

Comment of Former Commissioners of the Federal Election Commission

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January 15, 2015

Via Electronic Submission

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Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Comment in Response to Advance Notice of Proposed Rulemaking on  
“Aggregate Biennial Contribution Limits,” 79 Fed. Reg. 62361 (Oct. 17, 2014),  
Notice 2014-12 for 11 CFR Part 110 – REG 2014-01

Dear Ms. Rothstein:

This letter presents the comments of four former commissioners of the Federal Election Commission acting in their personal capacities on the Advance Notice of Proposed Rulemaking (“ANPR”) on “Aggregate Biennial Contribution Limits” issued on Oct. 9, 2014. We have a combined 30 years of experience on the Federal Election Commission (“FEC”) administering and enforcing federal campaign finance laws that govern the election process and regulate candidate-related financial activity.

The ANPR requests comments on whether, in light of the U.S. Supreme Court’s recent decision in *McCutcheon v. FEC*,<sup>1</sup> new or revised regulations should be issued with regard to earmarking of contributions, affiliation factors, joint fundraising committees, and disclosure requirements. The ANPR also asks whether the FEC should “make any other regulatory changes in light of the decision.”

In a separate statement, Commission Chairwoman Ann M. Ravel urges the FEC to re-examine “the Commission’s approach to the Internet and other emerging technologies.” She mistakenly claims that the current regulation regarding campaign activity on the Internet “does not make sense” and turns “a blind eye to the Internet’s growing force in the political arena.”<sup>2</sup>

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<sup>1</sup> 571 U.S. \_\_\_\_, 134 S.Ct. 1434 (2014).

<sup>2</sup> Statement of Reasons of Vice Chair Ann M. Ravel, In the Matter of Checks and Balances for Economic Growth, MUR 6729 (Oct. 24, 2014).

In summary, the FEC regulations governing earmarking, affiliation, joint fundraising committees, and disclosure are more than sufficient to prevent circumvention of the base limits on contributions and to carry out fully the mandate of Congress in the law. They do not need to be revised. The “alternative approaches” referred to in the ANPR for preventing circumvention of the base limits were specifically noted by the Supreme Court as “alternative approaches available to Congress,” *not to the FEC*.<sup>3</sup> This ANPR should never have been issued.

Further, FEC Chairwoman Ravel’s claims about the FEC regulation of campaign activity on the Internet are also wrong. Her proposal to regulate political speech on the Internet is profoundly misguided and poses a serious threat to free speech. It would constitute an “unnecessary abridgment” of basic First Amendment rights guaranteed by the Constitution. It would also be an abuse of the regulatory power of the FEC, which has no authority under the Federal Election Campaign Act and the Bipartisan Campaign Reform Act, as amended (collectively “FECA”), to regulate political speech simply because it is a “growing force in the political arena.”

At an absolute minimum, a proposal that would so implicate the First Amendment, and that would so greatly expand regulation into an area that has heretofore been regulated only lightly or not at all, should come from Congress, not the FEC. And it is worth noting that Congress, well aware of the Commission’s appropriate “hands off” approach for over a decade, has not passed such legislation.

The FEC’s authority is strictly limited to regulating large contributions and expenditures made to and by candidates and political action committees (“PACs”) that pose a danger of “corruption or the appearance of corruption,” the standard set for campaign finance regulation by the U.S. Supreme Court in *Buckley v. Valeo*.<sup>4</sup> This proposal to regulate political commentary on the Internet would take the FEC into an area far outside of this limited authority. It has no relevance to the only type of specific corruption in the campaign process the Supreme Court has said that Congress can permissibly target, which is “‘quid pro quo’ corruption.”<sup>5</sup> The fact that such commentary might influence elections or even influence election officials “does not give rise to such *quid pro quo* corruption.” The government and specifically the FEC cannot “seek to limit the appearance of mere influence or access.”<sup>6</sup>

### **The Current Regulations on Earmarking Already Prevent Circumvention**

FECA 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 directed through an intermediary or conduit to such candidate” shall be considered contributions to that candidate.<sup>7</sup> The FEC’s regulation defines “earmarked” as meaning “a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or

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<sup>3</sup> McCutcheon, 134 S.Ct. at 1459.

