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April 30, 2014

The Hon. Angus King
The Hon. Pat Roberts
Committee on Rules & Administration
U.S. Senate
305 Russell Senate Office Building
Washington, D.C. 20510

Dear Sen. King and Ranking Member:

Public Citizen is pleased that the Senate Committee on Rules & Administration is holding a hearing on April 30, 2014, to examine the influence of undisclosed money on elections in the wake of the Supreme Court's 2014 *McCutcheon v. Federal Election Commission* decision. Please accept these written comments discussing the damage to our elections caused by the *McCutcheon* decision and the Court's earlier decision, *Citizens United v. Federal Election Commission* (2010), two sweeping court rulings that set the stage for today's loss of reasonable limits and disclosure of money in politics.

Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen played an important role in the Supreme Court proceedings in both the *Citizens United* and *McCutcheon* decisions as amicus curiae on behalf of congressional leaders.

Respectfully Submitted,

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Testimony of Craig Holman, Public Citizen[1]

"Dark Money" and the McCutcheon Decision: Harms and Potential Remedies

A sharply divided U.S. Supreme Court once again struck down regulations on money in politics on April 2, 2014, when five justices ruled that the long-standing "aggregate contribution limits" of the Federal Election Campaign Act of 1971 (FECA) are now unconstitutional on First Amendment grounds. *McCutcheon v. Federal Election Commission*, 572 U.S. __ (2014).

Prior to the *McCutcheon* decision, an individual could contribute up to a total of $123,200 per election cycle to all federal candidates and committees combined, with sub-limits of $48,600 to all candidates and $74,600 to all political committees and parties. This meant that a wealthy donor could give a maximum individual contribution to 9 candidates and seven political committees.

Aggregate contribution limits were originally established in the 1974 amendments to FECA in response to the Watergate scandals that involved allegations of laundered campaign funds, illegal corporate contributions, "bought" ambassadorships by wealthy individuals and secret campaign cash. The aggregate contribution limits were upheld by the Supreme Court in the 1976 *Buckley v. Valeo* decision[2].

In 2014, the Roberts Court overruled these holdings, reversing some 40 years of established campaign finance law. The *McCutcheon* decision expands the rights only of a handful of millionaires and billionaires capable of making campaign contributions in excess of $123,200. While the ruling on its face may not be as sweeping as the *Citizens United* decision, it has the potential of being more dangerous. Citing itself as precedent, the majority of the Roberts Court changed the legal standard for upholding campaign finance laws, holding that the interest in preventing "corruption or the appearance of corruption," which had previously included using money to buy unfair influence over or access to public officials, could support only laws aimed at what the Court perceives as a genuine risk of *quid pro quo* corruption.

The Court, however, has repeatedly upheld campaign-finance disclosure laws, most recently and notably in *Citizens United* itself. Reflecting the Justices' lack of experience in real-world campaigns, the Roberts Court in *Citizens United* naively assumed that in the Internet age there is

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[1] Craig Holman, Ph.D., Government Affairs Lobbyist, Public Citizen, Washington, D.C.
[2] Buckley v. Valeo, 424 U.S. 1 (1976).

full disclosure of money in politics, reaffirmed the public's right to know, and even partly justified lifting campaign finance regulations on the grounds of transparency.

In *Citizens United*, Justice Kennedy wrote for the majority:

> "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."[3]

In *McCutcheon*, Justice Roberts reiterated the Court's confidence in disclosure:

> "With modern technology, disclosure now offers a particularly effective means of arming the voting public with information... Today, given the Internet, disclosure offers much more robust protections against corruption... Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time Buckley, or even McConnell, was decided."[4]

But Kennedy and Roberts are gravely mistaken about the real world of campaign finance disclosure. Transparency of money in politics today is sorely lacking. Because of weak enforcement policies at the Federal Election Commission, and excessive ambiguity in the tax laws, many corporations and wealthy special interests have been able to spend record-breaking sums on campaign ads and conceal their identities. Donors can easily sidestep disclosure by funneling money through nonprofit organizations – and they do. Well over $300 million was spent in "dark money" in just the 2012 federal elections from anonymous sources.

There are significant steps Congress and regulatory agencies can take to address the dark money plague and rein in some of the damage caused by the *Citizens United* and *McCutcheon* decisions. Options for congressional responses to the decisions fall into three general categories: transparency, regulation and constitutional change. Since these two Court rulings are substantively distinct, appropriate congressional responses vary for each decision.

