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January 15, 2015

Chair Ann M. Ravel
Vice Chairman Matthew L. Petersen
Federal Election Commission
999 E Street NW.
Washington, DC 20463

Re: *FEC REG 2014-01, Aggregate Biennial Contribution Limits*

Dear Chair Ravel and Vice Chairman Petersen:

The Brennan Center for Justice at NYU School of Law¹ respectfully submits this Comment in response to the Advance Notice of Proposed Rulemaking (the “ANPRM”) issued by the Federal Election Commission on October 17, 2014.² In addition to submitting this Comment, we respectfully request the opportunity to testify in person at the Commission’s February 11, 2015 public hearing.

We applaud the FEC for taking action in response to *McCutcheon v. FEC*.³ It is important for the Commission to respond in a thoughtful, comprehensive manner to changes in campaign finance law, and the ANPRM is a step in the right direction. Giving the public the opportunity to speak fully and frankly with administrative decision makers, particularly in the electoral realm, is imperative to a healthy democracy.

In *McCutcheon*, the Supreme Court struck down the aggregate contribution limits in the Federal Election Campaign Act (“FECA”), which limited the total amount individual contributors could give to candidate and political party committees.⁴ The Court found that such limits were not sufficiently tailored to preventing the reality or appearance of *quid pro quo* corruption.⁵

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Money in Politics project works to reduce the undue influence of money in our democracy. These comments do not purport to convey the position of NYU School of Law, if any.

² *Aggregate Biennial Contribution Limits*, 79 Fed. Reg. 62,361 (Oct. 17, 2014) [hereinafter ANPRM].

³ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

⁴ 52 U.S.C. § 30116(a)(3) (formerly 2 U.S.C. § 441a(a)(3)).

⁵ *McCutcheon*, 134 S. Ct. at 1458 (plurality opinion).

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McCutcheon's controlling plurality made clear, however, that it was not calling into question the validity of base limits on contributions to particular candidate or party committees, or the government's legitimate interest in preventing circumvention of those limits. Rather, the plurality reasoned that other, less burdensome means exist by which the government can guard against circumvention, including restrictions on joint fundraising and earmarking of contributions, and the Commission's anti-proliferation rules (through which it determines when certain committees are affiliated with one another).⁶ The Court also strongly reaffirmed the importance of robust disclosure requirements, which help to inform voters and guard against "abuse of the campaign finance system."⁷

On December 24, 2014, the Commission issued a final rule deleting the regulation that had implemented the aggregate limits and making certain other technical and conforming changes.⁸ The ANPRM seeks comment on whether the Commission "should further modify its regulations or practices" in response to *McCutcheon*.⁹

While it would be premature at this stage to propose detailed regulatory changes, we do believe that there are a number of additional actions the Commission should take in the wake of *McCutcheon* and other Supreme Court cases over the last five years. We urge the Commission to:

- Take concrete steps to improve disclosure, including through long-delayed rulemakings and the full enforcement of federal political committee registration and reporting requirements;
- Update rules regulating coordinated communications and other in-kind contributions to take into account current campaign practices;
- Take other measures to prevent circumvention of the federal base contribution limits; and
- Consider additional ways to boost political participation through technological innovation.

This does not represent an exhaustive list of recommended priorities, but a subset of what, in our view, are the most pressing concerns.

⁶ *Id.* at 1446-47, 1458-59 (plurality opinion).

⁷ *Id.* at 1459-60 (plurality opinion).

⁸ Aggregate Biennial Contribution Limits, 79 Fed. Reg. 77373 (Dec. 24, 2014) (final rule); Aggregate Biennial Contribution Limits, 79 Fed. Reg. 62335 (Oct. 17, 2014) (interim final rule).

⁹ ANPRM, 79 Fed. Reg. at 62362.

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1. The Commission Should Take Concrete Steps to Improve Disclosure.

Disclosure requirements, as the Supreme Court has long recognized, help to protect the integrity of the democratic process. In *Citizens United v. FEC*, Justice Kennedy, writing for eight members of the Court, explained that disclosure “provid[es] the electorate with information about the sources of election-related spending,”¹⁰ thereby “enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages.”¹¹ Furthermore, while “disclosure requirements may burden the ability to speak . . . they impose no ceiling on campaign-related activities and do not prevent anyone from speaking.”¹² Accordingly, the *Citizens United* Court upheld the constitutionality of the disclosure and disclaimer requirements of the Bipartisan Campaign Reform Act of 2002 (“BCRA”).¹³

In *McCutcheon*, the Court reaffirmed the constitutionality of disclosure requirements, explaining that “disclosure of contributions minimizes the potential for abuse of the campaign finance system.”¹⁴ Disclosure requirements “deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”¹⁵

Congress intended federal disclosure requirements to reach broadly, but they are increasingly ineffective. Since *Citizens United*, “dark money” from groups who do not disclose their donors has increased dramatically in federal elections. According to the Center for Responsive Politics, of the almost \$2 billion in outside spending since 2010, at least \$617 million—almost one third—has been dark.¹⁶

¹⁰ *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)) (internal quotation marks omitted).