<sup>4</sup> 424 U.S. 1 (1976).

<sup>5</sup> McCutcheon, 134 S.Ct. at 1450.

<sup>6</sup> McCutcheon, 134 S.Ct. at 1450-51.

<sup>7</sup> 52 U.S.C. §30116(a)(8).

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.”<sup>8</sup>

In its enforcement of this provision, the FEC has determined that there must be “clear documented evidence of acts by donors that resulted in their funds being used” as contributions to find a violation of this provision.<sup>9</sup> However, a “person may contribute to a candidate or his or her authorized committee...and also to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as...(2) 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.”<sup>10</sup>

Given both the possible civil and criminal penalties that can be imposed for violations of the earmarking ban, requiring “clear documented evidence” of a violation either through testimony, written documents, or a combination of the two is a *fundamental* requirement of due process, particularly when an agency is regulating basic First Amendment activity. That is a requirement that the FEC has imposed in all of its enforcement actions. Actual knowledge is the key to a violation and there must be clearly documented evidence of such knowledge; otherwise, the FEC will be basing its enforcement on speculation and acting like thought police. If the FEC charged donors with circumvention without any evidence of a clear intent to violate the law, it would chill donations because no ordinary person could determine whether their contribution was legal or not.

No exception should be made to this evidentiary rule with regard to earmarking, and there has been no evidence presented that the current regulation is inadequate to deter violations and ensure compliance, a necessary prerequisite to avoid a finding that the FEC acted arbitrarily and capriciously in issuing a new or revised regulation. In fact, the regulation has successfully been enforced by the FEC and in federal court.<sup>11</sup>

FEC regulations also limit the ability of individuals to aggregate their contributions to a candidate by giving to separate PACs. Individuals can contribute to a candidate and a separate PAC that also contributes to that candidate but only if the PAC is not an authorized committee or a single-candidate committee; the contribution is not given with any knowledge that a substantial portion will be contributed to that same candidate; and no control over the contribution is retained by the donor.<sup>12</sup>

Thus, as the Supreme Court itself recognized, the existing FEC regulations already “disarm” the possibility of circumvention of the base contribution limit for specific candidates.<sup>13</sup> This regulation is more than sufficient to prevent earmarking and no changes need to be made. In fact, any limits on the maximum percentage of a PAC's funds that could go to a single

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<sup>8</sup> 11 CFR §110.6(b)(1).

<sup>9</sup> Matt Brown for U.S. Senate, MUR 5732, Factual & Legal Analysis at 6-7 (April 4, 2007).

<sup>10</sup> 11 C.F.R. § 110.1(h).

<sup>11</sup> See for example, *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471 (D.C. Cir. 1992).

<sup>12</sup> 11 CFR §110.1(h).

<sup>13</sup> *McCutcheon*, 134 S.Ct. at 1453.

candidate or establishing a minimum number of candidates a PAC could support would violate basic associational rights guaranteed by the First Amendment.

As the Supreme Court said in *McCutcheon*, the government cannot impose limits that deny the ability to exercise “expressive and associational rights by contributing to someone who will advocate” for the policy preferences of an individual donor, or in this case, a PAC.<sup>14</sup> Any number or percentage restriction chosen by the FEC would be totally arbitrary, violating the requirements of the Administrative Procedure Act and *Chevron v. Natural Resources Defense Council*.<sup>15</sup>

It should come as no surprise that individuals give contributions to both candidates and PACs that share their particular views on social and political issues. It should not be a violation of the law simply because an individual, for example, makes contributions to both a candidate and a PAC that is pro-Second Amendment or pro-abortion – as long as the contribution to the PAC was made without any earmarking.

