights and apply public scrutiny to donors—to speak out, ridicule, satirize, protest, and otherwise object to excessive acts of speech that often or in general intend to do us harm. We do not have the ability to curtail excess donations by our own speech as the Court assumed based on the Commission’s supposed provision of information. We cannot reply to the proxy speech of money with what most of us Americans would construe as “Real” speech literally uttered or written by humans. It is the FEC’s responsibility to meet the Supreme Court’s assumption of this data base, in its entirety. Such a data base was cited by the Court as an offsetting factor that mitigated the need for aggregate limits. The Commission has already removed the aggregate limits without this data provision in place, thereby harming us by enabling corruption beyond the bounds imagined by Chief Justice Roberts and his colleagues in the plurality. Consequently, the Commission has not truly revised its rules to comply with the assumed facts and reasoning of the *McCutcheon v. FEC* decision.

In the vein of disclosure post *McCutcheon*, specifically the need to rein in dark money contributions, it thus also seems imperative that the FEC promulgate rules that rein in 501(c) corporations, increasing oversight by the FEC and increasing 501(c)’s reporting requirements. The FEC should consider whether it is possible to require that before expending any funds related to political campaigns that 501(c)s be required to file FEC-1s or something similar to FEC-1’s in force but not technically a founding statement of organization.

Suggested disclosure rule:

To the extent that a 501 (c) 4 or 501 (c) 5 or 501 (c) 6 must file a report of political expenditures with the Federal Election Commission, it must also report the donors whose contributions made such expenditures possible.

The Supreme Court specified disclosure as a means to mitigate corruption in order to render aggregate limits unnecessary.

For most of us, seeing corruption is a common sense no-brainer. Rather than narrow quid pro quo or the Founders’ broader definitions of corruption, a more practical precedent to guide legalistic minds might be US Supreme Court Justice Potter Stewart’s threshold test for obscenity in *Jacobellis v. Ohio* (*Jacobellis v. Ohio*, 84 S.Ct. 1676, 1683 [1964]) applied specifically to corruption instead of obscenity: “I shall not today attempt further to define...and perhaps I could never succeed in intelligibly doing so. But I know it when I see it.” In *A Worthy Tradition: Freedom of Speech in America*, Harry Kalven Jr. described

this famous aphorism as “realistic”—a point that is agreeable. Most Americans can relate to the difficulty of defining an abstract concept like corruption—just as Plato had Socrates’ students impossibly struggle with the definition of Justice. While not able to satisfy Socrates, most Americans know corruption well enough when they see it. Americans are dissatisfied with the highly polarized political product of this new era of campaign finance. That elected officials are chasing donors rather than voters is a flat out dissociative denial of our First Amendment rights. Those of us who follow such things are exasperated with one-sided chipping away at campaign finance provisions that are meant to prevent political corruption. To that end we want disclosure and we want the FEC to stop ignoring that we need and want disclosure.

That there are many empirical ways to judge that the status quo is already corrupt, some say beyond hope, is ignored in the interest of abstract and narrow legalistic definitions of corruption that are impractical in the everyday world of appearances and protect nothing more than a highly privileged abstract concept of free speech that few Americans will ever have the opportunity to enjoy. That the common sense is an appropriate judge of corruption ensues because the FEC should charge itself with not only limiting corruption per se but also with limiting the appearances of corruption. “Appearance” is a long-standing concept that describes a different standard of truth than legalistic definitions of quid pro quo or “an improper dependency on an outside body or placing private interests over the public good in public office” (Zephyr Teachout, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United*, Harvard, 2014). How something appears is a matter of the senses, usually visual, rather than legalistic facts and jargon that likewise are ignorant of the status quo in real life. The distinction between appearance and reality goes back as least as far as Plato’s Allegory of the Cave. Plato did not hold appearances in high esteem but neither did he did not have any better words for Athenian democracy. The appropriate eyes to judge the appearance of corruption even within the legal realm are the eyes and minds of popular opinion not legal technicalities, jargon, and precedent. Thus, the FEC should seek to expand rules as necessary to require that it watch for corruption in two forms: both what the legal profession would call reality according to legal theory and precedent but also what citizens would see as the appearance of reality in practice.

