Memo

From: Allen Dickerson, Legal Director

RE: New York's Aggregate Contribution Limits per N.Y. ELEC. LAW § 14–114(8) are Likely Unconstitutional

I write on behalf of the Center for Competitive Politics ("CCP"), a § 501(c)(3) nonprofit organization dedicated to protecting the First Amendment political rights of speech, petition, and assembly. CCP works to defend these freedoms through scholarly research, regulatory comments, and federal and state litigation. Today, I wish to address N.Y. ELEC. LAW § 14–114(8) in the wake of the recent Supreme Court decision, *McCutcheon v. Federal Election Commission*.[1]

McCutcheon invalidated the federal aggregate limit on contributions by individuals to candidate campaigns and political committees. In his controlling opinion, Chief Justice Roberts summarized: "we conclude that the aggregate limits on contributions…intrude without justification on a citizen's ability to exercise 'the most fundamental First Amendment activities.'"[2]

Two key aspects of the *McCutcheon* opinion render many of the different forms of aggregate limits harder for states to defend from a challenge in court: (1) *McCutcheon* clarified that even contribution limits are subject to a high level of constitutional scrutiny, and (2) the Court appeared to significantly narrow the basis for regulation of contribution limits.

I. Laws Restricting Contributions are Subject to "Exacting Scrutiny"

Contribution limits implicate fundamental First Amendment interests.[3] When Congress first created substantial regulation of campaign finance in the 1970s, the Supreme Court in *Buckley v. Valeo* identified campaign contributions as a component of the "right to associate," and therefore determined that limits must

[1] 572 U.S. __, No. 12-536 (Apr. 2, 2014).
[2] *Id.*, slip op. at 39-40 (Roberts, C.J. for the plurality) (quoting .*Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).
[3] *McCutcheon*, slip op. at 7 (Roberts, C.J. for the plurality); *see also Buckley*, 424 U.S. at 14.

be subject "to the closest scrutiny."[4] These "rights are important regardless whether the individual is, on the one hand, a 'lone pamphleteer[] or street corner orator[] in the Tom Paine mold,' or is, on the other, someone who spends 'substantial amounts of money in order to communicate [his] political ideas through sophisticated' means."[5]

Under "the closest scrutiny" standard, the Government may regulate protected activity only if such regulation promotes *a sufficiently important interest* and uses *a means closely drawn* to further the interest.[6] Contribution limits provide a lesser burden on the right to associate and "[u]nder that standard, '[e]ven a significant interference' with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms."[7] Even still, the Court noted that "In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable… a means narrowly tailored to achieve the desired objective."[8]

The Court thus tests contribution limits by requiring that: 1) the state provide "a sufficiently important interest" to justify the law, and 2) that the law employs means closely drawn to avoid unnecessary abridgement of associational freedoms. Aggregate contribution limits fail the test.

II. Aggregate Contribution Limits Fail "Exacting Scrutiny"

First, the prevention of *quid pro quo* corruption, or the appearance of such corruption, is the *only* constitutionally sufficient justification for contribution limits.[9] Latin, meaning "this for that," *quid pro quo* corruption is very narrow in definition, and must involve more than just a large check. Rather, it requires "an effort to control the exercise of an officeholder's official duties."[10] Gratitude is not "*quid pro quo* corruption."[11] And while "[t]he line between *quid pro quo* corruption and general influence may seem vague at times," the law must make "the distinction… in order to safeguard basic First Amendment rights."[12]

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[4] *Buckley*, 424 U.S. at 25 (1976) (citing *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958)).
[5] *McCutcheon*, slip op. at 14-15 (quoting *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985)) (brackets in *McCutcheon*).
[6] *McCutcheon*, slip op. at 7-8 (Roberts, C.J. for the plurality).
[7] *Id.* at 8 (Roberts, C.J. for the plurality) (quoting *Buckley*, 424 U.S. at 25).
[8] *Id.* at 30 (Roberts, C.J. for the plurality) (internal citation and quotation marks omitted).
[9] *Id.* at 39 (Roberts, C.J. for the plurality); *see also Buckley*, 424 U.S. at 25 *and Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 388 (2000).
[10] *Id.* at 19 (Roberts, C.J. for the plurality) (internal citation omitted).
[11] *Id.* at 2 (Roberts, C.J. for the plurality).
[12] *Id.* at 20 (Roberts, C.J. for the plurality).