### **The FEC’s Affiliation Definition is Sufficient to Prevent Circumvention**

FEC regulations provide that “All committees (including a separate segregated fund)...established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated” and therefore subject to the single contribution limit.<sup>16</sup> Part (4)(ii) of the same regulation provides a comprehensive list of ten factors considered by the FEC in determining affiliation, ranging from the ownership of controlling stock to overlapping membership or officers to “similar patterns of contributions or contributors which indicates a formal or ongoing relationship.”

These definitions are more than adequate to prevent affiliated organizations from circumventing base contribution limits, and there is no evidence that affiliated organizations have been able to avoid compliance with FECA and the FEC regulation. The Supreme Court noted that the FEC has “in the past initiated enforcement proceedings against contributors with such suspicious patterns of PAC donations.”<sup>17</sup> No revisions are necessary to make the regulation even stricter – any such change in the applicable regulation without evidence that it is inadequate would be arbitrary and capricious, once again violating the *Chevron* requirements.

In fact, the very idea that a contributor would donate to a large number of PACs in order to circumvent base contribution limits, hoping that each PAC would then contribute to the same candidate, is, as the Supreme Court said in *McCutcheon*, “hard to believe.” Why go to such “machinations” when the contributor “could have spent unlimited funds on independent expenditures on behalf of” their favored candidate with no risk of being caught violating the law:

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<sup>14</sup> *McCutcheon*, 134 S.Ct. at 1448. The right to associate with a political candidate is a “basic constitutional freedom” that “lies at the foundation of a free society.” *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

<sup>15</sup> 467 U.S. 838 (1984)

<sup>16</sup> 11 CFR §100.5(g)(2).

<sup>17</sup> 134 S.Ct. at 1454. *See e.g.* *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992); MUR 4568 (*Triad Management Services Inc.*); MUR 5274 (*Missouri State Democratic Committee*).



“[A]t least from the donor’s point of view, it strikes us as far more likely that he will want to see his full \$500,000 spent on behalf of his favored candidate – even if it must be spent independently – rather than see it diluted to a small fraction so that it can be contributed directly by someone else.”<sup>18</sup>

Concerns about affiliated organizations and individuals circumventing base contribution rules are “much ado about nothing.” As the Supreme Court pointed out, “statutory safeguards against circumvention have been considerably strengthened...through both statutory additions and the introduction of a comprehensive regulatory scheme.”<sup>19</sup> While the *McCutcheon* Court did discuss some alternative regulatory approaches that could be taken by Congress, it expressed skepticism that any additional safeguards were necessary, and the Court was very careful to note that it was not meaning “to opine on the validity of any particular proposal.”<sup>20</sup> The FEC could certainly not impose new, more restrictive regulations, without establishing an evidentiary record of successful circumvention of the existing regulations.

There is no such evidence in the actual record before the FEC.

### **Current FEC Rules Adequately Police Joint Fundraising Committees**

Both FECA and accompanying FEC regulations provide for joint fundraising committees.<sup>21</sup> The FEC regulations are comprehensive in outlining the rules, limits, and restrictions on such committees. Congress itself has specified that “candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.”<sup>22</sup> Candidates can transfer contributions they receive to the “national, State, or local committee of a political party” and the limits on contributions do not apply to transfers between “national, State, district or local committees...of the same political party.”<sup>23</sup>

In the ANPR, the FEC asks whether these rules should be revised. However, Congress specifically provided for joint fundraising committees and made a legislative judgment that the limits on contributions do not apply to political subordinates and committees of the same political party. Further, although *McCutcheon* noted that one of the options with regard to joint fundraising committees would be to limit the size of such committees, *the FEC does not have the authority to do so*. In fact, the opinion specified that such a limit could be implemented “if Congress [not the FEC] believes that circumvention is especially likely to occur through creation of a joint fundraising committee.”<sup>24</sup> Congress has not chosen to do so.

Instead, Congress recognized the important associational rights of political parties and their candidates that are protected by the First Amendment. It concluded that there is no danger

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<sup>18</sup> 134 S.Ct. at 1454.

<sup>19</sup> *McCutcheon*, 134 S.Ct. at 1446.