Responses that Congress can and should pursue that specifically target *McCutcheon* include:

- Turn the imaginary Internet disclosure systems envisioned by Kennedy and Roberts into reality by passing the "Real Time Transparency Act of 2014," which would require 48-hour disclosure of campaign contributions to candidates, parties and committees, as well as transfers from joint fundraising committees.

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[3] Citizens United, 588 U.S. at 370.
[4] McCutcheon, 572 U.S. _ at 24.

- Ban or restrict "joint fundraising committees," which under *McCutcheon* are likely to become the preferred fundraising vehicle for major donors and the greatest potential source of corruption.
- Strengthen the ban on direct candidate solicitations of contributions in excess of candidate limits and extend the ban to include prohibiting candidate appearances (and appearances by representatives of candidate committees) at any fundraising event in which contributions in excess of candidate limits are being solicited. This would apply to both super PACs and joint fundraising committees.
- Press for constitutional change to reverse *McCutcheon*.

Broader congressional responses that would address both the *Citizens United* and *McCutcheon* decisions include:

- Encourage the Securities and Exchange Commission (SEC) to adopt rules mandating disclosure of corporate political spending by publicly-held companies, and the Internal Revenue Service (IRS) to move ahead with rulemaking that would clearly define political intervention by nonprofit organizations and enforce the current law prohibiting 501(c)(4) nonprofit organizations from making more than de minimis political expenditures.
- Approve legislation that would enhance transparency of money in politics, such as the Bright Lines Project legislative proposal that clearly defines political intervention for nonprofit organizations so as to reduce the discretion of the IRS in such evaluations; the Shareholder Protection Act; and the DISCLOSE Act.
- Empower citizens through effective presidential and congressional public financing systems that offset spending by outside groups and incentivize small dollar donations.
- Submit to the states for ratification a constitutional amendment that clarifies for the Supreme Court what the First Amendment really means.

Fading Disclosure and the Dramatic Rise in Outside Campaign Spending

Fading disclosure of the sources of electioneering funds has plagued nearly all federal and state elections in the United States at an alarming rate since the U.S. Supreme Court's *Citizens United v. Federal Election Commission* decision. The problem may well grow worse in a post-*McCutcheon* world. This was not the intent of the Court.

The *Citizens United* decision marked a radical break by the Roberts Court from long-standing American political tradition and court precedents. On January 21, 2010, the Supreme Court unleashed a flood of corporate money into federal, state, judicial and local elections by announcing that, contrary to long-standing political tradition, corporations have a constitutional right to spend unlimited amounts of money to promote the election or defeat candidates.

The Roberts Court explicitly overruled two existing Supreme Court decisions. In the 1990 *Austin v. Michigan Chamber of Commerce* decision,[5] the Court previously held that the government can require for-profit corporations to use political action committees funded by individual contributions when engaging in express electoral advocacy. The 2003 *McConnell v. Federal*

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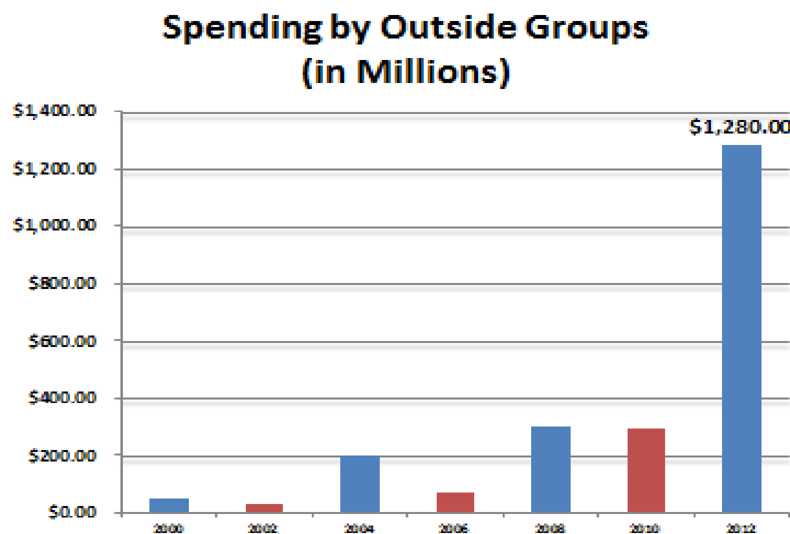
[5] Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

Election Commission decision[6] applied that principle to uphold the federal Bipartisan Campaign Reform Act's restrictions on "electioneering communications," that is, its ban on corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. *Citizens United* overruled *Austin* and *McConnell*. The *Citizens United* decision also effectively negated parts of the same Court's 2007 ruling in *Federal Election Commission v. Wisconsin Right to Life.*[7]

By overruling these decisions, the Roberts Court opened the door to unlimited corporate spending in candidate campaigns, breaking a sixty-year policy of prohibiting such direct corporate expenditures, established in the 1947 Taft-Hartley Act. The decision's unprecedented logic also may endanger the century-old tradition of prohibiting direct corporate contributions in federal elections, established by the 1907 Tillman Act.

