October 27, 2015

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

Re: Comments on REG 2015-04 re Independent Spending by Corporations, Labor Organizations, Foreign Nationals and others

Dear Ms. Rothstein:

These comments are filed by Democracy 21 and the Campaign Legal Center with regard to the Notice of Availability (Notice 2015-09) published by the Federal Election Commission on July 29, 2015 at 80 Fed. Reg. 45116, seeking comment on two identical petitions for rulemaking filed by Public Citizen and Make Your Laws PAC.

The petitions seek a rulemaking to promulgate new regulations that would (1) improve the disclosure of donations used to fund electioneering communications, (2) clarify the prohibition on campaign spending by U.S. subsidiaries of foreign corporations, (3) clarify rules relating to corporate and union coercion of employees and members to make political contributions, and (4) ensure that supposedly independent expenditures by Super PACs are truly independent of the candidates they support.

Democracy 21 and the Campaign Legal Center support the initiation of the proposed rulemaking, particularly with regard to the first and fourth topics.

For the record, we re-submit a copy of rulemaking comments we filed with the Commission on January 15 of this year in response to the Commission's Notice 2014-12, an Advance Notice of Proposed Rulemaking published at 79 Fed. Reg. 62361 (Oct. 17, 2014), seeking comment on whether to begin a rulemaking to revise the Commission's regulations in light of the Supreme Court's decision in *McCutcheon v. FEC,* 134 S. Ct. 1434 (2014), and also seeking comment on whether the Commission "should make any other regulatory changes in light of the decision." 79 Fed. Reg. at 62362.

In our January comments, we explained at length the need for the Commission to revise its rules for disclosure of both electioneering communications and independent expenditures. Comments at 8-15. As we pointed out then, the federal district court in Washington, DC has already twice struck down the Commission's plainly inadequate electioneering communications rules—rules that result in virtually zero disclosure of the donors who are funding such

communications. In its most recent decision, in November 2014, the district court held that the Commission's current regulation is "arbitrary, capricious, and contrary to law" and an "unreasonable interpretation" of the governing statute. *Van Hollen v. FEC*, 2014 WL 6657240 (D.D.C. 2014) at *1; *see also Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012). As the district court stated, "the regulation's purpose requirement is inconsistent with the statutory language and purpose" and creates an "easily exploited loophole that allows the true sponsors of advertisements to hide behind dubious and misleading names." *Van Hollen*, 2014 WL 6657240, at *2. (This decision is currently on appeal).

What was true then remains true now. The Commission should undertake a rulemaking to fix what is plainly a broken rule.

Our January comments also explained our views on the Commission's equally inadequate coordination rules. Comments at 19-23. As we then said:

> As the amount of outside spending in federal elections has increased, there is mounting evidence of collaboration and cooperation between groups funding ostensibly "independent" expenditures and the candidates they support. While such collaboration and cooperation amounts to coordination under any common sense definition of the term, much of it is not considered coordination under the Commission's regulations. The Commission must fix the disconnect between its coordination regulations and the governing statute that the Supreme Court interprets as requiring independent expenditures to be "totally" independent of candidates.

Comments at 19. And again, what was true then remains true now.

Nine months after receiving these (and many other) comments, and eight months after holding a hearing (on February 11, 2015), the Commission has—not surprisingly—done nothing.

We are under no illusion that the current rulemaking petitions will yield a different result. There is no reason to believe that any Republican Commissioner would provide a fourth vote to initiate a rulemaking, either to improve the agency's patently inadequate disclosure rules or, certainly, to examine (much less, improve) the Commission's plainly overwhelmed coordination regulations. The Republican Commissioners have resisted such efforts for years, preferring instead to sit on an inert agency that has lost all purpose, all credibility, and indeed, all relevance.

We wish we thought that the current Notice of Availability was the start of a serious inquiry that poses serious questions about whether the agency should engage in a serious rulemaking. But that would require believing that the three Republican Commissioners are suddenly going to take seriously the law and their responsibilities as Commissioners. And there is no serious reason to believe that.

Sincerely,

*/s/ J. Gerald Hebert* *
/s/ Fred Wertheimer*

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January 15, 2015

**Submitted Electronically** (sers.fec.gov)

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

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Notice 2014-12, an Advance Notice of Proposed Rulemaking (ANPRM) published at 79 Fed. Reg. 62361 (October 17, 2014), requesting comment on whether to begin a rulemaking to revise Commission regulations in light of certain language from the Supreme Court's decision in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). The Campaign Legal Center and Democracy 21 each request the opportunity to testify at the hearing scheduled for February 11, 2015.

Specifically, the ANPRM notes that, although *McCutcheon* held the challenged aggregate contribution limits to be unconstitutional, the "Court indicated that there are multiple alternatives available to Congress that would serve the Government's interest in preventing circumvention [of the base contribution limits] while avoiding unnecessary abridgment of First Amendment rights." 79 Fed. Reg. at 62362 (quoting *McCutcheon*, 134 S. Ct. at 1458) (internal quotation marks omitted). The *McCutcheon* "Court identified mechanisms that could be implemented or amended to prevent circumvention of the base limits, including:" earmarking regulations, affiliation factors, joint fundraising committee regulations and disclosure regulations. *Id.* "The Commission seeks comment on whether it should modify its regulations or practices in these areas" and "also seeks comment on whether it should make any other regulatory changes in light of the decision." *Id.*

As detailed below, the Campaign Legal Center and Democracy 21 urge the Commission to modify its regulations and practices with respect to all four policy areas identified in the *McCutcheon* decision and in the ANPRM, as well as to the policy areas of political party fundraising/spending and coordination.

## I. Earmarking and Aggregation

In *McCutcheon*, the Supreme Court invalidated on First Amendment grounds the aggregate contribution limits based largely on the Court's conclusion that the aggregate limits

were not necessary to prevent circumvention of the presumably valid base contribution limits. The Court wrote: "Based on what we can discern from experience, the indiscriminate ban on all contributions above the aggregate limits is disproportionate to the Government's interest in preventing circumvention." 134 S. Ct. at 1458. The Court had explained earlier in the opinion:

> The primary example of circumvention, in one form or another, envisions an individual donor who contributes the maximum amount under the base limits to a particular candidate, say, Representative Smith. Then the donor also channels "massive amounts of money" to Smith through a series of contributions to PACs that have stated their intention to support Smith.
>
> Various earmarking and antiproliferation rules disarm this example. <u>Importantly, the donor may not contribute to the most obvious PACs: those that support only Smith</u>. *See* 11 CFR § 110.1(h)(1); *see also* § 102.14(a). Nor may the donor contribute to the slightly less obvious PACs that he knows will route "a substantial portion" of his contribution to Smith. § 110.1(h)(2).

*Id*. at 1453 (emphasis added) (internal citations omitted).

The Court dismissed circumvention concerns that had been cited by the district court in *McCutcheon*, stating: "Even the 'implicit[ ]' agreement imagined by the District Court, 893 F. Supp. 2d, at 140, would trigger the earmarking provision" and "could not succeed" without assuming that political committees "would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did)." *Id*. at 1455. "These scenarios," the Court claimed, "along with others that have been suggested, are either illegal under current campaign finance laws or divorced from reality." *Id.* at 1456.