<sup>20</sup> *McCutcheon*, 134 S.Ct. at 1459.

<sup>21</sup> 52 U.S.C. §30102(e)(3)(A)(ii) and 11CFR §102.17.

<sup>22</sup> 52 U.S.C. 30102(e)(3)(A)(ii).

<sup>23</sup> 52 U.S.C. 30114(a)(4) and 30116(a)(4).

<sup>24</sup> *McCutcheon*, 134 S.Ct. at 1458-59.

of corruption or the appearance of corruption in the interactions between candidates and the various committees of the candidates' political parties. The FEC has no authority to issue regulations that would restrict such transfers or otherwise limit and interfere with the statutory system that Congress laid out for such contributions and transfers by joint fundraising committees. And again, there is no evidence in the record of the need for any change in the existing regulations, a necessary prerequisite before any action can be taken.

### **No Additional Disclosure Requirements Should Be Implemented for Internet Publications**

As the Supreme Court reiterated in *McCutcheon*, the Court held in *Buckley v. Valeo*, the seminal case on FECA, that disclosure of *large* contributions and expenditures offers protection against corruption in the political campaign process.<sup>25</sup> This is particularly true because “[r]eports and databases are available on the FEC’s Web site almost immediately after they are filed” by candidates and PACs.<sup>26</sup> Commission Chairwoman Ravel says that the FEC is asking what “rules it should implement to address corruption and increase disclosure in the political process.”

However, there is no evidence that the current FECA law or the current FEC regulations are ineffective in combating so-called “corruption,” and there is also no evidence that the public believes that there is not already sufficient disclosure. After all, candidates running for federal office must disclose all of the contributions they receive and the expenditures they make. This includes any payments to Internet websites or portals to post political advertising for their campaigns.

The FEC understood in 2006 that it did not have the authority to regulate all political commentary that citizens and organizations publish online for free on websites, in email messages, or in other social media platforms such as Twitter.<sup>27</sup> There are no changes that need to be made in the FEC’s current regulations to increase disclosure requirements. Further, the FEC does not have the authority to increase disclosure rules beyond those specified in the law, and it certainly does not have the authority to impose disclosure requirements on any political activity or political speech that is not directly and expressly related to political campaigns.

Commentators, bloggers, individual citizens, and anyone else who post political opinions and commentary on the Internet should not be required to file disclosure reports with the FEC. Such a requirement would not only be an unconstitutional violation of fundamental First Amendment rights, but impractical, putting the FEC in the position of chilling free speech on the web and in emails by regulating it. The California Fair Political Practices Commission (“FPPC”) considered a similar proposal for extensive regulation of political speech on the Internet proposed by Chairwoman Ravel when she was a member of that body. A bipartisan group of commissioners of that agency *rejected* the proposal.<sup>28</sup>

Chairwoman Ravel’s claims about the supposed dangers of so-called “dark money” connected with political commentary on the Internet are unproven, undocumented speculation

<sup>25</sup> *McCutcheon*, 134 S.Ct. at 1459-60.

<sup>26</sup> *McCutcheon*, 134 S.Ct. at 1460.

<sup>27</sup> 11 CFR §100.94; *see also* 11 CFR §100.155 .

<sup>28</sup> Ronald D. Rotunda, “Targeting Political Speech for the Next Election,” WALL STREET JOURNAL (Nov. 4, 2014).

and conjecture. As the Supreme Court warned in *McCutcheon*, we “have never accepted mere conjecture as adequate to carry a First Amendment burden.”<sup>29</sup> As Prof. Ronald Rotunda, one of Chairwoman Ravel’s former colleagues on the FPPC and a leading constitutional scholar, says, the entire basis for limiting political contributions and requiring their disclosure is “the fear that a contributor might secure special access to an officeholder or secure his, or his successor’s, secret promise to vote for or against a piece of legislation. This fear does not apply when someone is arguing publicly for or against a law, regardless of who may or may not have paid him to do so” or who they are.<sup>30</sup>

Chairwoman Ravel also claims that in today’s world, “the distinctions between the Internet and other modes of communication are not what an earlier group of Commissioners may have anticipated” when the regulation governing paid political advertisements on the Internet was issued in 2006. Former Commissioner von Spakovsky was on the FEC at the time the regulation was issued and Chairwoman Ravel’s claim is completely incorrect.

