Please see the attached PDF comment submitted by the Republican National Lawyers Association.

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Federal Election Commission
Attn.: Amy L. Rothstein
Assistant General Counsel
999 E Street, NW
Washington, DC 20463

Re: REG 2014-01 Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (*McCutcheon*)

Dear Ms. Rothstein:

The Republican National Lawyers Association (RNLA) submits these comments to the Federal Election Commission (FEC or Commission) in response to the Advance Notice of Proposed Rulemaking (ANPRM) published in the Federal Register on October 17, 2014 [Notice 2014-12]. The RNLA is the principal national organization of Republican lawyers, and has a four-part mission to advance: professionalism; open, fair, and honest elections; career opportunity; and Republican ideals. These comments focus solely on disclosure.

I. Absent Congressional guidance, the Commission should refrain from undertaking any new rulemakings that would require further disclosure of political contributions.

The Commission should defer to Congress before advancing any new regulations on the disclosure of political expenditures. Placing additional disclosure burdens on political speakers would denote a major policy undertaking with constitutional implications, and thus should begin with the legislative branch. Previous rulemakings have derived from disclosure statutes or court cases that directly examined the constitutionality of laws containing disclosure provisions, for example, the Bipartisan Campaign Reform Act[1] and *McConnell v. FEC*.[2] *McCutcheon v. FEC*,[3] however, analyzed the constitutionality of biannual aggregate contribution limits and only briefly touched on political disclosure.

In fact, *McCutcheon* explicitly directed the legislative branch, not the FEC, to pursue whatever remedies thought necessary in the decision's aftermath. ''[T]here are multiple alternatives *available to Congress* that would serve the Government's anticircumvention interest, while avoiding 'unnecessary abridgment' of First Amendment rights.''[4] These suggested remedies—the main subject of this ANPRM—focused almost exclusively on the circumvention implications of removing the biennial contribution limits. Only with disclosure, did the Court

write in a separate section about generalized benefits. There the plurality cited its *Citizens United* and *Buckley* rationales of "provid[ing] the electorate with information' about the sources of election-related spending" and "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[5] Thus, the plurality's disclosure proclamations were not *McCutcheon*-specific.[6] In fact, these general governmental corruption concerns have formed part of the campaign finance legal paradigm since *Buckley* and were more central to *Citizens United* than *McCutcheon*.

Thus far, however, Congress has declined to enact further disclosure provisions despite comprehensively debating the issue through multiple bills and Congressional sessions since *Citizens United*. Almost immediately after that ruling, members of Congress, recognizing their legislative prerogative, began sponsoring bills to provide greater transparency for political spending. Senator Charles Schumer (D-NY) and Representative Chris Van Hollen (D-MD-8) both sponsored one such bill, the so-called 'DISCLOSE Act' in the Senate and House respectively.[7] Congress extensively debated these measures throughout 2010 and the Committee on House Administration produced a 92-page report.[8] The bill eventually failed. Congressional Republicans perceived it as a partisan maneuver aimed at thwarting newly recognized freedoms, as stated in the minority portion of the committee report: "The frantic rush to legislate is not a response to actual facts. It is, instead, an effort to use the Citizens United case as a smokescreen to cover up a historically unprecedented twisting of the campaign finance laws for partisan advantage."[9] In addition, another legislative reaction to *Citizens United*, the 'Shareholder Protection Act'[10] also failed to garner the requisite support to become law.

In fact, advocates of additional political disclosure introduced bills in the 111th, 112th, and 113th editions of Congress. The proper committees have held hearings on the matter and legislators have thoroughly debated the costs and benefits. In other situations, Congress has not hesitated to enact disclosure laws on political activity when warranted. For instance, the Honest Leadership and Open Government Act of 2007,[11] (HLOGA) significantly expanded federal lobbying disclosure. But unlike the disclosure provisions in the FECA, BCRA, or HLOGA, advocates have been unable to garner enough votes to pass additional disclosure measures. This lack of political support should strongly signal to the Commission the public and Congress views the current level of disclosure as adequate.

As the Supreme Court has stated, "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[12] Removing the disclosure debate—fraught with thorny constitutional implications—from elected representatives diminishes the importance of what is a major public policy debate. In fact, elections themselves are undermined if agencies act as the major policy players with little or no recourse from the American public.[13] As political philosopher John Locke stated: "The power of the *Legislative*" is "derived from the People by a positive voluntary Grant and Institution" and "can be no other, than what that positive Grant conveyed."[14]

A somewhat analogous situation arose in *FDA v. Brown & Williamson Tobacco Corp.*[15] There the Federal Drug Administration had disavowed regulating cigarettes for decades before reversing itself. The Court reviewed both legislative action and inaction and concluded Congress

had not given the FDA approval to regulate cigarettes. "In fact, on several occasions . . . the health consequences of tobacco use and nicotine's pharmacological effects had become well known, Congress considered and rejected bills that would have granted the FDA such jurisdiction." Of course, the FEC does have authority to promulgate political disclosure measures, but that should not assuage it of Congressional deference and separation-of-power concerns.