The Court reiterated in conclusion:

> Many of the scenarios that the Government and the dissent hypothesize involve <u>at least implicit agreements</u> to circumvent the base limits—<u>agreements that are already prohibited by the [Commission's] earmarking rules</u>. *See* 11 CFR § 110.6. The FEC might strengthen those rules further by, for example, defining how many candidates a PAC must support in order to ensure that "a substantial portion" of a donor's contribution is not rerouted to a certain candidate. § 110.1(h)(2).

*Id.* at 1459 (emphasis added).

Thus, the Court clearly believes that the Commission's earmarking rules prohibit even <u>implicit</u> agreements to circumvent the base limits. This is consistent with the Commission's existing earmarking regulations, which clearly define "earmarked" to mean "a designation, instruction, or encumbrance, <u>whether direct or indirect, express or implied</u>, oral or written, which results in all or any part of a contribution or expenditure being made to, <u>or expended on behalf of</u>, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b)(1) (emphasis added).

The problem, however, is that the Commission, by its own admission, does not enforce its own regulation. The Commission explains in the ANPRM that it has determined in enforcement actions that "funds are considered to be 'earmarked' only when there is 'clear documented evidence of acts by donors that resulted in their funds being used' as contributions." 79 Fed. Reg. at 62362. In other words, the Commission enforces its earmarking rules only when there is an express agreement to circumvent the contribution limits.

The Commission asks whether it should "revisit the manner in which it enforces its earmarking regulations to encompass the 'implicit agreements' addressed by the Court?" *Id.* Plainly, the answer is yes. To the extent that the Commission refuses to enforce its own earmarking rules, it should change its practice, particularly now given the Court's reliance on those rules as written to strike down the aggregate contribution limit.

Not only must the Commission begin enforcing its own definition of "earmarked" to include implicit agreements, but the Commission must do so in conjunction with enforcing a related regulation repeatedly cited and characterized in *McCutcheon* as preventing circumvention of the base contribution limits—11 C.F.R. § 110.1(h). *See*, *e.g.*, *McCutcheon*, 134 S. Ct. at 1447, 1453, 1456 and 1459.

Section 110.1(h), entitled "Contributions to committees supporting the same candidate," reads:

> A person may contribute to a candidate or his or her authorized committee with respect to a particular election and also contribute to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as—(1) The political committee is not the candidate's principal campaign committee or other authorized political committee or a single candidate committee; (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; and (3) The contributor does not retain control over the funds.

11 C.F.R. § 110.1(h) (emphasis added); *see also McCutcheon*, 134 S. Ct. at 1447. The Commission describes section 110.1(h) in the ANPRM as the rule that governs "the circumstances under which contributions to a candidate . . . must be aggregated with contributions to other political committees for purposes of the [Act's] contribution limits." 79 Fed. Reg. at 62362 (quoting Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 765 (Jan. 9, 1987)).

Section 110.1(h)(1), taken together with the Commission's definition of "single candidate committee,"[1] clearly prohibits any contributor who gives the maximum amount to a candidate from then giving more to a single candidate independent expenditure-only committee (*i.e.*, single

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[1] The Commission's regulations define "single candidate committee" as "a political committee other than a principal campaign committee which makes or receives contributions or makes expenditures on behalf of only one candidate." 11 C.F.R. § 100.5(e)(2).

candidate Super PAC) that makes expenditures in support of that candidate. Yet single candidate Super PACs have proliferated over the past five years with the Commission sitting idly by, refusing to enforce this regulation.

According to the Center for Responsive Politics, during the 2012 federal election cycle, 103 single candidate Super PACs raised more than $300 million; during the 2014 cycle, 104 single candidate Super PACs raised more than $68 million. Among these single candidate Super PACs were Restore Our Future, which spent more than $140 million in support of Governor Mitt Romney's presidential campaign, and Priorities USA Action, which spent more than $65 million in support of President Barak Obama's reelection campaign.[2]

Section 110.1(h)(2) similarly prohibits any contributor who gives the maximum amount to a candidate from then giving more to a committee if the contributor gives with the knowledge that a substantial portion of her funds will be "expended on behalf of" that candidate by such committee. This rule prohibits most contributions to Super PACs and other committees that spend money in support of a small number of candidates. The *McCutcheon* Court suggested that the Commission might "strengthen" section 110.1(h)(2) by "defining how many candidates a PAC must support in order to ensure that 'a substantial portion' of a donor's contribution is not rerouted to a certain candidate. 134 S. Ct. at 1459.

The Commission asks in the ANPRM whether it should "make such a change to 11 CFR 110.1(h), for example, by establishing a minimum number of candidates a PAC must support or by establishing a maximum percentage of a PAC's funds that can go to a single candidate?" 79 Fed. Reg. at 62362. We urge the Commission to make such amendments to section 110.1(h) and to clarify the relationship between section 110.1(h) and 110.6, which the *McCutcheon* Court referred to collectively as the "earmarking rules." *See* 134 S. Ct. at 1459.

Given that the federal law currently defines "multicandidate committee"[3] to mean, *inter alia*, a committee that has made contributions to five or more federal candidates, it makes sense to establish five as the minimum number of candidates a PAC must support under sections 110.1(h) and 110.6. However, establishing a minimum number of candidates a PAC must support would be functionally meaningless if not accompanied by a limit on the percentage of a PAC's funds that could be contributed or expended to support a single candidate—because absent such a percentage limit, a PAC could evade the section 110.1(h) rules by making token small expenditures supporting four candidates, while spending the vast majority of its funds to support a single candidate.

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[2] *See 2012 Outside Spending, by Single-Candidate Super PAC*, Center for Responsive Politics, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C (last visited Jan. 15, 2015); *see also 2014 Outside Spending, by Single-Candidate Super PAC*, Center for Responsive Politics, https://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=V&disp=O&type=C (last visited Jan. 15, 2015).

[3] The Commission's regulations define "multi-candidate committee" as a "political committee which (i) has been registered with the Commission or Secretary of the Senate for at least 6 months; (ii) has received contributions for Federal elections from more than 50 persons; and (iii) (except for any State political party organization) has made contributions to 5 or more Federal candidates." 11 C.F.R. § 100.5(e)(3); *see also* 52 U.S.C. § 30116(a)(4).

Maintaining the five-candidate distinction in current law, the Commission should set 20% as the maximum percentage of a PAC's funds that can be expended to support a single candidate under sections 110.1(h) and 110.6. In the event a PAC spends more than 20% of its funds in support of a single candidate, contributions to any such PAC should be deemed to have been given with the knowledge that a substantial portion of the contributor's funds would be expended on behalf of that candidate under section 110.1(h). Furthermore, contributors to such a PAC should be deemed to have designated their contributions to be "expended on behalf of" such candidate and, therefore, "earmarked" for that candidate under section 110.6. Accordingly, the contributions to the PAC should be aggregated with any contributions the same donor has made to the candidate, and subject to the contribution limit applicable to the candidate.

Put differently, the Commission should clarify and strengthen its regulations to make clear that, for the purposes of the candidate contribution limits at 52 U.S.C. § 30116, a donor's contributions to any PAC that contributes or spends more than 20% of its funds to support a single candidate will be deemed earmarked for that candidate, as well as aggregated with any contributions that the donor has given directly to such candidate.