In fact, modern technology has led to a Renaissance of ordinary citizens being able to influence public debate in the political arena. Anyone with access to a computer or smart phone can publish his or her political opinion, social commentary, YouTube video, or tweet on important issues and public policy problems at little or no cost. As former FEC Chairman Lee Goodman accurately says, “[p]olitical speech and civic engagement have flourished on the Internet.”<sup>31</sup>

The FEC noted this at the time it issued its Internet regulation, concluding that:

The Internet has changed the way in which individuals engage in political activity by expanding the opportunities for them to participate in campaigns and grassroots activities at little or no cost and from remote locations. Accordingly, in the *NPRM*, the Commission proposed new rules to extend explicitly the existing individual activity exceptions to the Internet to remove any potential restrictions on the ability of individuals to use the Internet as a generally free or low-cost means of civic engagement and political advocacy.<sup>32</sup>

Chairwoman Ravel states that she simply wants the FEC to “begin opening a new dialogue, listening to outside experts and gathering a broad range of views about new and emerging technologies.” But it is clear from her recent vote in an enforcement matter involving two videos produced and posted for free on YouTube, as well as other statements she has made, that she wants to regulate the use of such technology by citizens, which would have the ultimate effect of deterring its use.<sup>33</sup> Such regulation could end up “seriously restricting participation in the democratic process,” something the Supreme Court warned against in *McCutcheon*.<sup>34</sup>

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<sup>29</sup> *McCutcheon*, 134 S.Ct. at 1452.

<sup>30</sup> Ronald D. Rotunda, “Targeting Political Speech for the Next Election,” *WALL STREET JOURNAL* (Nov. 4, 2014).

<sup>31</sup> Lee E. Goodman, “Online Political Opinions Don’t Need Regulating,” *WALL STREET JOURNAL* (Jan. 1, 2015).

<sup>32</sup> Internet Communications, 71 Fed. Reg. 18,589, 18603 (April 12, 2006), Notice 2006-8, Federal Election Commission.

<sup>33</sup> In the Matter of Checks and Balances for Economic Growth, MUR 6729, Federal Election Commission.

<sup>34</sup> *McCutcheon*, 134 S.Ct. at 1442.

There is no question that requiring government registration, disclosure, and reporting by the literally thousands of online bloggers, websites, commentators, podcasters, and kitchen table journalists and reporters would not only burden and interfere with their First Amendment right to speak freely, but would be entirely impractical for the FEC. It simply does not have the resources or time to regulate such voluminous activity – it is unfeasible, and would invariably lead to the charge of selective, politically-motivated enforcement. It would create a huge group of violators who would have no idea that there was a reporting requirement, much less how to do it correctly.

Finally, it would raise the dire specter of a federal agency monitoring everything that is being said and done on the Internet, something that should scare every American.

As Prof. Ronald Rotunda says:

Dictators in Iran, China, North Korea and elsewhere want to censor the Internet. If California or the FEC regulate Internet political speech, we can be sure that these dictators would justify their own political censorship by pointing to the United States. This would cripple U.S. efforts to protect Internet freedom.<sup>35</sup>

With her emphasis on disclosure, the current chair of the FEC apparently has a problem with anonymous political commentary on the Internet. Anonymous political commentary has a grand tradition in American history, including with the Federalist Papers, without which our Constitution might not have been ratified.