The FEC should promulgate rules that adequately define and address the appearance of corruption parallel to rules designed to address corruption per se as defined by the legal system in order to place some agency into the hands of the people. One of the reasons the Court has only considered corruption quid pro quo in a rather strict sense is that the FEC has failed to define and regulate the appearance of corruption adequately and to defend its rules in the Decisions by aggressively expanding the scope of corruption with the same tenacity that Appellants have aggressively pursued increasing the Constitutional scope and definitions of the First Amendment.

That the opponents of contribution limits have claimed ever since *Buckley v. Valeo* that political contributions are the only form of meaningful speech is scandalous, for by that we 200 million other Americans have no de facto meaningful First Amendment rights as this confirms that citizens have no “meaningful” audience and ability to associate themselves with candidates and elected officials in a meaningful way. It also implies that that even the elite are rendered unable to speak for themselves other than in coined terms of feudal patronage to a professional class. The Decisions do more harm to the First Amendment than good. Appellants won the *Citizens United* and *McCutcheon* decisions partly because designed FEC dysfunction goes beyond its (in)abilities to promulgate and enforce effective and fair rules, but also extends to its asymmetric (in)abilities and wherewithal to defend its regulations in court with complete arguments and a corresponding zeal.

Absence of corruption is not properly opposed to free speech as has been assumed. Absence of corruption is a prerequisite for the practical existence of free speech and meaningful First Amendment rights. The societal corruptive opportunity of money in politics is not limited to mere contractual bribery for direct personal gain but also occurs by indirect means for personal gain. The particular nature of the corruptive influence of speech limited to corporations and the wealthy elite is that it harms the First Amendment rights of citizens by constraining “real” speech by its mass (weight in dollar quantity). The importance of accruing such weight to win elections insists candidates and elected officials associate with the privileged rather than voters who contrarily are to be sovereign if government is to function as a democratic republic. No one unconcerned about corruption first can truly be an advocate of free speech or republican government.

There is no freedom of speech, no First Amendment right, in a corrupt political system where exists only a tyranny of silence. The tyrants have no audience and lesser members of society have no voice. The best you can hope for from the tyranny of the peerage is to be constitutionally bound to be misquoted.

Revising Other Regulations

The Notice specifically asks if the Commission should revise any other regulations. The discussions of the Commissioners during the meeting that included the approval of this Notice (and for which audio and minutes are included in the docket) acknowledge a lack of progress by the Commission well recognized outside FEC offices.

In an effort toward quantifying the trend and measure of the appearance of corruption and to assess the effectiveness of earmarking, disclosure, and other rules, the FEC should commission an annual public opinion survey. It is recommended that several academic public opinion research centers collaborate to develop and test questions in the field on behalf of the FEC and that their results and preliminary development surveys be made available for public comment. From this a standard set of tested questions could be put in the field at a regular interval. This way, despite any unsettled arguments over question design and survey methodology, if the same questions are fielded repeatedly in the same manner, the FEC would have rather reliable measures of trend from good measures of quantity over time, which gets to the heart of the Commission’s mission.

The reasons the FEC needs to commission this is evident from the record. Questions about corruption vary in wording and context from survey to survey. The FEC can commission standard questions to address this issue making more valuable data available.

As far as present public opinion, I would say that enough public opinion surveys have been conducted to say that the public undoubtedly believes the system is corrupt and that elected officials are corrupted by special interests and a few wealthy elites investing large sums to influence the outcome of the electoral process by drowning out the speech of citizens and less wealthy contenders and disassociating voters from candidates and elected officials. That is, the public believes that the enormous amount of funds pouring into politics from corporations, wealthy individuals, and unknown sources is the cause of the broad political corruption that they see. Public opinion is bound to worsen as the trend is away from Super PACs which must report their significant donors and toward dark money contributions which have minimal reporting requirements allowing most donors to speak anonymously with no apparent justification. Their lives are not being threatened, making inappropriate analogies to the *NAACP v Alabama* decision (*NAACP v Alabama ex rel Patterson*, 78 S. Ct. 1163 [1958]) which warned against public disclosure of membership lists.