## II. Affiliation

The *McCutcheon* Court pointed not only to the earmarking rules, but also to the committee affiliation rules as preventing circumvention of the base contribution limits. The Court noted, for example, that the 1976 amendments to the Federal Election Campaign Act (FECA) prohibit "donors from creating or controlling multiple affiliated political committees." 134 S. Ct. at 1446-47 (citing 52 U.S.C. § 30116(a)(5) (formerly 2 U.S.C. § 441a(a)(5)) and 11 C.F.R. § 100.5(g)(4)).

FECA provides that, for purposes of the base contribution limits, "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person . . . , or by any group of such persons, shall be considered to have been made by a single political committee . . . ." 52 U.S.C. § 30116(a)(5).

Commission regulations make clear that, for the purposes of the contribution limits, "all contributions made <u>or received by</u> more than one affiliated committee . . . shall be considered to be made or received by a single political committee." 11 C.F.R. § 110.3(a)(1) (emphasis added). "Affiliated committee" is defined by Commission regulation to include all "authorized committees of the same candidate for the same election to Federal office" and all committees "established, financed, maintained or controlled by the same corporation, labor organization, person, or group of persons . . . ." *Id.* § 100.5(g)(1)-(2). The "affiliation" regulation states that the "Commission may examine the relationship between organizations that sponsor committees, between the committees themselves, or between one sponsoring organization and a committee established by another organization to determine whether committees are affiliated" and that, in doing so, the Commission "will consider the circumstantial factors" "in the context of the overall relationship between committees or sponsoring organizations to determine whether the presence of any factor or factors is evidence of one committee or organization having been established,

financed, maintained or controlled by another committee or sponsoring organization." *Id.* § 100.5(g)(4). Such circumstantial factors include, but are not limited to:

- "Whether a sponsoring organization or committee has a common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;"
- "Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees;"
- "Whether a sponsoring organization or committee has any members, officers or employees who were members, officers or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees, or which indicates the creation of a successor entity;"
- "Whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee . . . ;"
- "Whether a sponsoring organization or committee or its agent had an active or significant role in the formation of another sponsoring organization or committee;" and
- "Whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicates a formal or ongoing relationship between the sponsoring organizations or committees."

*Id.* § 100.5(g)(4)(ii). These same "affiliation factors" are repeated in section 110.3(a)(3)(ii).

The Commission notes in the ANRPM that the *McCutcheon* Court cited these "antiproliferation" affiliation rules as protection against evasion of the contribution limits and asks whether the "current affiliation factors" are "adequate to prevent circumvention of the base contribution limits" and whether the Commission should "revisit its affiliation factors." 79 Fed. Reg. at 62363 (citing *McCutcheon*, 134 S. Ct. at 1453-54).

At the very least, the Commission should add to the list of affiliation factors whether family members or former employees of a candidate had a role in the formation or operation of a committee that supports the candidate, or whether a committee has been established at the request or suggestion of the candidate. In addition, the Commission should repeal 11 C.F.R. § 100.5(g)(5), which provides that, notwithstanding the presence of some or all of the affiliation factors or other grounds for affiliation under the rule, "no authorized committee shall be deemed affiliated with any entity that is not an authorized committee." Given that the power to authorize or disavow authorization of a committee is solely within the hands of a candidate, section 100.5(g)(5) effectively nullifies the affiliation rule with respect to candidates and committees they affiliate with. A candidate could simply disavow authorization of a committee that would otherwise be deemed affiliated with the candidate's authorized committee under the affiliation factors. *See id.* §§ 100.3(a)(3), 100.5(g)(5) and 102.13. This gives candidates unilateral authority

to evade the affiliation rules and thereby dramatically undermines the scope and effectiveness of those rules.

## III. Joint Fundraising Committees

From the outset of the *McCutcheon* litigation, the Campaign Legal Center and Democracy 21 argued that, in the absence of the aggregate limits, joint fundraising committees would serve as vehicles to facilitate massive, corrupting contributions solicited by candidates and officeholders. *See* Mem. of Campaign Legal Center and Democracy 21 as Amici Curiae in Opp'n to Pls.' Mot. For Prelim. Inj. 3-10 (July 10, 2012), *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012). The district court cited our brief and explained in detail how joint fundraising committees would be used to evade the base contribution limits.

> Eliminating the aggregate limits means an individual might, for example, give half-a-million dollars in a single check to a joint fundraising committee comprising a party's presidential candidate, the party's national party committee, and most of the party's state party committees. After the fundraiser, the committees are required to divvy the contributions to ensure that no committee receives more than its permitted share, 11 C.F.R. §§ 102.6(a)(1), 110.3(c)(2), but because party committees may transfer unlimited amounts of money to other party committees of the same party, the half-a-million-dollar contribution might nevertheless find its way to a single committee's coffers. 2 U.S.C. § 441a(a)(4); 11 C.F.R. §§ 102.6(a)(1)(ii), 110.3(c)(1). That committee, in turn, might use the money for coordinated expenditures, which have no "significant functional difference" from the party's direct candidate contributions. *Colorado II,* 533 U.S. at 460, 121 S. Ct. 2351. The candidate who knows the coordinated expenditure funding derives from that single large check at the joint fundraising event will know precisely where to lay the wreath of gratitude.

*McCutcheon*, 893 F. Supp. 2d at 140; *see also id.* at 136 n.1 (citing Campaign Legal Center and Democracy 21 *amici* brief).

On appeal, however, the Supreme Court largely dismissed the district court's concerns regarding the threat of circumvention posed by joint fundraising committees in the absence of aggregate contribution limits. The Court viewed the Commission's "earmarking" rules as foreclosing the scenario envisioned by the district court, explaining that the "District Court's speculation relies on illegal earmarking" because the "'implicit[ ]" agreement imagined by the District Court, would trigger the earmarking provision. So this circumvention scenario could not succeed without assuming that nearly 50 separate party committees would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did)." 134 S. Ct. at 1455 (internal citations omitted).

As noted above, the Campaign Legal Center and Democracy 21 wholly support the strengthening and clarification of the earmarking rules—and a commitment by the Commission to enforce the earmarking rules with respect to implicit designations of contributions, which the Supreme Court understands the plain language of the current regulation to cover.

But the Court also suggested additional steps that could be taken to prevent the use of joint fundraising committees to circumvent the base contribution limits. "The most obvious might involve targeted restrictions on transfers among candidates and political committees." 134 S. Ct. at 1458. Another reform suggested by the Court is to "simply limit the size of joint fundraising committees." *Id.* at 1459.

While prohibiting transfers among political committees would seemingly require Congressional action, the Commission has the necessary authority under existing statutes to limit the size of joint fundraising committees—and should exercise that authority.

FECA provides that "[n]o political committee which supports or has supported more than one candidate may be designated as an authorized committee," except that "candidates may designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee." 52 U.S.C. 30102(e)(3)(A) (emphasis added).