¹¹ *Id.* at 371.

¹² *Id.* at 366 (internal citations and quotation marks omitted).

¹³ *Id.* at 367.

¹⁴ *McCutcheon*, 134 S. Ct. at 1459 (plurality opinion).

¹⁵ *Id.* (internal citation and quotation marks omitted).

¹⁶ See Ctr. for Responsive Politics, *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/disclosure.php> (last visited Jan. 15, 2015) (\$617 million in dark outside spending from 2010 to 2014); Ctr. for Responsive Politics, *Outside Spending - 2014*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2014 (last visited Jan. 15, 2015) (\$560.5 million in non-party outside spending in 2014); Ctr. for Responsive Politics, *Outside Spending - 2012*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012 (last visited Jan. 15, 2015) (\$1.038 billion in non-party outside spending in 2012); Ctr. for Responsive Politics, *Outside Spending - 2010*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2010 (last visited Jan. 15, 2015) (\$309.8 million in non-party outside spending in 2010).

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Critically, the vast majority of this spending is concentrated in the closest races. For example, the Brennan Center calculated that roughly 91% of the money spent in the 2014 senate races by groups that hid some or all of their donors went to the eleven most competitive contests.¹⁷ And in those eleven contests, 59% of non-party outside spending came from groups that hid some or all of their donors.¹⁸

This cannot be what Congress intended, nor does it accord with the Court's jurisprudence. We urge the Commission to take three key steps to fix the dark money problem.

A. The Commission Should Enforce Political Committee Registration and Reporting Requirements.

The Commission could go a long way toward solving the problem of dark money if it would simply adhere to its own longstanding approach to determining whether particular groups are required to comply with political committee registration and reporting obligations.

Originally, political committee status entailed being automatically subject to contribution limits, but after *Citizens United* and the decision of the Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. FEC*,¹⁹ it carries only disclosure-related obligations. The D.C. Circuit described these obligations as “minimal,” and not “much of an additional burden.”²⁰ Nevertheless, they form the core of the entire federal disclosure regime.

FECA defines a political committee as an organization that receives contributions or makes expenditures over \$1,000 during a calendar year.²¹ In *Buckley v. Valeo*, the Court added the so-called “major purpose test,” which requires that an organization have the major purpose of supporting or opposing candidates for office.²² While this determination is fairly

¹⁷ IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE *CITIZENS UNITED* 13 (2015), *available at* <http://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united>.

¹⁸ *Id.* at 2.

¹⁹ *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

²⁰ *Id.* at 697.

²¹ 52 U.S.C. § 30101(4)(A) (formerly 2 U.S.C. § 431(4)(A)).

²² *Buckley*, 424 U.S. at 79. Because political committee status now only results in the organization being subject to disclosure requirements, the major purpose test may no longer be constitutionally required. *See, e.g.*, *Vt. Right to Life Comm. v. Sorrell*, 758 F.3d 118, 135-36 (2d Cir. 2014); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 35, 59 (1st Cir. 2011); *accord* *FEC MUR 6396* (Crossroads Grassroots Policy Strategies), Statement of Reasons of Vice Chair Ann M. Ravel, Commissioner

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straightforward for candidate and party committees, it can be more difficult for other types of election spenders.

In 2007, the Commission issued a detailed Supplemental Explanation and Justification (“the Supplemental E&J”) explaining how it would apply *Buckley*’s major purpose test to outside groups.²³ Among other things, the Supplemental E&J provided a non-exhaustive list of “campaign activities” that the Commission would consider in determining whether a group is a political committee—including “direct mail attacking *or* expressly advocating” a candidate’s defeat, “television advertising opposing” a candidate, “candidate research,” “polling” and “other spending . . . for public communications mentioning Federal candidates.”²⁴ Federal courts across the country have affirmed the constitutionality of the approach taken in the Supplemental E&J.²⁵

Nevertheless, in recent years, the Commission itself has failed to enforce the letter and spirit of the Supplemental E&J’s guidance. Instead, contrary to the advice of the Commission’s own General Counsel,²⁶ it has been suggested by some Commissioners that the sole type of campaign activity relevant to whether an organization is a political committee consists of the organization’s “express advocacy” communications explicitly or unmistakably calling for the election or defeat of a candidate.²⁷ These communications must constitute at least 50% of a group’s spending total over an unspecified period of time; the Commission’s General Counsel suggested standardizing the relevant time period under consideration to the calendar year (consistent with the relevant provisions of FECA), but that proposal was rejected.²⁸

Steven T. Walther, and Commissioner Ellen L. Weintraub 4 n.30 (Jan. 10, 2014), *available at* <http://eqs.fec.gov/eqsdocsMUR/14044350964.pdf> (“Given that political committee status now serves largely a transparency function, courts have begun to question the constitutional necessity of imposing a major purpose test at all.”).

²³ Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007).

²⁴ *Id.* at 5605 (emphasis added).