Immediately after *Citizens United*, outside spending in federal elections increased 427 percent in the 2010 elections over the previous 2006 congressional elections, and increased another four-fold in the 2012 presidential election cycle.[8]



But the Roberts Court never intended disclosure to be one of its victims. Even as the court struck down the limitation on corporate-funded campaign expenditures in the *Citizens United* opinion, the Roberts Court upheld the constitutionality of BCRA's disclosure requirements relating to the funders of electioneering communications.

[6] McConnell v. Federal Election Commission, 540 U.S. 93 (2003).
[7] Federal Election Commission v. Wisconsin Right to Life, 551 U.S. 449 (2007).
[8] Data on outside spending in federal elections provided by the Center for Responsive Politics, analyzed by Public Citizen.

In addition, Justice Kennedy, who wrote the majority opinion, appeared to rely on the existence of strict disclosure laws as a rationale for lifting the ban on corporate-funded campaign expenditures.

> "A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure. 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."[9]

Such disclosure, Kennedy wrote, would enable citizens to "see whether elected officials are 'in the pocket' of so-called moneyed interests."[10]

However, contrary to the Supreme Court's promise that voters would be able to "give proper weight to different speakers and messages," voters were left completely in the dark about who funded about half the messages that were blasted into their living rooms in the elections following *Citizens United*.

At the federal level, the initial fading of campaign finance disclosure began from an errant rulemaking by the Federal Election Commission. In response to the 2007 *Wisconsin Right to Life* decision, the FEC revised the disclosure rule by exempting groups that made electioneering communications from disclosing contributors' identities except in special cases in which donors specifically earmarked money for that purpose.[11] A similar earmarking requirement for disclosure has also been applied to independent expenditures.

Because few donors are apt to attach such specific instructions to their contributions, the effect has been to gut the disclosure requirement enshrined in BCRA – despite the fact that the federal statute calls for full donor disclosure.

According to an analysis by Public Citizen,[12] among groups broadcasting electioneering communications in federal elections, nearly 100 percent disclosed their funders in the 2004 and 2006 election cycles (the first two election cycles after BCRA created this category of campaign ads). In the 2008 elections, the first after *Wisconsin Right to Life*, the share of groups disclosing their funders plummeted to less than 50 percent. In 2010, barely a third of electioneering communications groups disclosed their funders.

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[9] Citizens United, 588 U.S. at 370 (internal citations omitted).
[10] Id.
[11] 11 C.F.R. §104.20(c)(9).
[12] Taylor Lincoln and Craig Holman, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at: http://www.citizen.org/documents/Citizens-United-20110113.pdf

Disclosure by Groups Making Electioneering Communications, 2004-2010

Year	# of Groups Reporting ECs	# of Groups Reporting the Donors Funding ECs	Pct. of Groups Reporting the Donors Funding ECs
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010	53	18	34.0

Source: Public Citizen's analysis of Federal Election Commission data.

Among groups making independent expenditures (expenditures expressly intended to influence elections) in federal elections, disclosure of donors fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010.

Disclosure Among Top 30 Groups Making Independent Expenditures, 2004-2010

Year	Groups Disclosing Funders	Groups Not Disclosing Funders	Pct. Of Groups Re-porting the Donors funding IEs
2004	26	3	89.7
2006	29	1	96.7
2008	25	5	83.3
2010	21	9	70.0

Source: Public Citizen's analysis of data from the Federal Election Commission and the Center for Responsive Politics

Combining the loss of donor disclosure behind electioneering communications with the loss of donor disclosure behind independent expenditures, the sources of only about half the funds spent by outside groups in the 2010 federal elections were disclosed to the public. There was a modest up-tick in donor disclosure in the 2012 elections, due almost entirely to the new prevalence of "super PACs," which are registered political committees subject to federal disclosure laws. According to the Center for Responsive Politics, 24 percent of outside spending groups provided no donor disclosure, another 24 percent provided partial disclosure, and only about 52 percent of outside spending groups provided full disclosure of their funding sources.[13] But the total amount of "dark money" in the 2012 elections – at least $310 million – exceeded the amount of undisclosed money in any previous election.[14]

The problem of dark money is likely to worsen under the *McCutcheon* decision. Candidates, parties and committees are expected to create a plethora of joint fundraising committees under the direction of congressional and party leaders, who will then collect huge contributions and

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[13] Center for Responsive Politics, analysis of disclosure of donors by outside spending groups in the 2012 federal elections, available at:
http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D
[14] Center for Responsive Politics, at: https://www.opensecrets.org/outsidespending/disclosure.php

distribute the funds. These transfers are supposed to be transparent, but the actual sources of the funds can be difficult to trace and monitor, and these disclosures tend to be slow in coming.