Although FECA only authorizes joint fundraising by candidates, the Commission's joint fundraising committee regulation permits any political committee to "engage in joint fundraising with other political committees or with unregistered committees or organizations." 11 C.F.R. § 102.17(a)(1)(i). Consequently, candidates have for many years formed joint fundraising committees with party committees and other organizations. And the Court's *McCutcheon* decision has predictably led to the formation of new "super joint fundraising committees."[4]

Given the massive contributions that political parties may accept in the absence of aggregate contribution limits—particularly in light of the recent amendment to 52 U.S.C. § 30116(a) permitting parties to set up new accounts for presidential nominating conventions, party headquarters and recounts—inclusion of party committees in joint fundraising committees dramatically increases the amount of funds participating candidates can solicit and benefit from, in circumvention of the candidate contribution limits.

We urge the Commission to amend section 102.17 to make it consistent with 52 U.S.C. § 30102(e)(3)(A) by permitting only candidate committees to form joint fundraising committees. Doing so would reduce the ability of donors and candidates to circumvent the candidate contribution limits by candidates soliciting, and donors making, massive contributions to joint fundraising committees authorized by such candidates.

## IV. Electioneering Communication and Independent Expenditure Disclosure

The Supreme Court has repeatedly stressed the importance of disclosure of money raised and spent on campaign-related activities. In *Citizens United v. FEC*, 558 U.S. 310 (2010), after striking down the ban on corporate expenditures in federal campaigns, the Court strongly reaffirmed the constitutionality of, and need for, laws that require disclosure of corporate spending to influence federal elections. The Court in *Citizens United*—by an 8 to 1 majority—rejected the argument that disclosure requirements "chill" the exercise of First Amendment

[4] *See*, *e.g.*, Russ Choma, *Super JFC Donors Emerge in Third Quarter*, Center for Responsive Politics (Oct. 15, 2014), http://www.opensecrets.org/news/2014/10/super-jfc-donors-emerge-in-third-quarter.

rights. Disclosure requirements, the Court said, "impose no ceiling on campaign related activities," and "do not prevent anyone from speaking." *Id.* at 366. The Court held that requiring the disclosure of campaign-related expenditures serves an important governmental interest in "provid[ing] the electorate with information about the sources of election-related spending." *Id.* at 367. The Court—including four of the five Justices who voted to strike down the ban on corporate spending—explained:

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

*Id*. at 370-71 (citations omitted). In short, the Court said that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 369. The Court, however, mistakenly thought that an effective disclosure system exists for independent spending groups. The Court did not appreciate that, contrary to statutory requirements, flawed and ineffectual Commission regulations have left us with almost no disclosure by such groups of the contributions used to pay for their campaign-related expenditures.

The Supreme Court once again endorsed disclosure in *McCutcheon* as a safeguard against "abuse of the campaign finance system" that is "justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending." 134 S. Ct. at 1459 (citations omitted). Disclosure, the Court noted, may also "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* (citations omitted).

Yet, despite the *McCutcheon* Court's inspirational and aspirational claim that "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information" and protecting against corruption, *id.* at 1460, the Commission has eschewed "effective" disclosure and undermined the statutory disclosure requirements, allowing hundreds of millions of dollars of undisclosed dark money to flood federal elections. *See, e.g.*, *Van Hollen v. FEC*, 2014 WL 6657240 (D.D.C. Nov. 25, 2014).

The Commission asks in the ANPRM "what regulatory changes or other steps should the Commission take to further improve its collection and presentation of campaign finance data?" 79 Fed. Reg. 62363. As detailed below, we urge the Commission to amend its disclosure regulations with respect to both electioneering communications and independent expenditures.

### A. Electioneering Communication Disclosure

Following the Supreme Court's 2007 decision in *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007) ("*WRTL*"), invalidating certain applications of the federal law prohibition on corporate electioneering communication, the Commission held a rulemaking proceeding to implement that decision. Though no disclosure statutes or regulations had been challenged or invalidated by the Court, the Commission proceeded to amend its disclosure regulations to exempt corporations and labor unions from the plain language set forth in the donor disclosure requirements of the statutory electioneering communication disclosure provision.

The statutory provision requires any person who makes disbursements for electioneering communications that exceed $10,000 in a calendar year to file a report that includes the "names and addresses of <u>all contributors</u> who contributed an aggregate amount of $1,000 or more to the person making the disbursement" during the election cycle. 52 U.S.C. § 30104(f) (emphasis added).[5] By contrast, the post-*WRTL* regulation promulgated by the Commission states that "[i]f the disbursements were made by a corporation or labor organization," the spender need only report "the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization . . . <u>for the purpose of furthering electioneering communications</u>." 11 C.F.R. § 104.20(c)(9) (emphasis added).

According to the Center for Responsive Politics, in the 2014 election cycle, groups that did not disclose their donors spent $4.4 million on electioneering communications, while groups that disclosed only some of their donors spent an additional $3.9 million on electioneering communications.[6] In the 2012 election cycle, groups that did not disclose their donors spent $10.9 million on electioneering communications, while groups that disclosed only some of their donors spent an additional $2.3 million on electioneering communications.[7]

This regulation was challenged in the *Van Hollen* litigation and twice held to be invalid by the district court, most recently in November 2014, when the district court held that section 104.20(c)(9) is "arbitrary, capricious, and contrary to law" and an "unreasonable interpretation" of the governing statute. *Van Hollen*, 2014 WL 6657240, at *1; *see also Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012). As the district court opined, "the regulation's purpose requirement is inconsistent with the statutory language and purpose" and creates an "easily exploited loophole that allows the true sponsors of advertisements to hide behind dubious and misleading names." *Van Hollen*, 2014 WL 6657240, at *2.

For all of the reasons articulated by the district court in *Van Hollen*, the FEC must repeal section 104.20(c)(9) and restore the statutory requirement that persons making large disbursements for electioneering communications disclose <u>all contributors</u> who contributed $1,000 or more to the spender during the time period specified in the statute.

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[5] As an alternative, the statute also permits the use of a separate account to fund the electioneering communications, and disclosure only of the contributors to that account. *Id.* § 30104(f)(2)(E).

[6] *See 2014 Outside Spending, by Group*, Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2014&chrt=D&disp=O&type=E.

[7] *See 2012 Outside Spending, by Group*, Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=E.

### B. Independent Expenditure Disclosure

Like the Commission's electioneering communication disclosure regulation, the independent expenditure disclosure regulation is also an unreasonable interpretation of the governing statute that undermines effective disclosure, and should be amended.

Under 52 U.S.C. § 30104(c)(1), every person (other than a political committee) who makes independent expenditures in excess of $250 during a calendar year "shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person." Subsection (b)(3)(A), in turn, requires disclosure of "the identification of each person (other than a political committee) who makes a contribution to the reporting committee during the reporting period," whose aggregate contributions within the calendar year exceed $200. *Id.* § 30104(b)(3)(A). However, 52 U.S.C. § 30104(c)(2)(C) requires every person who makes independent expenditures in excess of $250 during the calendar year to disclose "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure."

Thus, corporations and labor organizations and other persons that make independent expenditures are subject to two overlapping contribution disclosure requirements in section 30104. Subsection 30104(c)(1) requires them to disclose the identity of "each . . . person . . . who makes a contribution" to them of more than $200. *Id.* § 30104(c)(1) and (b)(3)(A). Subsection 30104(c)(2) requires them to disclose the identity of "each person who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure." *Id.* § 30104(c)(2)(C).