²⁵ *See, e.g.*, *Free Speech v. FEC*, 720 F.3d 788, 798 (10th Cir. 2013); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556-57 (4th Cir. 2012); *Shays v. FEC*, 511 F. Supp. 2d 19, 29-31 (D.D.C. 2007).

²⁶ *See, e.g.*, FEC MUR 6396 (Crossroads Grassroots Political Strategies), First General Counsel’s Report 16-24 (Nov. 21, 2012), *available at* <http://eqs.fec.gov/eqsdocsMUR/14044350839.pdf>.

²⁷ *See, e.g.*, FEC MUR 6396 (Crossroads Grassroots Policy Strategies), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Peterson 14 (Jan. 8, 2014), *available at* <http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf>.

²⁸ *See* FEC MUR 6081 (American Issues Project), Statement of Reasons of Vice Chair Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen 14 (July 25, 2013), *available at* <http://eqs.fec.gov/eqsdocsMUR/13044340543.pdf>.

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Suffice it to say, we disagree with this new, curtailed application of the major purpose test. No aspect of this approach is constitutionally required. In fact, *Citizens United* itself expressly rejected the “contention that . . . disclosure requirements must be” limited to communications containing express advocacy or its functional equivalent.²⁹ For this and the many other reasons ably (and repeatedly) set forth by the Commission’s Office of General Counsel,³⁰ we urge the Commission to return to its previous longstanding approach to major purpose determinations.

B. The Commission Should Fix Its Rule Governing Disclosure of Independent Expenditures.

A second step the Commission can take to counter dark money is to finally fix its regulation governing disclosure by non-political committees who make “independent expenditures” (“IEs”), which by definition contain express advocacy or its functional equivalent.³¹ Under the FECA, persons other than political committees who make at least \$250 worth of IEs in a calendar year must file periodic reports disclosing, *inter alia*, the names of each contributor who “made a contribution in excess of \$200 . . . for the purpose of furthering *an* independent expenditure.”³² The plain text of the statute thus mandates disclosure of all contributors who fund IEs.

The Commission’s regulation, however, significantly narrows this requirement. It calls for disclosure only of donors who contributed more than \$200 “for the purpose of furthering *the reported independent expenditure.*”³³ As others have argued, this regulation is “manifestly inconsistent with the statute.”³⁴ Since contributors almost never specify that they

²⁹ *Citizens United*, 558 U.S. at 369. *See also* *McConnell v. FEC*, 540 U.S. 93, 193 (2003) (“Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley’s* magic-words requirement is functionally meaningless.”) (internal citations omitted).

³⁰ *See, e.g.*, FEC MUR 6589 (American Action Network), First General Counsel’s Report (Jan. 17, 2013), *available at* <http://eqs.fec.gov/eqsdocsMUR/14044361896.pdf>; FEC MUR 6538 (Americans for Job Security), First General Counsel’s Report (May 2, 2013), *available at* <http://eqs.fec.gov/eqsdocsMUR/14044361705.pdf>; FEC MUR 6402 (American Future Fund), First General Counsel’s Report (Jan. 17, 2013), *available at* <http://eqs.fec.gov/eqsdocsMUR/14044364800.pdf>; FEC MUR 6396 (Crossroads Grassroots Political Strategies), First General Counsel’s Report, *supra* note 26; FEC MUR 6081 (American Issues Project), First General Counsel’s Report (Mar. 12, 2013), *available at* <http://eqs.fec.gov/eqsdocsMUR/13044333743.pdf>.

³¹ 11 C.F.R. § 109.21(c)(5).

³² 52 U.S.C. § 30104(c)(2)(C) (formerly 2 U.S.C. § 434(c)(2)(C)).

³³ 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

³⁴ *See* Chris Van Hollen, Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures 6 (Apr. 21, 2011).

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contributed to fund particular communications, the regulation has allowed non-political committees who make IEs to easily circumvent this key disclosure provision. As a result, hundreds of millions of dollars in IEs, constituting the vast majority of dark money expenditures in both the 2012 and 2014 election cycles, have been shrouded in secrecy.³⁵

Not only has this problem gone uncorrected, the Commission has repeatedly declined even to approve an NPRM that would allow the public to weigh in on the issue.³⁶ We urge the Commission to commence a new rulemaking to address this problem.