In fact, we might never have gotten to the point of even having a new Constitution to ratify if such disclosure rules had been in place when Thomas Paine published “Common Sense” in 1776. This pamphlet, which helped inspire the American colonists to declare independence and fight Great Britain, was published anonymously with the type of so-called “dark money” Chairwoman Ravel complains about. From the nation’s very beginnings, many of our greatest statesmen have stated their views on public issues, or financed the publications of others, behind the protection of anonymity, including Alexander Hamilton, James Madison, John Jay, Richard Henry Lee, Robert Yates, Chief Justice John Marshall, Abraham Lincoln, and John Hay, to name but a few.<sup>36</sup>

The Supreme Court has also recognized in *McIntyre v. Ohio Elections Commission* that the right to engage in political commentary anonymously is a fundamental constitutional right<sup>37</sup> and “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.”<sup>38</sup>

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<sup>35</sup> Ronald D. Rotunda, “Targeting Political Speech for the Next Election,” WALL STREET JOURNAL (Nov. 4, 2014).

<sup>36</sup> See Bradley A. Smith, “Disclosure in a Post-Citizens United Real World,” 6 UNIV. ST. THOMAS J. L & PUB. POL’Y 257, 277 (2012) and citations therein.

<sup>37</sup> *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

<sup>38</sup> *Talley v. California*, 362 U.S. 60, 64 (1960).



In *McIntyre*, the Court explicitly gave the protection of anonymity to Mrs. McIntyre, an individual citizen who the state prosecuted for failing to identify herself on fliers that she distributed to express her opinion on an upcoming election, holding that the state's asserted "informational interest" in requiring speakers to disclose their identity "is plainly insufficient to support the constitutionality of its disclosure requirement."<sup>39</sup> The Internet in the hands of citizens today is the functional equivalent of the copy machine and fliers that political activists like Mrs. McIntyre used only a few years ago. *There is no compelling interest that would justify regulation of such speech by our citizens.*

All of these issues were considered by the FEC when it issued its Internet regulation in 2006. There is no justification for the FEC to revise these regulations or impose burdensome registration and disclosure requirements on political speech and activity on the Internet. Such oppressive regulations would simply discourage civic participation and squelch free speech.

## Conclusion

Any actions taken by the FEC, including the issuance of regulations, must be in accord with its duty to "make, amend, and repeal such rules, as are necessary to carry out the provisions of this Act."<sup>40</sup> Not only must the regulations issued by the FEC comply with the provisions of the Federal Election Campaign Act, as enacted and amended by Congress, but they must respect Supreme Court precedents and provide clear guidance to citizens and organizations attempting to comply with the law. They also cannot restrict or violate the First Amendment rights of Americans.

Such regulations should also provide clear bright line rules that can easily be understood and followed by candidates and others involved in campaign activity. The FEC's current regulations on earmarking, affiliation, joint fundraising committees, disclosure, and the Internet are more than sufficient to carry out the intent of Congress in FECA. As the Supreme Court noted in *McCutcheon*, the "intricate regulatory scheme that the Federal Election Commission has enacted...limits the opportunity for circumvention."<sup>41</sup> These regulations do *not* need to be revised and the FEC should *not* attempt to further restrict core First Amendment activity. It would be an abuse of its authority if the FEC went around Congress's decision not to regulate in a specific area such as political speech on the Internet or if it imposed restrictions on joint fundraising committees that do not exist in FECA.

FEC Chairwoman Ravel's proposal would violate all of the foregoing precepts. Going forward with such a regulation would be arbitrary and capricious and a clear and obvious violation of the Administrative Procedure Act.

Given the importance of the issues implicated by the ANPR, we request that some of the signees to this public comment be allowed to testify at any public hearings held on this matter.

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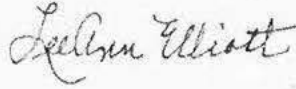
<sup>39</sup> *McIntyre*, 514 U.S. at 349.

<sup>40</sup> 52 U.S.C. §30107(a)(8).

<sup>41</sup> *McCutcheon*, 134 S.Ct. at 1447.

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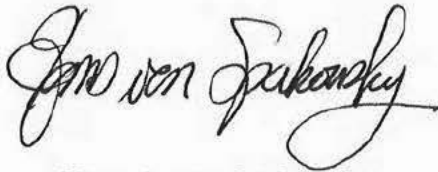
Respectfully submitted,



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