The Commission's regulation implementing these disclosure requirements, codified at 11 C.F.R. § 109.10, provides that every person that is not a political committee and that makes independent expenditures aggregating more than $250 with respect to a given election in a calendar year shall file a disclosure report "containing the information required by paragraph (e)." 11 C.F.R. § 109.10(b). Subsection (e) provides that the disclosure report must include: "The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made <u>for the purpose of furthering the reported independent expenditure</u>." *Id.* § 109.10(e)(1)(vi) (emphasis added).

The regulation is manifestly inconsistent with the statute. Whereas the statute requires the disclosure of "each . . . person . . . who makes a contribution" of more than $200 to the person making the independent expenditures, 52 U.S.C. § 30104(b)(3)(A); *see id.* § 30104(c)(1), the regulation requires disclosure only of those contributors who made a contribution "for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi).

Thus, of the two overlapping statutory disclosure requirements, the Commission has in effect chosen to implement the narrower statutory provision and to ignore the broader one. In doing so, it has left the public without disclosure of the contributions being used by non-political committee groups to pay for their independent expenditures. It cannot do this because the

Commission has effectively written the broader disclosure requirement out of the law, undermining both the statutory language and the intent of Congress to require comprehensive disclosure of those persons contributing $200 or more to the funding of independent expenditures.

There is no inconsistency between the two disclosure provisions in FECA. While Congress could seek disclosure of all contributors to persons making independent expenditures, it could also conclude there is a public interest in the additional disclosure of the subset of those contributors who gave money specifically "for the purpose" of funding an independent expenditure. For the Commission to implement only the latter disclosure requirement and discard the former is beyond the agency's authority. It is particularly inconsistent with the emphasis that the Supreme Court has put on disclosure as an essential prophylactic to guard against the corruption that might well result from unlimited contributions made to groups spending vast sums of money for independent expenditures.

And to compound the problem, the Commission's implementation of even just the narrower statutory disclosure requirement is profoundly flawed. The regulation requires far less disclosure than the statute requires, making the statutory language virtually useless. Whereas the statute requires disclosure of contributions made "for the purpose of furthering <u>an</u> independent expenditure," 52 U.S.C. § 30104(c)(2)(C) (emphasis added), the regulation requires disclosure of only contributions made "for the purpose of furthering <u>the reported</u> independent expenditure. 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added). Thus, contributions to the person making independent expenditures that were not given for the <u>specific purpose of furthering the specific reported independent expenditure</u> are not required to be disclosed. This is in direct contradiction to the language and purpose of even the narrower statutory disclosure provision.

The indefinite article "an" preceding the term "independent expenditure" in subsection (c)(2)(C) is significant and should be given effect: it requires disclosure of all persons who made contributions for the purpose of furthering independent expenditures in general. The indefinite "an" means that the person making the contribution need not have a purpose to further any particular independent expenditure. The regulation, however, requires disclosure only of those persons who made contributions "for the purpose of furthering <u>the reported</u> independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

The insertion of the definite article "the" in the regulation radically narrows the scope of the section 30104(c)(2)(C) disclosure requirement. A purpose to further "an" independent expenditure encompasses <u>any</u> expenditure, whereas a purpose to further "the" independent expenditure encompasses only <u>one</u>. In addition, the statute does not connect the "contribution" to the "reported" expenditure, and accordingly does not condition disclosure on intent to further the particular independent expenditure that is the subject of the report.

Under 11 C.F.R. § 109.10(e)(1)(vi), even if a contributor gave money to a person making independent expenditures with knowledge that the contributed funds would be used for independent expenditures, and the donor specifically intended that the funds be used for that purpose, the contribution would still not be subject to disclosure under the regulation unless the

contributor intended that the funds be earmarked and used for a specific independent expenditure.

This ineffectual disclosure regime is so easily evaded as to be practically pointless. It is certainly contrary to the language of the statute, which requires disclosure of the contribution if it was made for the purpose of furthering an independent expenditure, even if it was not made for the purpose of furthering any specific independent expenditure. The regulation also contradicts the clear purpose of the statute, which is to obtain disclosure of the identity of all donors, subject to a threshold, whose donations are being used to fund independent expenditures.

The Commission's regulation is thus contrary to the language of the statute and frustrates Congress's intent to require disclosure of the sources of funds used by persons making independent expenditures. The Commission's regulation permits a corporation or labor organization that makes independent expenditures to avoid disclosing its contributors—even contributors who gave money specifically for the purpose of furthering the corporation's or labor organization's independent expenditures. The regulation enables a corporation or labor organization to take the position that because persons who made contributions to it did not express a specific intent to further the specific independent expenditure that is being reported, no disclosure of such persons is required. As a practical matter, the regulation enables corporations and labor unions that choose not to abide by Congress's disclosure requirements to evade them entirely, without fear of sanction.

According to the Center for Responsive Politics, in the 2012 election cycle, groups that did not disclose their donors spent $292 million on independent expenditures, while groups that disclose only some of their donors spent an additional $308 million on independent expenditures.[8] This is more than a thirtyfold increase from the $9.6 million spent by similar groups in the 2008 election cycle.[9] As the amount of money spent by non-disclosing groups has skyrocketed, the Commission's independent expenditure disclosure regulations have permitted those spending large amounts of money to influence our elections to remain hidden from public view.

This wholesale and widespread absence of donor disclosure by groups making independent expenditures to influence federal elections could not possibly be what Congress intended when it passed the statutory disclosure provisions. This data only serves to make crystal clear that the current regulation is contrary to law and must be revised to carry out the purpose, meaning and language of the statute.

Although Section 109.10 was promulgated in its current form in 2003, 68 Fed. Reg. 404 *et seq.* (Jan. 3, 2003), the insufficiency of the current regulation has been heightened by the *Citizens United* decision. Prior to *Citizens United*, the bulk of independent spending was done by political committees, including party committees, which are required to disclose all of their

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[8] *See 2012 Outside Spending, by Group*, Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=D&disp=O&type=I.

[9] *See 2008 Outside Spending, by Group*, Center for Responsive Politics, http://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=D&disp=O&type=I (last visited Jan. 15, 2015).

donors of more than $200 to the FEC, or by so-called 527 groups, which are required to disclose all of their donors of more than $200 to the IRS, or by individual spenders, for whom the donor disclosure issue is largely inapplicable. Thus, prior to *Citizens United*, there generally was comprehensive disclosure of donors to groups making independent expenditures. Post-*Citizens United*, however, corporations, including non-profit corporations, and labor organizations are able to use their treasury funds to make independent expenditures and to contribute funds to other corporations that make independent expenditures. This has created a new universe of independent spenders that can raise and spend contributions from other persons (including from corporations and labor organizations) to finance their independent expenditures. And that development has in turn highlighted the insufficiency and illegality of the Commission's existing regulation on disclosure of contributors to corporations and labor organizations that make independent expenditures.