C. The Commission Should Fix Its Rule Governing Disclosure of Electioneering Communications.

Finally, the Commission should also fix its rule governing disclosure of “electioneering communications” (“ECs”). ECs are broadcast, cable, or satellite communications referring to a candidate within thirty days of a primary election or sixty days of a general election and (except at the presidential level) targeting the candidate’s electorate.³⁷ BCRA requires disclosure of “all contributors who contributed an aggregate amount of \$1,000 or more to the person making” the electioneering communication.³⁸ On its face, the provision is in no way limited to contributors who donated solely to fund

³⁵ In 2012 and 2014 combined, \$1.5 billion was spent on independent expenditures and \$23 million was spent on electioneering communications. Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Jan. 15, 2015). During those two cycles, \$454.9 million was spent on dark independent expenditures and \$15.3 million was spent on dark electioneering communications. See Ctr. for Responsive Politics, *2014 Outside Spending, by Group - Independent Expenditures*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=D&disp=O&type=I> (last visited Jan. 15, 2015); Ctr. for Responsive Politics, *2012 Outside Spending, by Group - Independent Expenditures*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=I> (last visited Jan. 15, 2015); Ctr. for Responsive Politics, *2014 Outside Spending, by Group - Electioneering Communications*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=D&disp=O&type=E> (last visited Jan. 15, 2015); Ctr. for Responsive Politics, *2012 Outside Spending, by Group - Electioneering Communications*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=E> (last visited Jan. 15, 2015).

³⁶ See Statement of Commissioner Ellen L. Weintraub on the Notices of Proposed Rulemaking to Address *Citizens United*, Dec. 16, 2011, available at http://www.fec.gov/members/weintraub/statements/ELW_CU_Statement_12-16-11.pdf.

³⁷ 52 U.S.C. § 30104(f)(3)(A)(i) (formerly 2 U.S.C. § 434(f)(3)(A)(i)).

³⁸ 52 U.S.C. § 30104(f)(2)(F) (formerly 2 U.S.C. § 434(f)(2)(F)).

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particular communications or ECs generally—although organizations can avoid disclosing all of their non-political contributions by funding ECs through a segregated bank account.³⁹

Once again, however, the Commission has greatly narrowed the statutory rule. Under its current rule, organizations that make electioneering communications, including dark money groups, must only disclose their underlying donors who gave their donations “for the purpose of furthering electioneering communications.”⁴⁰ A controlling bloc of Commissioners has interpreted this language to again require, as with IEs, only disclosure of donors who *specifically earmarked* their contributions to pay for particular ECs.⁴¹ Once again, such a purpose requirement allows the vast majority of non-political committees who make ECs to evade meaningful disclosure.⁴²

The Commission has repeatedly been asked to address this problem, but has declined even to allow public discussion.⁴³ We urge the Commission to address this issue as well through a new rulemaking.

2. The FEC Should Revamp Its Rules Governing Coordinated Communications and Other Types of In-Kind Contributions to Candidates.

Strong regulation of coordinated activity between candidates and outside spenders is essential to any effective campaign finance system.⁴⁴ In *Buckley v. Valeo*, the Supreme Court drew a clear line between limits on independent expenditures and limits on contributions to

³⁹ See 52 U.S.C. § 30104(f)(2)(E) (formerly 2 U.S.C. § 434(f)(2)(E)).

⁴⁰ 11 C.F.R. § 104.20(c)(9), *vacated by* Van Hollen v. FEC, No. 11-0766 (ABJ), ___ F. Supp. 3d ___, 2014 WL 6657240, at *2 (D.D.C. Nov. 25, 2014).

⁴¹ FEC MUR 6002 (Freedom’s Watch), Statement of Reasons of Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn 5 (Aug. 13, 2010), *available at* <http://eqs.fec.gov/eqsdocsMUR/10044274536.pdf>.

⁴² See Ctr. for Responsive Politics, *2010 Outside Spending, by Group – Electioneering Communications*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=D&disp=O&type=E> (last visited Jan. 15, 2015) (over 88% of money undisclosed); Ctr. for Responsive Politics, *2012 Outside Spending, by Group – Electioneering Communications*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=E> (last visited Jan. 15, 2015) (over 70% of money undisclosed).

⁴³ See Statement of Commissioner Ellen L. Weintraub, *supra* note 36.

⁴⁴ It is the Brennan Center’s position that a communication falling outside the definition of “coordinated communication,” 11 C.F.R. § 109.21, still may constitute an in-kind contribution under FECA. See J. Adam Skaggs & David Earley, Brennan Ctr. for Justice, Comment on Advisory Opinion Request 2011-23 (American Crossroads) (Nov. 24, 2011), *available at* <http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/AO%202011-23%20Brennan%20Center%20Comments-Final.pdf>. To provide clarity to the regulated community, however, we urge the Commission to update its rules.

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candidates. The Court reasoned that while limits on independent expenditures warrant strict constitutional scrutiny, contribution limits “entail[] only a marginal restriction” on First Amendment rights, and therefore merit less onerous judicial review.⁴⁵ *Citizens United* left this distinction undisturbed.⁴⁶ While *McCutcheon* invalidated aggregate contribution limits, the plurality too specifically disclaimed any need to “revisit *Buckley*’s distinction between contributions and independent expenditures and the corollary distinction in the applicable standards of review.”⁴⁷

As the *Buckley* Court explained, third-party expenditures “coordinated” with a candidate can be “treated as contributions,” because “[t]he ultimate effect is the same as if the [spender] had contributed the dollar amount [of the expenditure] to the candidate.”⁴⁸ The Supreme Court has long made clear, moreover, that the legal definition of coordination need not entail actual “agreement or formal collaboration” between a candidate and an outside group.⁴⁹ “[E]xpenditures made after a ‘wink or nod,’” the Court has repeatedly observed, “will be ‘as useful to the candidate as cash.’”⁵⁰

Nothing in the Court’s more recent jurisprudence disturbs this line of reasoning. If anything, in fact, the flood of outside spending that has taken place in the last five years necessitates a *more* robust regulatory approach to coordination than the Commission might previously have adopted.