How *McCutcheon* Changes the Political Landscape

By a 5-to-4 ruling on April 2, 2014, the U.S. Supreme Court struck down the aggregate contribution limit of $123,200 that any individual may make to all federal candidates, committees and parties combined in an election cycle, but left intact—so far—the "base limits" on contributions to each candidate ($2,600 per election), political action committees ($5,000 per calendar year), state parties for federal elections ($10,000 per calendar year) and national party committee ($32,400 per calendar year). The plurality opinion written by Chief Justice John Roberts was supported by a concurring opinion from Justice Clarence Thomas who wrote that he would go further and reverse the 1976 *Buckley v. Valeo* decision in its entirety, invalidating all contribution limits.

The Roberts opinion noted that Congress may regulate campaign contributions to protect against corruption, but then changed the established definition of corruption that had been used previously into a very narrow *quid pro quo* definition of corruption. Citing its earlier *Citizens United* decision, the court said that making contributions in order to buy "[i]ngratiation and access … are not corruption." Instead, government "must instead target what we have called *quid pro quo* corruption or its appearance. That Latin phrase captures the notion of a direct exchange of an official act for money."[15] Aggregate contribution limits, argued Roberts, impermissibly attempt to curtail an overly broad concept of corruption involving favoritism and undue influence, as well as indirectly preventing circumvention of the base limits, rather than preventing direct *quid pro quo* exchanges.

The dissenting opinion, written by Justice Stephen Breyer, accused the court majority of creating a huge new loophole in campaign finance law, contradicting historic court precedents, and ignoring concerns about declining public confidence in the political process. Treating corruption as only "an act akin to bribery" is "inconsistent with the Court's prior case law." Such a narrow definition of corruption "is virtually impossible to reconcile with this Court's decision in McConnell, upholding the Bipartisan Campaign Reform Act of 2002 (BCRA)."[16]

Breyer concluded:

> "In reality, as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions….
>
> "Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a

[15] McCutcheon, Roberts opinion, 572 U.S. __ at 2-3.
[16] McCutcheon, Breyer's dissent, 572 U.S. __ at 4.

> democratic order in which collective speech matters…. Where enough money calls the tune, the general public will not be heard."[17]

An analysis by Public Citizen shows exactly how much wealthy individuals may drown out the voices of the general public. In a post-*McCutcheon* world, a wealthy donor may contribute up to $3.6 million in an election cycle to the candidates and committees of a single party, and up to $5.9 million if officeholder leadership PACs are included in the calculation.[18]

In addition to drowning out the voices of the general public in the political process, the *McCutcheon* decision dangerously raises the specter of actual corruption. It would be quite a bit of tedious work for a wealthy donor to hand out separate checks to hundreds of candidates, but that is not how campaign fundraising tends to work in the real world. Fundraising for groups of candidates and party committees is done through a single "joint fundraising committee," usually run by a congressional leader or party boss. The person heading a joint fundraising committee receives a single large check from a wealthy donor and then doles the money out to participating candidates and party committees in accordance to the base limits.

Joint fundraising committees originally were envisioned as useful fundraising tools in which a couple of candidates joined resources to stage an affordable fundraising event. Joint fundraising committees were few in number and generally accounted for modest donations. But they quickly grew in number and significance since the presidential elections of 2000. Presidential candidates began making extensive use of joint fundraising committees to collect checks from wealthy donors by joining their campaign committees with state and federal party committees, the latter of which already had high base limits of $25,000 or more depending on the year. By the 2012 presidential election, presidential joint fundraising committees, such as the Obama Victory Fund, could receive checks as large as $75,800 from a single donor – the maximum amount allowed under the aggregate contribution limits of that year –which was then disbursed to the presidential campaign and party committees dedicated to support the presidential campaign.