In summary, the Commissioners should expand upon the definition of corruption within their regulations and specifically include separate standards for corruption per se and for the appearance of corruption. The FEC should measure public opinion at regular intervals to determine the trend in the appearance of corruption.

The actions I have called for by the FEC are necessary because of the destructive influence “big money” has on the American public. To be sure, there is a widespread “perception of corruption.” This was so even prior to *McCutcheon*. An April 2012 poll, conducted under the auspices of the Brennan Center for Justice, found that a substantial proportion of respondents (nearly 70 %) agreed that the “unlimited” donations to SuperPACs “[would] lead to corruption.” Both Republicans (at 74%) and Democrats (at 73%) were among those who feared this outcome. Most distressing to those of us who are concerned about low voter turnout in the United States was the finding that respondents cited the ability of SuperPACs to raise and spend large amounts of money in elections makes it more likely that they would sit out elections. Forty-one per cent of the respondents agreed or strongly agreed with the statement, “My vote doesn’t matter very much because big donors to Super PACs have so much more influence.” Slightly over a quarter of the respondents (26%) agreed or strongly agreed that they were less likely to vote because those big donors “have so much more influence over elected officials than average Americans.” (http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy#_edn4) A poll conducted somewhat earlier in 2012 by the Pew Research Center for the People and the Press found similar results, with about two-thirds of those who had heard about the *Citizens United* decision agreeing that it had had a negative effect in primary campaigns that year. (<http://www.people-press.org/2012/01/17/super-pacs-having-negative-impact-say-voters-aware-of-citizens-united-ruling/?src=prc-number>) Voter turnout declined substantially for the 2014 General Election, the lowest voter turnout since World War II.

A poll taken shortly after the midterm elections of November 2014 by YouGov/Huffington Post found that about half the respondents (52%) believed that limiting contributions to campaigns “helps prevent corruption in politics”; 28% believed such restrictions have no impact on corruption. Well over half of those polled (59%) agreed that elections were more likely to be won by the better financed candidate than by the best candidate (28% agreeing *the best candidate would win*). In addition—and acknowledging that, of course, constitutional rights should not be subject to plebiscitary approvals or disapprovals—this poll found that over half of the respondents (53%) would support a constitutional amendment giving Congress the power to restrain campaign spending, while 23% would oppose such a measure. (<https://today.yougov.com/news/2014/11/11/poll-results-spending/>)

Concluding Remarks

We have regressed full circle. Once, First Amendment rights were guaranteed to the people as a limit on government and the tyranny of the peerage that censored the press. Now, we have come full circle and this principle seems turned on its head by *Citizens United* and *McCutcheon*. Now, it is the peerage, in fashionable parlance the one percent, who immodestly claims First Amendment rights for speech meant to overwhelm the speech of others by the sheer force of the quantity of money they can bring to bear on any issue or candidate. This excessive speech also disassociates voters from candidates and their elected representatives who are meant to be the voice for all of their constituents. Those few who enjoy the means claim to be harmed by even the very generous limits that have been placed upon their speech, a speech already unavailable to the average citizen who is subjected to the widening

distribution of wealth that is its consequence. This renders the First Amendment right of the common person meaningless.

We are not all Independents but the situation of Independents is illuminating. Independents are said to be an emerging phenomenon as many voters choose to abandon both the Democrat and Republican Parties because neither of the two seem responsive to voters due to the real necessity of catering only to wealthy donors in the present climate. How much money campaigns raise, while not yet an absolute determining factor, clearly is a major factor influencing the outcomes of elections. Money in quantity matters.

Being an Independent is to be independent of parties or even to reject the two-party system. However, Independents end up in an ironic position in that as true independents we have no means of promulgating a party platform or enjoying the other benefits enjoyed by the major parties that congeal under a well-connected professional class experienced in fundraising. In a general election, we Independents who are thus not relatively well-organized or financed either try to assert some influence as swing voters, vote in principle for a marginal third-party candidate who obviously cannot win, or protest vote for a fringe candidate maybe wearing a boot on his head or for no candidate at all.