Since *Citizens United*, super PACs and other outside groups have spent almost \$2 billion on federal elections.⁵¹ That is about two-and-a-half times the total spent from 1990 to 2008.⁵² Outside spending almost tripled between the 2008 and 2012 presidential elections, more than quadrupled between the 2006 and 2010 midterm elections, and then almost doubled again between the 2010 and 2014 midterm elections.⁵³ Most of this spending has

⁴⁵ *Buckley*, 424 U.S. at 20, 23.

⁴⁶ *Citizens United*, 558 U.S. at 357-59.

⁴⁷ *McCutcheon*, 134 S. Ct. at 1445 (plurality opinion); *see also* O’Keefe v. Chisholm, 769 F.3d 936, 942 (7th Cir. 2014) (Easterbrook, J.) (“[n]o opinion issued by the Supreme Court, or by any court of appeals, establishes (“clearly” or otherwise) that the First Amendment forbids regulation of coordination between campaign committees and issue-advocacy groups . . .”).

⁴⁸ *Buckley*, 424 U.S. at 36-37.

⁴⁹ *McConnell*, 540 U.S. at 219-20.

⁵⁰ *Id.* at 221 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446 (2001)).

⁵¹ Ctr. For Responsive Politics, *Outside Spending*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending/> (last visited Jan. 15, 2015).

⁵² Ctr. For Responsive Politics, *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Jan. 15, 2015).

⁵³ *Id.*

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been concentrated in the most hotly contested races, in which outside groups now routinely outspend both candidates and parties.⁵⁴

Moreover, such spending increasingly comes from groups devoted to electing a single candidate (sometimes called “buddy groups”)—often staffed by the candidate’s family, friends, or former staffers.⁵⁵ Buddy groups offer a convenient mechanism for maxed-out contributors to target particular races in exactly the same way as they can with direct contributions, resulting in exponentially greater corruption concerns.⁵⁶

Too often, the FEC’s rules for coordinated communications do not adequately address this new political landscape. The Brennan Center recently made a number of recommendations for how policymakers can revamp their rules to take into account the reality of how campaigns are conducted today.⁵⁷ Implementation of these recommendations would, in our view, significantly improve the Commission’s approach to coordination.

Our specific suggestions for the FEC are the following:

A. The Commission Should Provide for Sensible “Cooling Off” Periods For Former Staff and Campaign Consultants.

Mandatory “cooling off” periods before which candidates’ staff and consultants can go to work for an outside group are a staple of coordination laws. Former staff and strategic consultants are often the best placed to know a candidate’s confidential plans and strategies.⁵⁸ Without periods of reasonable length or other alternative safeguards,⁵⁹ there is a high risk that outside spending will be tailored in ways that closely match the candidate’s needs, creating a heightened corruption risk.

⁵⁴ VANDEWALKER, *supra* note 17, at 1.

⁵⁵ PUB. CITIZEN, SUPER CONNECTED (2014), at 4 (2015), *available at* <http://www.citizen.org/documents/super-connected-2014-citizens-united-outside-groups-report-updated.pdf> (estimating that 45% of super PAC spending in the 2014 cycle was by groups devoted to electing a single candidate); CHISUN LEE, BRENT FERGUSON & DAVID EARLEY, BRENNAN CTR. FOR JUSTICE, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES 8 (2014), *available at* <http://www.brennancenter.org/publication/after-citizens-united-story-states> (describing candidate-specific outside groups as “the quintessential coordination vehicle”).

⁵⁶ VANDEWALKER, *supra* note 17, at 2, 11.

⁵⁷ LEE ET AL., *supra* note 55, at 26-29.

⁵⁸ *See id.* at 9, 14-15.

⁵⁹ In some cases, a strong firewall policy covering the affected individuals can mitigate the risk of coordination associated with overlapping staff and consultants, though it is important to require proof of a strong formal written policy. *See* LEE ET AL., *supra* note 55, at 29.

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The Commission's current rules provide for a cooling off period for both former staff and consultants of only 120 days.⁶⁰ This brief period allows staffers to shift from a candidate's campaign to an outside group during the same election cycle, enabling parallel campaigns that can work in tandem for maximum effect.⁶¹ Other jurisdictions have adopted longer windows more likely to prevent this problem.⁶² We recommend the Commission follow a similar approach.