Presidential joint fundraising committees became so prolific and capable of raising massive amounts of funds from wealthy donors that they rendered the presidential public financing program an insignificant, if not irrelevant, source of presidential campaign funds. The newly destructive nature of joint fundraising committees in presidential elections prompted legislative proposals to restrict such fundraising committees to candidates only, excluding party committees.[19]

Congressional leaders and party bosses took note of the massive campaign funds that could be raised through joint fundraising committees and followed suit. The number of presidential and

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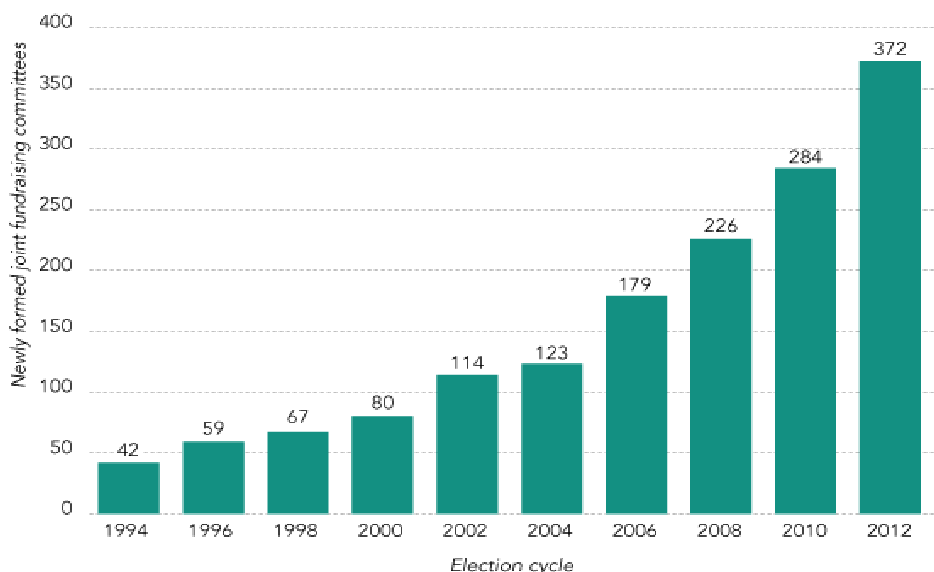
[17] Id, at 4-6.
[18] Adam Crowther, Beware of a Naïve Perspective (Part 1 of 2), Public Citizen (Jan. 7, 2014) at 7, available at: http://www.citizen.org/mccutcheon-campaign-finance-analysis-report
[19] For legislation restricting the size of joint fundraising committees to cover only candidates and exclude party committees, see for example, "Empowering Citizens Act" (H.R. 270), sponsored by Rep. David Price, 113th Congress.

congressional joint fundraising committees rose from 80 in 2000 to 372 in 2012. (*See* below "Joint Fundraising Committee Growth, 1994-2012."[20])



Following the *McCutcheon* decision, joint fundraising committees are expected to explode in number and significance for financing all federal campaigns. Without aggregate contribution limits, the sky's the limit for these entities, which will be run by a congressional leader or party boss. A wealthy individual who seeks to curry favor with the Speaker of the House or Senate Majority Leader now has a legal avenue to hand over a single multi-million dollar check to that officeholder.

To make matters worse, transfers between candidates and parties will make evasion of even the base limits very likely. While joint fundraising committees are required under FEC regulations to create a distribution formula for divvying up their largess among participating candidates and party committees,[21] the recipient candidates and party committees are not so bound. They may make large and, in the case of candidates to parties, unlimited transfers of those funds. As a result, candidates in noncompetitive elections may participate in a joint fundraising committee, receive an allocated contribution through the committee from a donor who maxed out to the national party committees, and then transfer those funds directly to the national party committees, indirectly but legally sidestepping the base limits for that donor.

[20] Paul Blumenthal, "McCutcheon v. FEC's Other Threat: Case Could Super-Size Fundraising Committees," *Huffington Post* (Oct. 7, 2013).
[21] FEC rules governing the operations of joint fundraising committee are at 11 CFR 102.17.

A Public Citizen analysis found that in the post-*McCutcheon* world of no aggregate limits, joint fundraising committees could readily enable candidates to transfer more than $74 million to the national party committees combined. Each donor to a joint fundraising committee would effectively be contributing more than $1.8 million to party committees, or more than 24 times the legal base limit.[22]

Just a few weeks after the *McCutcheon* decision, Republican leaders have already established three new joint fundraising committees: the Republican Victory Fund, a joint fundraising agreement among the Republican National Committee (RNC), National Republican Senate Committee (NRSC), and National Republican Congressional Committee (NRCC); and the 2014 Senators Classic Committee, a joint fundraising effort linking 19 Republican senate candidates; and a joint fundraising committee established under the direction of House Majority Leader Eric Cantor.