Other federal agencies have heeded this message and left additional disclosure options in legislative forums. Pressure from agitprop groups[16] and certain members of Congress[17] to bypass the legislative process, has thus far failed at the Securities and Exchange Commission. Chairwoman Mary Jo White eloquently articulated how independent commissions should approach pressure to misuse agency power, "[the SEC's] independence – and the agency's unique expertise – should be . . . respected by those who seek to effectuate social policy or political change through the SEC's powers of mandatory disclosure."[18] The Federal Communications Commission has also been under enormous pressure and has had some missteps, but the new chairman has stated he would not use his agency's power as a political disclosure bludgeon.[19] The FEC should follow the lead of these agencies.

Additionally, recent legal challenges to various disclosure requirements, particularly those at the state level, indicate FEC rulemaking imposing additional disclosure burdens will undoubtedly invite multiple suits and protracted litigation thereby causing political speakers more uncertainty, rather than less.

In sum, as a policy matter, the Commission should not proceed with a rulemaking in an area of fierce public disagreement where Congress has debated and chosen not to act and where recent and pending activity in federal and state courts have proven the constitutional validity of such rules may be in doubt and subject to legal challenge

II. Anonymous speech has a long and vibrant tradition in the U.S.

The American political conversation has included anonymous speech from its very inception. Both the Federalists and the Anti-Federalists conducted their ferocious debate over the U.S. Constitution's ratification partially through pseudonyms. The Supreme Court has repeatedly recognized anonymous speech as essential to robust political debate over contentious issues. In 1960 it stated, "leaflets, brochures and even books have played an important role in the progress of mankind [as] [p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[20] Anonymous speech allows individuals to express themselves freely without "fear of economic or official retaliation . . . [or] concern about social ostracism." *McIntyre v. Ohio Elections Comm'n*.[21] This latitude is essential even in a democracy committed to political transparency.[22]

Specifically regarding campaign finance, the Court in *Buckley v. Valeo* recognized disclosure burdens can outweigh benefits and offend the First Amendment where, "[t]he evidence offered . . . show[s] only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[23] This recognition eventually led to *Brown v. Socialist Workers Comm.*,[24] where

the Supreme Court granted the Socialist Workers Party the ability to shield its contributors and recipients of campaign disbursements. The SWP's protections continue to this day.[25]

While *Socialist Workers Comm.* focused on small political parties, the specter of harm and retribution mandatory disclosure forces on any speaker, particularly those espousing unpopular or "politically incorrect" views justifies caution. Indeed, the First Amendment requires that disclosure not "discourage[] participation" in the political process "without sufficient cause."[26]

Unfortunately, while the internet has made it easier to track whether politicians are "'in the pocket' of so-called moneyed interests,"[27] it has also provided a ready-made tool for the harassment of unpopular speakers. Certain groups have made embarrassing and shaming public companies and their customers a central tenant of their existence. For example, Media Matters, a partisan attack group, put together an entire plan to use disclosure laws to bully companies out of the political marketplace. "Media Matters Action Network will create a multitude of public relations challenges for corporations that make the decision to meddle in political campaigns," says the document. The data from corporate disclosure "may also be used to launch shareholder resolution campaigns to prevent corporations from making these types of expenditures."[28]

The intimidation is not confined to attack groups. Former Senate Majority Leader Harry Reid famously and repeatedly vilified private citizens and their affiliated 501(c)(4) nonprofit in the well of the Senate throughout 2014.[29] Mr. Reid's diatribes coincided with the efforts of a Reid-affiliated 'dark money group' that mirrored the political activity he near daily attacked.[30] In fact, Patriot Majority USA ranked fifth among 501(c)(4) organizations in independent expenditures this past cycle with over $10 million dollars.[31] Those not having Mr. Reid's political clout or megaphone will likely forego their speech rights rather than submit to constant public vilification.