B. *The Commission Should Consider Candidate Fundraising for Outside Groups in Its Coordination Analysis.*

In the wake of *Citizens United*, one of the most troubling new trends has been the explosion of candidate fundraising for outside groups that can raise unlimited funds, numerous instances of which have been documented at both the state and federal levels.⁶³ As the Minnesota Campaign Finance Board has explained, "fundraising for, or promotion of, an [outside group] constitutes cooperation that destroys the independence of any subsequent expenditures made . . . to affect the candidate's election."⁶⁴ According to one scholar, "a candidate who raises funds for a group by definition is coordinating fundraising strategy with that group."⁶⁵ Especially where the group's stated objective is to work for the candidate's election (as is increasingly the case), candidate fundraising essentially "lets would-be donors and the world know that a donation to the [group] is just as good (or better, given the lack of contribution limits) as a donation to the candidate's campaign."⁶⁶

⁶⁰ 11 C.F.R. § 109.21(d)(4), (5).

⁶¹ See, e.g., PUB. CITIZEN, SUPER CONNECTED 21, 22 (2013), available at <http://www.citizen.org/documents/super-connected-march-2013-update-candidate-super-pacs-not-independent-report.pdf>. See also LEE ET AL., *supra* note 55, at 22 (documenting this practice at the state level).

⁶² CONN. GEN. STAT. § 9-601c(b)(5); 94-270 ME. CODE R. ch. 1, § 6(9)(B)(1).

⁶³ LEE ET AL., *supra* note 55, at 10-12; see also, e.g., Carney: 'I Don't Remember' If President Obama Attended a Super PAC Fundraiser, WASH. FREE BEACON (Nov. 4, 2013), available at <http://freebeacon.com/politics/carney-i-dont-remember-if-president-obama-attended-a-super-pac-fundraiser/>; Mike McIntyre & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. TIMES (Feb. 26, 2012), available at <http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html>; Eliza Newlin Carney, *Rules of the Game: Democrats' Super PAC Promotion Signals Shift*, ROLL CALL (Feb. 5, 2013), available at http://www.rollcall.com/news/rules_of_the_game_democrats_super_pac_promotion_signals_shift-222180-1.html.

⁶⁴ Minn. Campaign Fin. & Pub. Disclosure Bd., Adv. Op. No. 437, at 5.

⁶⁵ See Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, DUKE J. OF CONST. L. & PUB. POL'Y 16, 20 (draft), available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1176&context=schmooze_apers.

⁶⁶ *Id.*; accord Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 97 (2013).

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Under the Commission’s current rules, candidate fundraising for super PACs and other outside groups is expressly permitted. According to Advisory Opinion 2011-12 (Majority PAC and House Majority PAC), “[f]ederal officeholders and candidates . . . may attend, speak at, or be featured guests at fundraisers for [political committees] at which unlimited individual, corporate, and labor organization contributions will be solicited”⁶⁷ The only restriction—that the candidate not violate the solicitation limit by personally asking for more than \$5,000—is easily circumvented.

To address the inherent *quid pro quo* corruption concerns that arise in connection with such spending, a growing number of jurisdictions treat candidate fundraising for an outside group as a presumptive indication, or at least evidence, that the group’s expenditures in support of the candidate are coordinated with him or her.⁶⁸ In our view, this is a sensible approach that the Commission too should follow.

C. The Commission Should Treat All Reproduction of Materials Made Available by the Candidate’s Campaign as a Type of In-Kind Contribution.

Reproduction of campaign materials is another common method that outside groups use to circumvent contribution limits, which is why it has long been treated as a type of contribution under federal law and the laws of many states.⁶⁹ Recently, however, many campaigns have sought to exploit a loophole in such laws by producing professional video footage and other images of candidates and putting these materials online for use by outside groups in their own advertisements (a tactic the press has dubbed “McConnelling,” because it was pioneered by the campaign of Senate Majority Leader Mitch McConnell).⁷⁰ Many candidates have provided raw material for ads to outside groups by simply posting them online in this manner.⁷¹

⁶⁷ FEC, Adv. Op. No. 2011-12, at 5 (Majority PAC and House Majority PAC) (June 30, 2011).

⁶⁸ See, e.g., Minn. Adv. Op., *supra* note 64; City of Philadelphia Bd. of Ethics, *Recent Amendments to Ethics Board Regulation No. 1 (Campaign Finance)*, Nov. 4, 2014, available at http://www.phila.gov/ethicsboard/PDF/SummaryOfChangesToBOERegNo1_Effective10.31.14.pdf; Conn. St. Elections Enf. Comm’n Decl. Ruling No. 2014-2, at 5 (July 2, 2014), available at <http://www.ct.gov/seec/lib/seec/AdvisoryOpinion201402.pdf>.

⁶⁹ See 11 C.F.R. § 109.23; Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 441-42 (Jan. 3, 2003); OHIO ADMIN. CODE § 111-3-02; FLA. STAT. ANN. § 106.011(12)(b); ME. REV. STAT. tit. 21-A, § 1015(5).

⁷⁰ See Jaime Fuller, *The Fix: How ‘McConnelling’ Came To Be The Hottest Thing on the Political Web*, WASH. POST (Mar. 14, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/03/14/how-mcconnelling-came-to-be/>.