Democratic party and congressional leaders will soon be following in the footsteps of their Republican counterparts. House Minority Leader Nancy Pelosi declared that Democrats are "not going to unilaterally disarm," even as they objected to the *McCutcheon* decision.[23]

The post-*McCutcheon* world of no aggregate limits will produce a huge infusion of new money into politics, but coming from a very small number of donors. Of 310 million Americans nationwide, only 0.4 percent of Americans made contributions in the 2012 elections of $200 or more. Among this small pool, a mere 646 people maxed out at the overall aggregate limit to both candidates and committees in the 2012 election.[24] The *McCutcheon* decision has instilled a new right for only those people who can afford to give even more.

The *McCutcheon* decision may not immediately be as sweeping in scope as the Citizens United decision, but it is another devastating blow to reasonable limits on money in politics and it may portends the death of what remains of laws restricting campaign contributions. Joint fundraising committees under the direct control of presidential candidates, congressional leaders and party bosses are likely to proliferate and dominate campaign fundraising, providing a small number of wealthy donors the means to endear themselves with political leaders. Though the Supreme Court in both *Citizens United* and *McCutcheon* preserved the constitutionality of disclosure of money in elections, and even spoke of disclosure as the counterpoint to the expected changes to the system caused by the decisions, an effective disclosure regime does not currently exist.

Three Powerful Ways to Respond to *McCutcheon*

Three general categories of policy options to rein in the damage caused by *McCutcheon* as well as *Citizens United* are available to Congress. These include *enhanced transparency*, *regulation of campaign fundraising*, and a *constitutional amendment* and political pressure on the Supreme Court to reverse its campaign finance decisions.

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[22] Adam Crowther, Beware of a Naïve Perspective (Part 2 of 2), Public Citizen (Jan. 14, 2014).
[23] Shane Goldmacher, "Are Democrats Repeating their Post-Citizens United Mistake?" *National Journal* (April 22, 2014).
[24] Center for Responsive Politics, McCutcheon's Multiplying Effect, available at: http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why.html

The *McCutcheon* decision primarily affects hard money in elections, and so direct hard money remedies are discussed first in each of the three policy categories. The *Citizens United* decision has a broader reach on both hard money of regulated entities and soft money of outside groups, but remedies to this ruling will help rein in the damage of *McCutcheon*, and so these are also discussed.

1. **Enhance Transparency.** In both the *McCutcheon* and *Citizens United* decisions the court stood firmly behind the constitutionality of disclosure requirements. Yet, the institutional framework for an effective transparency regime is not currently in place. Transparency of money in politics can be achieved through either legislative or regulatory actions, and Congress is in a position to influence both.

   - **Real Time Transparency Act of 2014.** The Court correctly understands part of the disclosure equation: in this era of the Internet, there is no excuse for not having full and instant transparency of money in politics, accessible to everyone at the click of a mouse. In fact, candidates and outside electioneering groups are required under current law to file electronic disclosure reports of their financial activity within 48 hours or 24 hours of each significant expenditure in the last few weeks of an election. Electronic filing and disclosure software are already developed by the FEC and federal candidates and electioneering groups generally know how to use these programs. With these easy-to-use electronic programs, instant electronic filing requirements pose little extra burden on campaign entities.

     Now that the *McCutcheon* decision is going to result in vast new sums of hard money flowing into campaigns, especially through joint fundraising committees, it has become more important than ever to require instant disclosure of significant contributions and transfers of funds by candidates, parties and committees. The "Real Time Transparency Act of 2014" – S. 2207 sponsored by Sen. Angus King (I-Maine) and H.R. 4442 by Rep. Beto O'Rourke (D-Texas) – does precisely that.

   - **SEC Petition for Transparency Rulemaking**. On August 3, 2011, several law professors submitted a petition for rulemaking to the Securities Exchange Commission (SEC) requesting that the agency promulgate rules to require publicly-held corporations to disclose their political spending to the public and shareholders. (Petition File No. 4-637) The petition has received a record-breaking 750,000 public comments in support. Transparency of corporate money in elections would go a long way toward mitigating the damage caused by *Citizens United*. The SEC, like the IRS, is heavily influenced by cues from Congress on whether to proceed. Members of Congress should weigh in and encourage the agency to address the issue by placing it on their next regulatory flexibility agenda.

   - **Bright Lines Project.** On November 29, 2014, the Treasury Department issued a Notice of Proposed Rulemaking (NPRM) to clarify the definition of political intervention for 501(c)(4) social welfare organizations. In the wake of thousands of comments, Treasury is debating revising the proposal. For more than four years, a coalition of tax lawyers and

nonprofit organizations led by Public Citizen, known as the Bright Lines Project, have developed extensive recommendations to clarify the definition of political intervention that would both encourage civic engagement by nonprofits and yet protect against abuse. (The recommendations are available at: http://www.brightlinesproject.org/.) Members of Congress again should weigh in, urging the agency to proceed with rulemaking, expand the rulemaking to cover all nonprofit organizations along the guidance offered by the Bright Lines Project, and set limits on the quantity of permissible political intervention.