After you vote in a few elections as an Independent, trying to swing the vote to one of the two major parties as a practical matter, you eventually find yourself swinging back and forth between parties that are both nonresponsive to voters as both run for the money. We have tried to elaborate why and how the FEC could change the rules to return some influence to voters and make elections less dependent upon how much money is raised and spent on a candidate. We have elaborated how this is a matter of First Amendment rights of voters to associate with candidates and elected officials in meaningful ways such that the lesser, whether voters, third parties, or even the lesser of the two parties financially, retain some reasonable semblance of meaningful speech. For the sake of good government, speech should not be reduced to its aggregate monetary value.

We are struggling to retain a modicum of faith in the FEC to awaken and to realize its mission is on the side of curtailing corruption first. Of course First Amendment rights should be a constraint considered by the FEC. However, unsettling cues can be found in the audio tape of the meeting that approved this ANPRM. In between statements by Commissioners a good bit of banter was directed toward reinforcing the concept of freedom of speech. And, much of this seemed to be directed at making a jab at Commissioner Weintraub just before she had the floor. "I believe in free speech, how about you [Commissioner Weintraub]?" Of course, Commissioner Weintraub agreed but, from the audiotape, the ploy seemed offensive. The Supreme Court Decisions essentially have dialectically adjudicated free speech opposed to corruption, a dialectic that I have negated as inappropriately simple. Again, I must say that absence of corruption is a prerequisite of free speech not its opposite.

Commissioner Weintraub was the only Commissioner to speak persuasively regarding corruption. In anticipation, the protagonist took advantage of competing notions of free speech. Weintraub was compelled to respond to the popular notion of free speech while the Commissioners know the issues deal with a different legal concept where it is opposed to corruption. The more disturbing aspect of this jousting is that, while several Commissioners flaunted their fondness of and support for free speech, none even mentioned any concern about curtailing the corruption that the FEC was foremost designed to curtail and is a necessary precondition of free speech.

It is not with malice toward any of the Commissioners to say that our political system caught up in the scandal of the corruption that surfaced in Watergate, when we all lost the faith, designed and put into place a corrupted system where the Commissioners by design would always tend to be split over meaningful resolutions, never able to accomplish much that was not superficial. As a consequence, FEC regulations in place are fraught with loopholes that render them ineffective. What is there is birdseed for careerists who can gain much for their wealthy clients by pecking away at the most salient morsels. I wonder how we voters could design a case to assert our contrary First Amendment rights. An asymmetry of futility occurs in that the FEC is always the defendant and the great majority of us voters are already well plucked and singed such that individually we have little monetary value to gain by defending our First Amendment rights like these rich birds can.

The two recent decisions are more than disappointing for their lack of consideration of good government and competing First Amendment rights of voters. Since the *McCutcheon* decision, we fear that without substantial change, which would be a first in the history of the FEC, that it is only a matter of time before base limits will suffer the fate of aggregate limits leaving us only with the possibility of disclosure which Chief Justice Roberts claims “offers much more robust protection against corruption”—an untested theory. Thus, while I have proposed wholesale revision of earmarks, such efforts may inevitably be moot. So, my opinion is that a full disclosure rule should be the immediate, top priority, issue at hand.

Nevertheless, we have strived to show that *McCutcheon v. FEC* contains a number of unanticipated consequences that have yet to be explored or developed. One is that the Appellants’ demand to protect the Free Speech of donors firmly insists that the speech involved is that of donors. The precedent of *Buckley v. Valeo*, as well as many other cases involving free speech issues is that First Amendment rights must be balanced against government interests including corruption and logically any competing First Amendment interests. We have elaborated that voters have several competing First Amendment interests that were not considered because the FEC Commissioners failed to introduce and defend those competing interests in Court.