⁷¹ See, e.g., Eliza Newlin Carney, *Firewall Between Candidates and Super PACs Breaking Down*, ROLL CALL (Feb. 18, 2014, 11:30 A.M.), <http://blogs.rollcall.com/beltway-insiders/candidate-super-pac-coordination>.

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Republication of this sort provides a direct benefit to a candidate, no different than any other type of in-kind contribution. By making stock footage and other images available online for use by outside groups, campaigns are engaging in exactly the sort of “wink or nod” that is the essence of most coordination.

In our view, FECA’s existing republication provisions and Commission regulations already cover such conduct.⁷² To the extent there is any confusion about the reach of the Commission’s regulations, however, we urge the Commission to clarify its rules accordingly.

D. The Commission Should Commit to Robust Enforcement.

Lastly, beyond any specific rule changes, the Commission must commit to robust enforcement of the rules already in place. To date, the Commission’s track record in this regard has not been encouraging.⁷³ We are, in fact, unaware of any significant penalties levied in recent years for coordination violations, which is remarkable given the amount of collaboration actually happening. We urge the Commission to adopt a new approach.

3. The Commission Should Take Other Steps to Prevent Circumvention of the Base Contribution Limits.

Apart from the matters described above, we urge the Commission to take other steps to prevent circumvention of the base contribution limits.

A. The Commission Should Continue to Enforce Reasonable Solicitation Restrictions.

Most importantly, we urge the Commission to continue imposing limits on solicitation of contributions above both FECA’s base and aggregate limits. We agree with the Commissioners who have argued that while *McCutcheon* struck down the aggregate limits themselves, the decision left FECA’s solicitation limits in place.⁷⁴ Consequently, candidates should not be allowed to solicit contributions for a joint fundraising committee in excess of

⁷² See 52 U.S.C. § 30116(a)(7)(B)(iii) (formerly 2 U.S.C. § 441a(a)(7)(B)(iii)) (“[T]he financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure”); 11 C.F.R. § 109.23.

⁷³ See, e.g., Rachael Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce*, CTR. FOR PUB. INTEGRITY (Jan. 13, 2012), <http://www.publicintegrity.org/2012/01/13/7866/rules-against-coordination-between-super-pacs-candidates-tough-enforce>.

⁷⁴ See Statement of Vice Chair Ann. M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub on Rulemaking in Response to *McCutcheon v. FEC* 2 (Oct. 9, 2014); see also *McCutcheon*, 134 S. Ct. at 1461 (plurality opinion).

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the aggregate contribution limits, even if that joint fundraising committee can now accept contributions in excess of the aggregate contribution limits.⁷⁵

Though the *McCutcheon* Court did not specifically reach the question,⁷⁶ the plurality approvingly cited Justice Kennedy's *McConnell* concurrence which rejected a ban on soft money contributions to national parties while also approving a ban on candidate solicitations of such contributions.⁷⁷ As Justice Kennedy explained in *McConnell*, "The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request)."⁷⁸ Hence, FECA's solicitation limits further the anticorruption interest and pass constitutional muster.⁷⁹

To be sure, as discussed in Section 2(B) herein, solicitation limits of this sort are relatively easy to evade. The Commission may therefore wish to consider strong rules implementing these limits—including, for example, additional restrictions on joint fundraising activities. In the wake of *McCutcheon*, such activities have taken on a greater role in our elections.⁸⁰ The *McCutcheon* plurality suggested limiting the number of committees who can participate in a joint fundraising effort as a course of action available to Congress,⁸¹ but we also believe the FECA does not prohibit the Commission from taking such action on its own. Doing so would further prevent the use of fundraising as a circumvention mechanism.

⁷⁵ 52 U.S.C. § 30125(e)(1)(A) (formerly 2 U.S.C. § 441i(e)(1)). This rule is very similar to the one restricting candidates from soliciting contributions larger than \$5,000 for a super PAC, even though a super PAC can accept unlimited contributions. *See* Adv. Op. 2011-12 (Majority PAC), *supra* note 67.

⁷⁶ *McCutcheon*, 134 S. Ct. at 1461 (plurality opinion).

⁷⁷ *Id.* at 1461 (citing *McConnell*, 540 U.S. 93, 298-99, 308 (opinion of Kennedy, J.)).

⁷⁸ *McConnell*, 540 U.S. at 308 (opinion of Kennedy, J.). *See also id.* at 183 ("Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.").

⁷⁹ *McConnell*, 540 U.S. at 308 (opinion of Kennedy, J.).