- **Transparency Legislative Remedies**. The disclosure regulations under consideration by the SEC and the IRS also have legislative vehicles for achieving the same transparency results. Members of Congress should join as cosponsors and help promote the "Shareholder Protection Act" (S. 824), sponsored by Sen. Robert Menendez (D-NJ). The recommendations of the Bright Lines Project should also be introduced as a legislative vehicle, complete with hearings that would publicize the problems of abuse of the tax code by electioneering nonprofit groups and the IRS, and the solutions that are available. Congress should consider legislation to explicitly extend the existing limit on permissible electioneering activity by 501(c)(4) groups to other tax exempt entities to distinguish a genuine nonprofit organizations from Section 527 political organization subject to disclosure. And, of course, the DISCLOSE Act must remain a priority of Congress, a measure that would achieve full transparency of corporate and nonprofit political donations and expenditures in one swoop.

2. **Regulation of Campaign Fundraising**. Both *McCutcheon* and *Citizens United* have fundamentally transformed the nature of campaign fundraising, the former by allowing wealthy donors to cut huge and potentially corrupting checks to congressional leaders and party bosses, and the latter by allowing the flow of corporate and union treasury funds into elections. The changed nature of campaign fundraising calls for Congress to make significant changes in the law.

- **Ban or Restrict Joint Fundraising Committees**. Joint fundraising committees are authorized by statute[25] and subject to FEC regulations.[26] Prohibiting or restricting joint fundraising activities will likely require legislation, though the operations of such committees could be subject to further FEC regulations. Joint fundraising committees could be banned altogether, limited in size to a small number of participating committees, restricted in the amounts of funds that could be transferred to candidates, or even defined as a single PAC subject to contribution limits applicable to its donors ($5,000 per year). The idea of restricting joint fundraising committees to just candidates, as has been proposed in recent legislation, pre-dates the *McCutcheon* decision and would not achieve a useful purpose in the post-*McCutcheon* world where such committees could receive checks up to $3.6 million from a single donor.

  There is no certainty in how the Roberts Court would treat legislative restrictions on joint fundraising committees. However, Roberts specifically stated in *McCutcheon*'s plurality opinion that restrictions on transfers of funds involving joint fundraising committees, or

[25] 2 U.S.C. 432(e)(3)(A)(ii), and 2 U.S.C. 441a(a)(5)(A).
[26] 11C.F.R. 102.17.

limits on the size of joint fundraising committees, may be appropriate legislative responses.

Roberts wrote: “One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees).”[27]

- **Extend the Ban on Direct Candidate Solicitations of Excessive Contributions**. Currently, officeholders and candidates are prohibited from soliciting contributions in excess of FECA limits, though they may make appearances at such “soft money” fundraising events according to FEC regulations. Legislation should be introduced that prohibits any officeholder or candidate from soliciting contributions in excess of the maximum that could be given to that candidate in an election cycle, or, if that limit proves politically unworkable, that amount plus the maximum that could be given to a single national party committee in that cycle. This restriction should be expanded to also include prohibiting an officeholder or candidate from even making an appearance at any fundraiser in which contributions in excess of these limits are being solicited.

- **Consolidate the Limits to Party Committees**. An unwieldy aspect of the current campaign finance law is that donors are allowed to make multiple contributions to a political party through several committees of the same party. The contribution limit to a national political party committee is set at $32,400 per year, but an individual may give that maximum amount each to the national committee of the party, the senate campaign committee of the party and the congressional campaign committee of the party – and then another $10,000 to the federal campaign accounts of each of the 50 state parties. Congress should establish one single contribution limit for all committees combined of a political party. Treating party committees as a single entity for the purposes of contribution limits would go a long way toward reining in the damage caused by lifting aggregate contribution limits under *McCutcheon*.

- **Establish Public Financing of Congressional and Presidential Campaigns.** A strong public financing program for campaigns could address many of the problems posed by *McCutcheon* and *Citizens United*. The “Fair Elections Now Act” (S. 2023) sponsored by Sen. Richard Durbin (D-IL), or the “Government By the People Act” (H.R. 20) sponsored by Rep. John Sarbanes (D-Md.), would incentivize small dollar donations, provide candidates with substantial public funds to offset special interest money, and set the framework for voluntary agreements by participating candidates to accept only small contributions from donors and reject joint fundraising activities.