Assigning the speech to the donors as *McCutcheon* has done implies that the speech is absolutely the property of donors who must still be considered the owners of that speech when it reaches its intended audience as a deferral since the audience is anticipated at the time of the donation.

In order to be consistent, the speech that is considered the donor’s upstream of a committee or corporation requires that the speech remain the donor’s downstream where it reaches its audience through purchased media on the basis of the monetary value that was explicit upstream. The same value carries through downstream although the transaction undergoes a deferral. This is a consequence of its conversion into the media that is the First Amendment right of Appellants to purchase as speech as argued in the Decisions. Because this downstream audience is also the location of the governmental concern in balancing the First Amendment rights with that speech’s possibility to corrupt, the speech is confirmed again as the donor’s property by the Decisions. Donors are thus still responsible for the content of the downstream speech and should be held responsible for its content and use.

Committees or corporations only serve as translators or converters in the location of a liminal void of transition as they are limited by *McCutcheon v. FEC*’s logic to only being able to change the form of speech in process from money to a form understandable by the intended audience which the Appellants claimed was their First Amendment right to do. Thus, this conversion is irrelevant to the issue of the First Amendment as already implicitly decided by *McCutcheon* and its precedents. And, all contributions

must be made with a specific aim already in the mind of the donor, which I have also shown to be consistent with rational choice according to capitalist microeconomic theory. Consequently all funds spent on behalf of candidates are implicitly earmarked.

The present FEC earmarking rule is unenforceable. It is no encumbrance to require donors and committees to clearly document what already is their intent. A rule requiring clearly documentation would result in an enforceable and simplified rule on all contributions being implied earmarks in consequence of the structure and language used in the *McCutcheon* decision. Thus all contributions that are ultimately spent by any organization on behalf of a candidate for office under FEC jurisdiction should now be subject to base limits and disclosure, even if made through independent expenditure committees and 501(c) corporations.

Another, more fervent, unintended consequence is that the *McCutcheon v. FEC* decision assumed a full disclosure system in place such that all donations could be made subject to public scrutiny making aggregate limits unnecessary to protect the government interest in limiting corruption. The FEC is thus obligated to immediately implement a disclosure rule that closes loopholes such that all contributions must be disclosed as this disclosure assumption is the foundation upon which the *McCutcheon* decision rests and therefore is as much a part of the decision which the FEC is bound to obey with the same attention and immediacy as the Court's directive that aggregate limits are unconstitutional which the FEC has already removed from its rules.

However, because of the structure of the FEC, it is expected that nothing of import will result from this ANPRM. The Commission is generally dead-locked by Commissioners who appear more loyal to party ideologies than they are to the legislated mission of the FEC.

Some suggest a Constitutional Amendment to override the Decisions. Although opinion surveys and polls show some support, it is not likely to be a practical pursuit. It is doubtful it would do as well as the Equal Rights Amendment which failed to be ratified and the tactic could set off a disturbing trend.

It is important to set priorities and focus on a limited agenda in the interest of success. The priority of the moment, as a consequence of the *McCutcheon* decision is disclosure. The only obstacles to a disclosure rule sit on the Commission. The Court's assumption that disclosure to public scrutiny offers much more robust protection against corruption should be tested.

Please, Commissioner Weintraub, make an immediate motion to fast track a new disclosure rule that would foreclose loopholes allowing donors to make undisclosed dark money contributions. As an interesting experiment, intense public scrutiny should be brought to bear on any Commissioners who fail to vote in the affirmative or attempt to obfuscate or complicate the motion by Amendments. In the end, we feel that the people may have to resort to a long-winded old-fashioned demonstration of real speech outside the FEC, Congress, the White House, and the Supreme Court in order to bring about a new and effective disclosure rule. I hope that is not the case and a few Commissioners can realize the error of their positions on disclosure and we can get on with it.

We thank you for your time and the opportunity for to testify here today. Needless to say we truly believe that these issues are important, especially for the nation's youngest voters. It's a cliché for good reasons that they are said to be our brightest hope and future. Please consider truly departing from traditional FEC dysfunction and promulgate and enforce new, truly effective regulations.

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