⁸⁰ Peter Olsen-Phillips, *Joint fundraisers ballooning after McCutcheon decision*, SUNLIGHT FOUND. (Oct. 29, 2014), <http://sunlightfoundation.com/blog/2014/10/29/joint-fundraisers-ballooning-after-mccutcheon-decision/> (indicating 213 new joint fundraising committees were formed in 2014); Michael Beckel, *Democrats embrace 'McCutcheon' decision*, CTR. FOR PUBLIC INTEGRITY (Aug. 26, 2014), <http://www.publicintegrity.org/2014/08/26/15396/democrats-embrace-mccutcheon-decision>; Byron Tau, *GOP launches new big money effort*, POLITICO (Aug. 5, 2014, 11:23 A.M.; updated Aug. 5, 2014 5:02 P.M.), <http://www.politico.com/story/2014/08/republicans-targeted-state-victory-fundraising-109724.html>.

⁸¹ *McCutcheon*, 134 S. Ct. at 1458-59 (plurality opinion).

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B. The Commission Should Robustly Enforce Its Earmarking and Affiliation Rules.

Finally, while we recommend no changes to the Commission's earmarking and affiliation rules at this time, we do urge the Commission to robustly enforce those rules.

We note in particular that while the Commission's rules appear to define earmarking "broadly," as the *McCutcheon* plurality observed,⁸² the Commission has used a narrower definition of earmarking in enforcement actions. There, the Commission has considered funds to be earmarked "only when there is clear documented evidence of acts by donors that resulted in their funds being used as contributions."⁸³ This interpretation of the rule encompasses only the most conspicuous of earmarks and creates an easily exploitable loophole. Indeed, this interpretation fails to reach the "implicit agreements" that the Supreme Court believes are "already prohibited by the earmarking rules."⁸⁴ We question whether this approach is consistent with Congress's broad directive 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" are contributions from that person to the candidate.⁸⁵

4. The Commission Should Take Other Steps to Enhance Political Participation Through Technology.

Finally, we encourage the Commission to consider additional measures to enhance political participation, particularly by small donors. For example, the Commission's approval of text message contributions in 2012 was an important step in encouraging broader participation in our democracy.⁸⁶ As a result of the advisory opinion, donors collectively contributed about \$1.2 million via text message in 2012.⁸⁷ Because contributions are capped at \$50,⁸⁸ this means at least 24,000 people gave via text. In fact, Pew Research estimated that 10% of donors to presidential campaigns in 2012 did so via either text message or cell phone

⁸² *Id.* at 1447.

⁸³ Aggregate Biennial Contribution Limits, 79 Fed. Reg. 62,361, 62,362 & n.3 (Oct. 17, 2014) (internal quotation marks omitted).

⁸⁴ *McCutcheon*, 124 S. Ct. at 1459 (plurality opinion) (citing 11 C.F.R. § 110.6).

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

⁸⁶ FEC, Adv. Op. No. 2012-17 (Red Blue T, ArmourMedia, and m-Qube) (June 11, 2012). The Brennan Center submitted comments to the Commission supporting text message contributions. J. Adam Skaggs & David Earley, Brennan Ctr. for Justice, Comment to FEC re: AO 2012-17 (Red Blue T, Armour Media, and m-Qube) Draft B (June 4, 2012), *available at* <http://www.brennancenter.org/sites/default/files/legacy/Democracy/CFR/Brennan%20Center%20Letter%20re%20AO2012-17%206-4-2012.pdf>.

⁸⁷ Jamie Lorber, *Barack Obama Continues to Win With Text Message Donors*, ROLL CALL (Oct. 26, 2012, 1:47 P.M.), <http://atr.rollcall.com/barack-obama-continues-to-win-with-text-message-donors/>.

⁸⁸ Adv. Op. 2012-17 (Red Blue T, ArmourMedia, and m-Qube), *supra* note 86 at 4-5.

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app.⁸⁹ Additionally, at least three states have approved of the use of text message contributions since the issuance of the Commission's advisory opinion.⁹⁰ We urge the Commission to continue looking for additional means to foster technological innovation to boost participation without undermining existing rules.

* * * * *

A full and fair public debate is essential to a democratic society. Indeed, the First Amendment's free speech guarantee is one of the most sacred rights enshrined in our constitution. But with federal election spending continuing to reach unprecedented levels, it is crucial that we have effective campaign finance regulation. Voters are entitled to know who is trying to influence their votes and, correspondingly, who is most likely to try to influence the votes of their representatives after the election. Contribution limits and other campaign finance laws must be scrupulously enforced to safeguard our government from corruption. We must ensure that our government works for all citizens rather than a select few.

The Supreme Court premised *McCutcheon* on vigorous rulemaking and enforcement by the FEC. We strongly urge the Federal Election Commission to honor the Court's promise.

Respectfully submitted,

/s/

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⁸⁹ Aaron Smith & Maeve Duggan, *Presidential Campaign Donations in the Digital Age*, PEW RES. INTERNET PROJECT (Oct. 25, 2012), <http://www.pewinternet.org/2012/10/25/presidential-campaign-donations-in-the-digital-age/>.

⁹⁰ Aaron Scherb, *Texas Approves Text Message Campaign Contributions*, PUB. CAMPAIGN (Feb. 1, 2013, 5:19 P.M.), <http://www.publiccampaign.org/blog/2013/02/01/texas-approves-text-message-campaign-contributions>.