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[27] McCutcheon, Roberts opinion, at 34.

3. **Sway Court Opinion through a Constitutional Amendment or Dissent**. It is important to keep in mind that neither *McCutcheon* nor *Citizens United* are decisions written in stone. First of all, both decisions were made by a sharply and narrowly divided Court. One change of vote could reverse these decisions. Secondly, if the Court is not inclined to change its vote or composition anytime soon, a constitutional amendment over-rides the Court.

    - **Constitutional Amendment**. A constitutional amendment reversing *McCutcheon* and *Citizens United* would completely rein in the damage to campaign finance regulations done by the Roberts Court. Public Citizen does not take amending the Constitution lightly, but there have been times in American history when amendments were needed and achieved. Since 1789, 35 amendments had been submitted to the states by Congress and 27 of these amendments were ratified.

      The movement for a constitutional amendment to reverse *Citizens United* and now *McCutcheon* has gained incredible momentum. Hundreds of local governments and 16 states have passed resolutions calling upon Congress to submit a constitutional amendment to the states for ratification granting Congress the authority to regulate money in politics. Public opinion is overwhelmingly in support of reversing the *Citizens United* decision (and no doubt the *McCutcheon* decision as well, once polling is conducted on this ruling), with poll after poll showing vast majorities of Americans – Democrats, Republicans and Independents alike – supporting regulating money in politics and expressing dismay at the campaign finance decisions of the Roberts Court.

      McCutcheon is fueling this drive. Several thousand people took coordinated action in protest of the McCutcheon decision the same day it was issued in 150 rallies held across 41 states. Pictures of these rallies are available at: https://www.flickr.com/search/?q=%23mccutcheonrapidresponse

      So far, 36 Senators and 114 Representatives have signed onto a constitutional amendment to overturn *Citizens United* and *McCutcheon* in the 113th Congress.

    - **Disagreement.** The five Justices of the Roberts Court that have invalidated campaign finance laws appear increasingly isolated from public opinion that overwhelmingly supports reasonable campaign finance laws. As the disagreement of the four Justices in the minority and many other respected jurists throughout the nation indicates, the view of the Court's current majority is hardly the only, or the most plausible, reading of our Constitution and the precedents of past Courts. Disagreement with the Court's views is entirely legitimate and, in these circumstances, called for. In an unusually frank opinion, for example, a U.S. district court judge in New York struck down the state's contribution limits for a super political action committee (PAC) while noting that he disagrees strongly with the Supreme Court rulings requiring him to do so.[28] The U.S. Supreme Court faced a similar challenge from the Montana Supreme Court, which upheld that state's ban on corporate spending in Montana elections despite the *Citizens United*

[28] New York Progress and Protection PAC v. Walsh, S.D.N.Y., No. 13-6769, 4/24/14.

decision (which the U.S. Supreme Court by the same 5-to-4 vote struck down).[29] Montana's challenge was supported by 22 states and the District of Columbia.

Legislation is expected to be introduced in the U.S. House of Representatives reinstating the aggregate contribution limits, in defiance of *McCutcheon*. The Senate should consider a similar response, or at a minimum a resolution expressing disagreement with the Court's decision. Justices on the Supreme Court read newspapers and follow political events, and on occasion are susceptible to a change of mind. Alternatively, such continuing expression of legitimate disagreement with the Court's decision could influence future appointments to the Court.

Conclusion: Several Options for a *McCutcheon* Response are Available

Congress must move swiftly and decisively to mitigate the damage to our democratic system of governance posed by the *Citizens United* and *McCutcheon* decisions. A number of targeted options are available for a congressional response to *McCutcheon*, and several broader options are available for responding to both *Citizens United* and *McCutcheon*.

Targeted *McCutcheon* responses include instant on-line disclosure of large campaign contributions and transfers proposed in the "Real Time Transparency Act of 2014"; banning or restricting joint fundraising committees; extending the ban on candidate solicitations of excessive contributions to apply to joint fundraising committees as well as super PACs; creating a single contribution limit for all party committees combined; and challenging the Court majority on its campaign finance jurisprudence. Broader responses that would address both *Citizens United* and *McCutcheon* include enhancing disclosure of all money in politics through legislation and regulatory actions; promoting the Bright Lines Project for defining political intervention by nonprofit organizations; establishing public financing of campaigns; and pursuing a constitutional amendment to clarify for the Supreme Court what the First Amendment really means.

Public Citizen encourages Congress to pursue all appropriate options.

[29] American Tradition Partnership v. Bullock, 132 S.Ct. 2490 (2012).