The Commission's existing regulation enables corporations or labor organizations to use front groups with nondescript and unrevealing names—*e.g.*, Patriot Majority USA, Crossroads GPS, American Action Network—to make independent expenditures and thereby to serve as vehicles to mask the identity of those who are the true sources of funds spent to influence the outcome of federal elections. Section 501(c) corporations, which are not otherwise subject to any obligation to disclose their donors, are particularly well suited to serve this purpose. The fact that so many 501(c) corporations made substantial independent expenditures in federal elections since the 2010 *Citizens United* decision, while so few of them disclosed their donors, demonstrates that they are being used to play precisely this role as vehicles to hide the identity of those funding independent expenditures. They can do so only because the FEC's unlawful disclosure regulation facilitates easy circumvention of the overlapping statutory requirements that any person making independent expenditures must disclose "each . . . person . . . who makes a contribution" in excess of $200, 52 U.S.C. § 30104(b)(3)(A), and "each person who made a contribution" in excess of $200 "which was made for the purpose of furthering an independent expenditure." *Id.* § 30104(c)(2)(C). The statute does not permit 501(c) non-profit corporations that make independent expenditures to hide their contributors who are funding their expenditures. The Commission's existing regulation, however, permits precisely this kind of secret funding of independent expenditures by hidden donors, in direct contradiction to the purpose and language of the statutory disclosure provisions.

The Commission should amend 11 C.F.R. § 109.10(e)(1) by striking existing subparagraph (vi) and replacing it with the following text:

> (vi) The identification of each person who made a contribution during the calendar year to the person filing such report, whose contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the person filing such report should so elect, together with the date and the amount of any such contribution; and
>
> (vii) The identification of each person who made a contribution during the reporting period in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering an independent expenditure.

In April 2011, Rep. Chris Van Hollen filed a petition for rulemaking with the Commission, urging the agency to review its independent expenditure disclosure regulation to conform to the statute. *See* 76 Fed. Reg. 36000 (June 21, 2011) (notice of availability of the petition). On December 16, 2011, by a vote of 3-3, the Commission failed to initiate a rulemaking on this petition (*see* Certification dated Dec. 16, 2011 in REG 2011-01), thus leaving in place the Commission's existing inadequate and unlawful regulation.

The Commission should not again miss the opportunity to serve the public interest by ensuring that its rules, in compliance with the statute, require full disclosure of the sources of funds used to pay for independent expenditures.

## V. New Party Accounts for Presidential Nominating Conventions, Party Headquarters and Recounts

In December 2014, Congress passed an omnibus appropriations bill that included an amendment to FECA wholly unrelated to the budget. *See* Consolidated and Further Continuing Appropriations Act, 2015, Division N, Sec. 101. The Act amended FECA's contribution limits section to permit national political party committees to accept contributions in amounts three-times greater than the base limit into each of three new types of separate segregated accounts used to pay for (1) presidential nominating conventions, (2) party headquarters building and maintenance and (3) "election recounts and contests and other legal proceedings." *Id*.

These new FECA provisions will permit wealthy donors to contribute in excess of $1.5 million to a single party's national committees per two-year election cycle. And though the Act purports to restrict the use of these funds for specified purposes—*e.g.*, "solely to defray expenses incurred with respect to a presidential nominating convention," "solely to defray expenses incurred with respect to" headquarters buildings, and "to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings"—the Act contains no definitions of such purposes and no disclosure provisions specific to funds spent out of these new accounts.

In order to prevent abuse of these new restricted-use funds, the Commission should promulgate regulations specifying and limiting the permissible uses of these new funds, prohibiting transfer of these funds between party accounts, and requiring detailed disclosure of these funds.

### A. Permissible Uses of New Party Funds

The decades since the enactment of FECA are replete with examples of political parties abusing funds that they are permitted to raise outside of the base contribution limits for specified purposes. Without quick action by the Commission, the major parties will undoubtedly stretch beyond recognition the boundaries of the purportedly restricted uses of these new funds. As *Roll Call* explained, "there's little question that party officials will test the new regulations to the fullest, exploring every possible legal avenue to fatten their coffers."[10]

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[10] Eliza Newlin Carney, *Parties Poised to Exploit Broad New Rules*, Roll Call, (Jan. 6, 2015), http://blogs.rollcall.com/beltway-insiders/parties-poised-to-exploit-broad-new-rules/?dcz=.

Unfortunately, the Commission has too often accommodated past efforts by the political parties to undermine the base contribution limits through the creation and ever-expanding use of special funds. As the district court explained in *McConnell v. FEC*, 251 F. Supp. 2d 176, 196 (D.D.C. 2003), the scandal that was the national party soft money system outlawed by the Bipartisan Campaign Reform Act of 2002 (BCRA) was born out of the Commission's AOs 1978-10 and 1979-17. In AO 1978-10, the Commission permitted state party committees to allocate the costs of voter registration and get-out-the-vote drives between federal and nonfederal accounts. In AO 1979-17, the Commission extended the "separate accounts" rationale of AO 1978-10 to a national party committee, allowing the RNC to set up a segregated account for funds exempted by statute from the definition of "contribution," including funds for "construction or purchase of any office facility not acquired to influence the election of any candidate in any particular election for Federal office." AO 1979-17 at 5 (internal quotation marks omitted); *McConnell*, 251 F. Supp. 2d at 196.

The history here is very pertinent. What may have appeared at the time to be an insignificant exception to the party contribution limits grew into the loophole that swallowed the rule. Recounting in painstaking detail how the national party soft money loophole that was opened by AO 1979-17 and the statutory "office facility" exemption grew and grew, the district court in *McConnell* explained that by the 2000 election cycle, the national parties were exploiting these two supposedly narrow loopholes to spend a total of $498 million of nonfederal funds—<u>42% of their total spending</u>. 251 F. Supp. 2d at 200-01.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court likewise recognized the Commission's central role in creating the soft money system outlawed by BCRA. The Court explained:

> Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. Although a literal reading of FECA's definition of "contribution" would have required such activities to be funded with hard money, the FEC ruled that political parties could fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money. In 1995 the FEC concluded that the parties could also use soft money to defray the costs of "legislative advocacy media advertisements," even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.
>
> <u>As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially.</u> Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000.

540 U.S. at 123-24 (emphasis added) (footnotes omitted) (citation omitted).

Similarly, years ago, the Commission, by regulation, incorrectly exempted funds raised and spent "with respect to a recount . . . or election contest" from treatment as "contributions" and "expenditures" through promulgation of 11 C.F.R. §§ 100.91 and 100.151. The Commission then based a series of "recount fund" advisory opinions on these ill-conceived regulations. The Campaign Legal Center and Democracy 21 have objected in the strongest possible terms to the series of nonsensical advisory opinions, based on nonsensical regulations, which over time concluded that federal candidates and party committees may set up segregated accounts, subject to separate contribution limits, to pay for recounts (AO 2006-24 and AO 2009-04) and an expanding list of other activities—*e.g.*, pre-election legal and administrative expenses to prepare for possible recounts (AO 2010-14), recounts in some unspecified future election (AO 2010-18) and party legal defense expenses in litigation wholly unrelated to recounts and elections contests (AO 2011-03).[11]

Most recently, Commission was asked by the parties in Advisory Opinion Request 2013-10 to wholly abandon the fig leaf that such "recount funds" need to be used for recounts at all, and to allow the parties to set up general purpose slush funds—using money that is in excess of a donor's contribution limit—to pay for "office building expenses," which of course have nothing to do with recounts. The plain language of the recount regulations at 11 C.F.R. §§ 100.91 and 100.151, and the advisory opinions relying on them, simply could not be read to exempt funds raised and spent for office building expenses from the definitions of "contribution" and "expenditure." (The parties ended up withdrawing their request before the Commission issued an opinion.)

