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03/26/2012 01:14 PM

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cc Don Simon <DSimon@sonosky.com>
bcc
Subject CLC & D21 Comments on AOR 2012-14 (McCutcheon)

Dear Mr. Deeley et al.,

Please accept the attached comments by the Campaign Legal Center and Democracy 21 filed in response to AOR 2012-14 (McCutcheon). Thank you. Best,

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CLC & D21 Comments on AOR 2012-14 (McCutcheon) 3.26.12.pdf

Comment on AOR 2012-14

March 26, 2012

By Electronic Mail

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Comments on Advisory Opinion Request 2012-14 (McCutcheon)

Dear Mr. Herman:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 with regard to Advisory Opinion Request (AOR) 2012-14, a request submitted on behalf of Mr. Shaun McCutcheon, who asks the Commission if he may make contributions in excess of the current $46,200 biennial limit on aggregate contributions from an individual to candidates and their authorized committees established by 2 U.S.C. § 441e(a)(3)(A). AOR 2012-14 at 1.

McCutcheon argues that the statutory aggregate contribution limit "is unconstitutional," *id.* at 2, but fails to cite a single court decision invalidating an aggregate contribution limit and, more importantly, fails to cite a court decision invalidating the aggregate contribution limit established by section 441a(a)(3)(A). Indeed, McCutcheon acknowledges that the Supreme Court in "*Buckley* upheld an aggregate contribution limit." AOR 2012-14 at 5 (citing *Buckley v. Valeo*, 424 U.S. 1, 38 (1976). Nevertheless, McCutcheon asks the Commission to issue an advisory opinion declaring the statutory limit unconstitutional and promising not to enforce it.

Advisory opinions are for the purpose of addressing questions "concerning the application of the [Federal Election Campaign] Act," 11 C.F.R. § 112.1(a), not for declaring key portions of the Act unconstitutional. Federal law is clear here and the Commission has no authority to declare this statutory contribution limit unconstitutional. It is well-settled law that "adjudication of the constitutionality of congressional enactments [is] beyond the jurisdiction of administrative agencies." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 367-68 (1974)); *see also Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). As the Court of Appeals for the D.C. Circuit said in *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1987), an "agency may be influenced by constitutional considerations in the way it interprets . . . statutes [but] it does not have jurisdiction to declare statutes unconstitutional." *Id.* at 47.

McCutcheon cites no authority that would authorize the Commission to do what he asks. He acknowledges that the "Commission may be tempted to invoke 'restraint' and lean on both the letter of the statute and purported wisdom of Congress." AOR 2012-14 at 9. (In this statement, he appears to ignore the ruling in *Buckley* upholding the section 441a(a) aggregate limit.) In an effort to counter this "temptation," McCutcheon argues "it is not judicial restraint to accept an unsound, narrow argument just so the Court can avoid another argument with broader implications. Indeed, a court would be remiss in performing its duties were it to accept an unsound principle merely to avoid the necessity of making a broader ruling." *Id.* (quoting *Citizens United v. FEC*, 130 S. Ct. 876, 892 (2010) (emphasis added)). This passage from *Citizens United* is inapposite, and indeed proves the opposite point. Courts, not agencies, have the authority to invalidate a statute on constitutional grounds. The Commission is not a "court" and though a court does have the authority and responsibility to adjudicate the constitutionality of a duly enacted statute, the Commission does not.

The Commission has no choice in this matter but to opine that the aggregate contribution limit established by section 441a(a)(3)(A) remains in full force and effect—and that if McCutcheon exceeds the limit he will violate federal law. The Commission cannot decide the law is unconstitutional. Indeed, the Commission's obligation is to defend the constitutionality of campaign finance laws enacted by Congress. When McCutcheon files the inevitable lawsuit for which this AOR is the obvious predicate, the Commission must meet McCutcheon in court and defend the law once again.[1]

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert
Paul S. Ryan
Campaign Legal Center

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[1] Even though the Commission has no authority to reach the constitutional arguments made by McCutcheon, those arguments in any event lack merit. The *Buckley* Court relied on an anti-circumvention rationale in upholding section 441a(a)(3), the aggregate limit on all federal contributions by a person, including contributions to non-candidate committees. Such contributions, the Court reasoned, might be passed through the committees to candidates, thus circumventing the candidate contribution limits. 424 U.S. at 38. McCutcheon seeks invalidation only of a subset aggregate limit—the limit on all of an individual's contributions to candidates—and maintains that no comparable anti-circumvention purpose is served by this sub-aggregate limit. His argument is not correct. Without an aggregate cap on contributions to candidates, a wealthy individual could contribute, in the aggregate, over two million dollars to all of one party's candidates in an election cycle and, by doing so, curry the same type of access and influence that was traded in the era of party soft money. By restraining the ability of a wealthy individual to make outsized contributions in aggregate to a party's candidates, the limit at issue here very much serves the Act's core anti-corruption purposes.

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Copy to: Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission
Mr. Kevin Deeley, Acting Associate General Counsel, Policy
Ms. Amy L. Rothstein, Assistant General Counsel
Mr. Robert M. Knop, Assistant General Counsel