Campaign finance expert Allen Dickerson testified before the House Committee on Oversight and Government Reform about the utility nondisclosure provides to certain nonprofits in the context of the Internal Revenue Service's proposed new rules for political activity:

> And I think it is important to deal with the elephant in the room, which is disclosure. The fact, as I said earlier, is that there is no revenue purpose to this rule. It is about the disclosure of people's donors. And I want to tackle that head on. **The reason 501(c)(4)s do not disclose their donors is because Congress said so.** When the Internal Revenue Code was passed, it created criminal penalties for the unauthorized disclosure of the donors to these organizations. And the reason for that is that it has always been understood that 501(c)(4)s are the beating heart of civil society. **These are the organizations, like the NRA and the Sierra Club, which go out there and take unpopular positions and move the national debate and make this a vibrant and functioning democracy. Requiring unpopular organizations to give up their donor list to public scrutiny is not only contrary to Congress's intention in the Internal Revenue Code, it is also contrary to constitutional law**.[32]

But it is not just public corporations, political advocacy groups, or millionaires who politicians, activists, and attack groups target. Private citizens with minimal involvement in the political sphere have found themselves facing unhinged wrath when on the supposed "wrong" side of an issue. Chairwoman Ravel mentioned the approach by California as a possible FEC model.[33] Unfortunately, the Golden State has one of the worst records regarding harassment of citizens for their speech. The 'Prop 8' state amendment defining marriage is illustrative. Nearly five years after the 2008 Prop 8 fight, a website still mapped out the addresses of those who contributed as little as $85 dollars to support traditional marriage.[34] Prop 8 supporters received death threats, packages of powdery substances, and had their businesses boycotted.[35] *Six years* after his contribution supporting Prop 8, activists successfully forced technology executive Brendan Eich from his just-earned promotion to Mozilla CEO.[36] This form of "transparency" serves no one but speech oppressors actively trying to harm those they find disagreeable. And, while the FEC may be able to require additional disclosure, it can do nothing to protect those harassed and harmed for having exercised their First Amendment rights by simply supporting an entity that made a public statement.

III. Undisclosed money makes up only a fraction of the amount spent in direct political activity.

Although the subject of overwrought and lopsided media coverage, undisclosed money accounts for only a fraction of political money spent each cycle. In the 2012 campaign, candidates, parties, and "outside" groups combined to spend about $7 billion dollars.[37] That total included only about $316 million[38] in undisclosed spending. Similarly, for the 2014 cycle, estimates place total undisclosed money at around $219 million of the $3.67 billion spent.[39] Chairwoman Ravel asserts undisclosed money for this cycle to be "700 million or more"[40]; she cites no authority for this figure. But the Center for Responsive Politics. which runs the oft-cited 'Open Secrets' website, cites much lower figures for undisclosed spending:

Total by Type of Spender, 2014[41]			
Type of Group	**Total Spent**	**# of Groups Registered**	**# of Groups Spending to date**
Super PACs	**$344,172,141**	**1,276**	**225**
Social Welfare 501(c)(4)	**$118,867,904**	**N/A**	**88**
Trade Associations 501(c)(6)	**$40,121,716**	**N/A**	**10**
Unions 501(c)(5)	**$1,723,211**	**N/A**	**18**
Parties	**$230,935,139**	**70**	**26**
Other (corporations, individual people, other groups, etc)	**$55,752,591**	**197**	**149**
Grand Total:	**$791,572,702**	**1,663**	**516**

In fact, almost all political advocacy is already disclosed, including independent expenditures over $250 dollars and electioneering communications over $10,000.

Conclusion

If the Commission implements new disclosure rules it would usurp a Congressional prerogative, ignore the rich history of anonymous political advocacy, and place unnecessary burdens on advocacy groups. In the landmark free speech case *New York Times v. Sullivan*,[42] the Court famously sought to ensure political debate is "uninhibited, robust, and wide-open." In order to do that, Court held political actors need "breathing space."[43] The current disclosure rules provide such breathing space. Almost all political money is already disclosed. Valid policy reasons fortify the minute amount that is not. Absent a congressional directive, the FEC should leave the current disclosure regime undisturbed.