The parties have now accomplished through legislation what they had not yet coaxed the Commission to allow—separate accounts, subject to separate higher contribution limits, for building expenses, legal proceedings, and party conventions. However, history has taught us that the parties will attempt to expand the permissible uses of these new funds and, if successful, the amount of money candidates and parties will raise for these slush funds will increase exponentially. Just as the *McConnell* Court recognized that the "solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's" contribution limits, 540 U.S. at 126, so too would the Commission's failure to enforce the statutory restrictions on these new funds enable parties and candidates to circumvent FECA's base contribution limits.

We urge the Commission to strictly define by regulation what activities constitute expenses incurred with respect to: "a presidential nominating convention"; "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; and "the preparation for and the conduct of election recounts and contests and other legal proceedings." Consolidated and Further Continuing Appropriations Act, 2015, Division N, Sec. 101(a)(3).

For example, the "operation" of a party headquarters building should be construed reasonably and narrowly to include only payment of utilities and routine maintenance of an actual party headquarters building—not anything that might happen in a party headquarters building, and certainly not payment of staff salaries or any other expenses for general operation

[11] *See, e.g.*, Comments of the Campaign Legal Center and Democracy 21 on Advisory Opinion Request 2013-10 (Aug. 2, 2013).

of the party itself, such as data mining or opposition research, as some have suggested might be allowable.[12] The phrase "the preparation for . . . other legal proceedings" should be construed narrowly so as to foreclose party claims that all legal expenses—*e.g.*, routine compliance costs—constitute "preparation for legal proceedings.

We further urge the Commission to repeal and supersede its regulations and advisory opinions based on the flawed premise that funds raised by candidates and national party committees for recounts, election contests, legal defense and other purposes are not "for the purpose of influencing" federal elections. Congress' recent amendments to the contribution limits at 52 U.S.C. § 30116 reflect a clear understanding by Congress that funds raised by parties to pay for nominating conventions, party headquarters building and maintenance, as well as recounts and other legal expenses constitute "contributions" under 52 U.S.C. § 30101(8). If such funds were not "contributions," amendment of the contribution limit section of FECA would have been unnecessary. Properly construed, the law requires all funds raised and spent by national party committees to be both "contributions" and "expenditures" under FECA and Commission regulations.

The Commission should also withdraw its recent Advisory Opinion 2014-12 (DNC and RNC) which, by fiat and without any statutory basis, concluded that the political parties could establish separate convention accounts and raise funds into those accounts under a separate contribution limit. The fact that Congress has now provided a statutory basis for such separate convention accounts both illustrates how *ultra vires* the Commission's prior decision was, and how unnecessary it now is. In order to ensure that the political parties do not argue that Advisory Opinion 2014-12 still has meaning after the Omnibus amendment and that it authorizes yet another convention-related contribution subject to a separate limit (in addition to the new convention account created by the recent statutory amendment), the Commission should explicitly state that such double-counting is not permitted, and that Advisory Opinion 2014-12 has been superseded by statute and is withdrawn.

### B. Prohibiting Transfer of New Party Funds

The plain language of the recent amendments to the contribution limits at 52 U.S.C. § 30116 restricts the use of funds in the three new types of "separate, segregated" party accounts to specified purposes. We urge the Commission to promulgate a regulation making clear that funds in these new separate, segregated accounts cannot be transferred to other party accounts. Allowing such transfers would render meaningless the statutory requirements that, in order to be eligible for the increased, separate contribution limit, the contributions be made to separate, segregated accounts and be used only for restricted, specified purposes. Allowing such transfers would also render meaningless the base contribution limits of section 30116.

[12] Robert Kelner et al., *National Party 2.0: FECA Amendments in Omnibus Spending Bill Increase Fundraising Power of National Parties*, Covington & Burling Inside Political Law (December 10, 2014), http://www.insidepoliticallaw.com/2014/12/10/national-party-2-0-feca-amendments-in-omnibus-spending-bill-increase-fundraising-power-of-national-parties/.

### C. Disclosure of New Party Funds

FECA requires political committees, generally, to disclose the "purpose" of disbursements in excess of $200. *See* 52 U.S.C. § 30104(b). However, Commission regulations implementing the required disclosure of the purposes of disbursements does not require the degree of specificity that will be necessary to monitor whether funds raised into the new restricted party accounts are, in fact, used "solely" for the purposes stated in the statute.

Under current regulations, examples of statements or descriptions that meet the "purpose" requirements for disbursements by committees other than authorized committees "include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs." 11 C.F.R. § 104.3(b)(3)(i)(B). The Commission's "Examples of Adequate Purposes" document,[13] suggests that committees use codes providing a bit more specificity than the examples listed in the regulation. But neither the regulation nor the "Examples" document requires the specificity that will be necessary to monitor and ensure compliance with the requirement that the party committees use the new segregated account funds only for permissible purposes.

We urge the Commission to promulgate new, detailed reporting and disclosure requirements applicable to the new party accounts authorized by recent amendments to 52 U.S.C. § 30116, that will enable the Commission and the public to monitor the party spending from these accounts in order to ensure that funds in these accounts are used solely for the limited purposes specified in the statute.

## VI. Coordination

Finally, we urge the Commission to revise its ineffective coordination regulations. *See, e.g.*, 11 C.F.R. § 109.21. As the amount of outside spending in federal elections has increased, there is mounting evidence of collaboration and cooperation between groups funding ostensibly "independent" expenditures and the candidates they support. While such collaboration and cooperation amounts to coordination under any common sense definition of the term, much of it is not considered coordination under the Commission's regulations. The Commission must fix the disconnect between its coordination regulations and the governing statute that the Supreme Court interprets as requiring independent expenditures to be "totally" independent of candidates.

Beginning with *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has allowed unlimited spending on independent expenditures based on the assumption that those expenditures are made "totally independently" of candidates and, therefore, do not have the same corrupting potential as expenditures controlled by or coordinated with a candidate. *Id.* at 45-47 (1976). The Court explained that FECA addressed the potential for circumvention of the candidate contribution limits by treating candidate controlled or coordinated expenditures as contributions to the candidate. *Id.* at 46. FECA provides that any "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."

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[13] FEC, *Examples of Adequate Purposes*, http://fec.gov/rad/pacs/documents/ExamplesofAdequatePurposes.pdf (last visited Jan. 15, 2015).

52 U.S.C. § 30116(a)(7)(B)(i). Independent expenditures, the Court said, are not as valuable to the candidate and may even be detrimental:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

*Buckley*, 424 U.S. at 47.

The Court's reasoning in *Buckley* hinges on expenditures defined as "independent" under the Commission's regulations actually being independent in fact. In subsequent cases, the Court has repeated and further explained the distinction between independent and coordinated expenditures.

The broad language of *Buckley* regarding coordination was echoed in subsequent Supreme Court decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Supreme Court held that a political party ad aired prior to a candidate's nomination would be not be treated as coordinated because the ad was developed "independently and <u>not pursuant to any general or particular understanding</u> with a candidate . . . ." *Id.* at 614 (emphasis added). The Court stressed that "the constitutionally significant fact . . . is the lack of coordination between the candidate and the source of the expenditure." *Id.* at 617.

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), the Court—again in the context of party spending—underscored "the good sense of recognizing the distinction between independence and coordination." *Id.* at 447. The Court recognized that there is a "<u>functional, not a formal</u>" definition of contributions, which includes expenditures made in coordination with a candidate. *Id.* at 443 (emphasis added). Of particular importance, the Court noted that independent expenditures are only those "without any candidate's approval (or wink or nod) . . . ." *Id.* at 442.

Writing for the majority in *McConnell*, Justices Stevens and O'Connor explained:

> [T]he rationale for affording special protection to <u>wholly independent</u> expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. . . . Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. <u>By contrast expenditures made after a wink or nod often will be as useful to the candidate as cash</u>.

540 U.S. at 221 (internal quotation marks and citation omitted) (emphasis added). The Court thus continued to adopt a broad view—a "wink or nod" view—of what constitutes coordination, a

position it had earlier set forth in both *Colorado I* ("general or particular understanding") and *Colorado II* ("wink or nod").

Most recently in *Citizens United*, a crucial part of the Supreme Court's rationale for allowing corporations and labor unions to make unlimited independent expenditures was that the spending would in fact be independent of candidates: "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." 558 U.S. at 360.

As the three election cycles since *Citizens United* have proven, however, many expenditures considered "independent" under the Commission's flawed regulations are not truly independent of candidates. Evidence of relationships and interactions between candidates and supposedly independent groups suggests "winks and nods" and much more involved forms of coordination. During the 2012 presidential election, President Obama, Governor Romney and many of the Republican Party primary contestants benefitted from Super PACs created solely to augment their campaign committees' fundraising and spending efforts. These single candidate Super PACs were blessed by the candidates and run by close allies of the candidates.[14] Such Super PACs solicited contributors who had already given the maximum permissible amount to the candidate's campaign. Indeed, under the FEC's current regulations and other guidance, candidates can solicit funds for such Super PACs, can be the featured guests at their fundraising events, and can personally thank donors for contributing to the Super PACs.

Single candidate Super PACs and other outside groups working closely with candidates are becoming increasingly common. In the 2014 election cycle, many House and Senate candidates had their own dedicated Super PACs. The growing number of single candidate Super PACs and other outside groups has produced more evidence that these groups are far from "totally" independent of candidates and that there is little distinction between the candidate's official campaign committee and the outside groups. We saw the following examples of common-sense coordination between candidates and outside groups in the 2014 election cycle:

- Ryan Zinke established the Special Operations for America Super PAC (SOFA PAC). He resigned as chairman of SOFA PAC shortly before announcing his candidacy for Montana's House seat. SOFA PAC made expenditures to support Zinke's campaign.[15]
- The campaign committee of North Carolina Senate candidate Thom Tillis e-mailed a detailed memorandum to supporters, outlining the campaign's advertising needs in the final weeks of the campaign that could "easily be read as an explicit wish list

[14] *See* Kenneth P. Vogel, *Big Money: 2.5 Billion Dollars, One Suspicious Vehicle, and a Pimp—on the Trail of the Ultra-Rich Hijacking of American Politics* 106-07 (2014) ("[The individuals running Gov. Romney's Super PAC] had been tapped because they were considered part of the Romney family and would be able to convey to donors the sense that their super PAC was the official unofficial super PAC of Romney World.").

[15] Troy Carter, *Zinke Denies Super PAC Coordination*, Bozeman Daily Chronicle (July 31, 2014), http://www.bozemandailychronicle.com/news/politics/zinke-denies-super-pac-coordination/article_bb44c77e-18de-11e4-8e41-001a4bcf887a.html?mode=story.

aimed at the inboxes of outside allies with whom he cannot otherwise legally communicate about strategy."[16]

- Numerous candidate campaign committees made "B-Roll" footage of the candidate available online for their supporters to use in advertisements supporting the candidate.[17]
- Joe Carr, who challenged incumbent Senator Lamar Alexander in the Republican Party primary, appeared at multiple public rallies organized and paid for by the Real Conservatives National Committee Super PAC. Carr's campaign did not organize or pay for any such rallies.[18]

Moreover, Super PAC's appear poised to play an even more prominent role in future elections. Former FEC Chairman Michael Toner explained:

> Some of the key strategic decisions you need to make when you're thinking about running are not only about your own campaign but, 'Who is going to head up a super PAC for me, and how are they going to raise money? . . . That's no longer a luxury—that's necessity.[19]

As former Chairman Toner made clear, the activity of single candidate Super PACs, and other outside groups, is now an integral part of candidates' campaigns and strategy. Candidates are calling the shots regarding who runs "their" Super PAC and its operations. Indeed, a candidate-specific Super PACs largely functions as an arm of the candidate's campaign—in effect, the candidate's dedicated soft money account.

In light of all of this, the Commission should update its coordination regulations, including 11 C.F.R. § 109.21, which focuses too narrowly on the details of particular ad buys, to include within the scope of the regulations all expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." 52 U.S.C. § 30116(a)(7)(B)(i). The regulations should capture the range of coordinated activity actually occurring between

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[16] Alex Roarty & Shane Goldmacher, *They're Not Allowed to Talk. But Candidates and PACs are Brazenly Communicating All the Time*, Nat'l Journal (Oct. 20, 2014), http://www.nationaljournal.com/politics/they-re-not-allowed-to-talk-but-candidates-and-pacs-are-brazenly-communicating-all-the-time-20141030.

[17] *See* Nathaniel Herz, *Despite Similar Messages, Senate Campaigns Say There's No Coordination with Outside Groups*, Alaska Dispatch News (Sept. 21, 2014), http://www.adn.com/article/20140921/despite-similar-messages-senate-campaigns-say-theres-no-coordination-outside-groups; Sean Sullivan, *How Campaigns and Outside Groups Communicate Silently, Revisited*, Wash. Post (Sept. 15, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/09/15/how-campaigns-and-outside-groups-communicate-silently-revisited/; Sean Sullivan, *McConnell-Aligned Group Launches Seven-Figure Ad Campaign with His Footage*, Wash. Post (Mar. 18, 2014), http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/18/mcconnell-aligned-group-launches-seven-figure-ad-campaign-with-his-footage/.

[18] Patricia Murphy, *Is the Tea Party's Latest Move Illegal*, The Daily Beast (Aug. 6, 2014), http://www.thedailybeast.com/articles/2014/08/06/tennessee-s-sketchy-tea-party-super-pac.html.

[19] Matea Gold, *Election 2014: A New Level of Collaboration between Candidates and Big-Money Allies*, Wash. Post (Nov. 3, 2014), http://www.washingtonpost.com/politics/election-2014-a-new-level-of-collaboration-between-candidates-and-big-money-allies/2014/11/03/ec2bda9a-636f-11e4-836c-83bc4f26eb67_story.html?hpid=z2.

candidates and outside groups, and bring the regulations in line with the Supreme Court's expectation that expenditures deemed "independent" under law are truly independent.

## VII. Conclusion

We appreciate the opportunity to submit these comments.

Sincerely,

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| */s/ J. Gerald Hebert* | */s/ Fred Wertheimer* |
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