Sincerely,

Larry Levy
President

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[1] Public Law 107-155 (2002).
[2] 540 U.S. 93 (2003).
[3] 134 S. Ct. 1434 (2014).
[4] *McCutcheon*, 134 S. Ct. at 1458 (quoting *Buckley*, 424 U.S. 1, 25 (1976)) (emphasis added).
[5] *McCutcheon*, 134 S. Ct. at 1459–60 (quoting *Citizens United*, 558 U. S., at 367(internal citation omitted).
[6] The Court did note removal of the aggregate limits would likely serve the purpose of disclosure by funneling more money back into regulated vehicles. *Id.*
[7] S.3295 — 111th Congress (2009-2010) and H.R.5175 — 111th Congress (2009-2010).
[8] H. Rept. 111-492 - 111th Congress (2009-2010), May 25, 2010.
[9] *Id.* at 85.
[10] H.R.4537 — 111th Congress (2009-2010) Shareholder Protection Act of 2010
[11] Lobbying Disclosure Act, 2 U.S.C. §§ 1601 *et seq.*
[12] *FDA v. Brown & Williamson Tobacco Corp*. 529 U.S. 120 (2000) citing *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 231 (1994).
[13] See generally, Postell, Joseph, Ph.D, *From Administrative State to Constitutional Government*, December 14, 2012, available at http://www heritage.org/research/reports/2012/12/from-administrative-state-to-constitutional-government
[14] John Locke, Two Treatises of Government, ed. Peter Laslett, student ed. (New York: Cambridge University Press, Cambridge Texts in the History of Political Thought, 1988), ch. 11, §141, p. 363.
[15] 529 U.S. 120 (2000).
[16] McGehee, Meredith, Policy Director Campaign Legal Center, *What's Next for Campaign Finance*, Huffington Post, updated Nov. 19, 2014, available at http://www.huffingtonpost.com/meredith-mcgehee/campaign-finance-reform_b_5847164.html
[17] Memorandum from Majority Staff, H. Comm. on Oversight & Gov't Reform, to Members, H. Comm. on Oversight & Gov't Reform, "The SEC and Political Speech" (July 22, 2013).
[18] White, Mary Jo, *The Importance of Independence*, 14th Annual A.A. Sommer, Jr. Corporate Securities and Financial Law Lecture, Fordham Law School, October 3, 2103, available at http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.VLLtLC7zzU_
[19] Wyatt, Edward, *New chief of the F.C.C. is confirmed*, N.Y. TIMES, Oct. 29, 2013.
[20] *Talley v. California*, 362 U.S. 60, 65 (1960).
[21] 514 U.S. 334, 341-42 (1995).
[22] See generally *U.S. v. Cassidy*, 814 F.Supp.2d 574 (2011).
[23] *Buckley*, 424 U.S. at 74.
[24] 459 U.S. 87 (1982).

[25] See FEC Advisory Opinion 2012-38 (issued 4/25/2013).
[26] *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1999).
[27] *McConnell v. FEC*, 540 U.S. 93, 259 (opinion of Scalia , J.).
[28] *The Corporate Disclosure Assault*, WALL ST. J., Mar. 20, 2012.
[29] See e.g., *Harry Reid vs. the Koch brothers, take 134*, Washington Post, April 29, 2014, available at http://www.washingtonpost.com/blogs/the-fix/wp/2014/04/29/harry-reid-vs-the-koch-brothers-take-134/
[30] *Democrats relying on big donors to win*, Politico, September 22, 2014, available at http://www.politico.com/story/2014/09/democrats-big-donors-2014-elections-111225 html
[31] 2014 Spending, by group, Open Secrets.org, available at https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=U
[32] *"The Administration's Proposed Restrictions on Political Speech: Doubling Down on IRS Targeting":* Hearing Before the Subcomm. on Economic Growth, Job Creation, & Regulatory Affairs of the H. Comm. on Oversight & Gov't Reform, 113th Cong. (2014), (statement of Allen Dickerson, Center for Competitive Politics) (emphases added).
[33] STATEMENT OF VICE CHAIR ANN M. RAVEL ENCOURAGING PUBLIC COMMENTS TO INCREASE DISCLOSURE AND ADDRESS CORRUPTION IN THE POLITICAL PROCESS, October 20, 2014.
[34] Klein, Stephen, R., *Bailey v. Maine Commission on Governmental Ethics: Another Step Toward the End of Political Privacy*, Engage, Volume 14, Issue 2 July 2013 at 58 n.90.
[35] *Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword*, N.Y. Times, Feb. 7, 2009, available at http://www.nytimes.com/2009/02/08/business/08stream html?_r=0
[36] See e.g., *Mozilla's Brendan Eich: Persecutor Or Persecuted?*, Forbes, April 4. 2014, available at http://www.forbes.com/sites/susanadams/2014/04/04/mozillas-brendan-eich-persecutor-or-persecuted/
[37] *$7 billion spent on 2012 campaign, FEC says*, Politico, Jan. 31, 2013, available at http://www.politico.com/story/2013/01/7-billion-spent-on-2012-campaign-fec-says-87051 html
[38] Blowie, Blair, and Adams, Louise, BILLION-DOLLAR DEMOCRACY: The Unprecedented Role of Money in the 2012 Elections, Joint report by Demos and U.S. PIRG Education Fund, Jan. 17, 2013.
[39] *Money Won on Tuesday, But Rules of the Game Changed*, Opensecrets.org, Nov. 5, 2014, available at http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed/
[40] STATEMENT OF VICE CHAIR ANN M. RAVEL ENCOURAGING PUBLIC COMMENTS TO INCREASE DISCLOSURE AND ADDRESS CORRUPTION IN THE POLITICAL PROCESS, October 20, 2014.
[41] Note: The spending figures cited are what the groups reported to the FEC; certain kinds of ads are not required to be reported; http://www.opensecrets.org/outsidespending/fes_summ.php
[42] 376 U.S. 254 (1964).
[43] Citing *NAACP v. Button*, 371 U.S. 415, 433 (1963).