Consequently, "[n]o matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'"[13] The *McCutcheon* ruling could not be clearer: "Campaign finance restrictions that pursue other objectives [i.e. those not aimed at preventing *quid pro quo* corruption]…impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the *last* people to help decide who *should* govern."[14]

Later, the Court said, "the degree to which speech is protected cannot turn on a legislative or judicial determination that particular speech is useful to the democratic process. The First Amendment does not contemplate such 'ad hoc balancing of relative social costs and benefits.'"[15]

But the government may not merely assert a "corruption" interest in order to burden the fundamental right to associate via aggregate contribution limits.[16] Instead, the aggregate contribution limit must also be a means closely drawn to vindicate the government's interest while avoiding burdening the right of association.[17] So, while the *McCutcheon* decision stated that "base limits"—that is, limits on contributions to individual candidates—may be justified as tailored to avoid corruption, the *aggregate* limits must be independently tested. When the Court examined the federal aggregate contribution limits, they failed the analysis.[18]

The problem is that once the aggregate limit cap is reached, such laws ban any further contribution to an additional candidate. In the federal context, the aggregate limits allowed a contributor to "max out" to nine candidates.[19] But giving the same "maxed out" contribution to the tenth candidate cannot be any more corrupting than giving to the prior nine. Therefore, the Court found that the aggregate limits failed to be the least restrictive means of preventing corruption—indeed, aggregate limits "do not serve that function in any meaningful way."[20]

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[13] *Id.* at 18 (Roberts, C.J. for the plurality) (citing *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U. S. ___, No. 10-238 slip op. at 22-23 (2011)); *Davis v. Federal Election Comm'n*, 554 U. S. 724, 741-42 (2008); *and Buckley*, 424 U.S. at 56).

[14] *Id.* at 3 (Roberts, C.J. for the plurality) (citing and quoting *Arizona Free Enterprise Club's Freedom Club PAC*, No. 10-238 slip op. at 25) (emphasis in *McCutcheon*).

[15] *Id.* at 17 (Roberts, C.J. for the plurality) (citing *United States v. Stevens*, 559 U.S. 460, 470 (2010); *and United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000) ("'What the Constitution says is that' value judgments 'are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority'")).

[16] *Shrink Mo. Gov't PAC*, 528 U.S. at 392 (citing and discussing *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (opinion of Breyer, J.)).

[17] *Id.* at 10 (Roberts, C.J. for the plurality); *see also Randall v. Sorrell*, 548 U.S. 230, 248 (2006).

[18] *Id.* at 39-40 (Roberts, C.J. for the plurality).

[19] *Id.* at 15 (Roberts, C.J. for the plurality); *see also*, 2 U.S.C. § 441a(1)(a).

[20] *Id.* at 22 (Roberts, C.J. for the plurality).

Limits on contributions to political committees (also known as "PACs") suffer similar problems. Giving to PACs "significantly dilute[s]" the power of the single contributor's check because it is gathered with many other contributors.[21] Furthermore, once given to a PAC, the contributor loses control over how his money will be spent.[22] Now diluted and no longer able to be directed by the contributor, the contribution to the PAC loses its corrupting ability.[23] The risk of "dollars for favors" is so low that the aggregate limits on contributing *to* PACs loses its justification and is therefore no longer properly tailored.

Make no mistake: aggregate limits are strong medicine. The opinion explains: "An aggregate limit on *how many* candidates and committees an individual may support through contributions is not a 'modest restraint' at all. The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."[24] The Chief Justice continues: "To require one person to contribute at lower levels than others because he wants to support more candidates or causes is to impose a special burden on broader participation in the democratic process. And as we have recently admonished, the Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights."[25]

McCutcheon makes the constitutionality of N.Y. ELEC. LAW § 14–114(8) suspect. The Court is now on record noting the heightened standard of review for contribution limits generally, and aggregate contribution limits in particular. The federal system could not survive the intense scrutiny of the Supreme Court because the federal laws were not properly tailored to their stated interest. Likewise, since N.Y. ELEC. LAW § 14–114(8) so closely resembles the federal statute, it almost certainly fails that test as well.

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Even before the *McCutcheon* ruling, states were acting to eliminate aggregate limit statutes, in part due to a growing recognition that such statutes burden First Amendment rights. In Arizona, for example, Governor Jan Brewer (R) signed a bill into law in April 2013, which raised existing state contribution limits on the amount individuals and PACs may give to candidate campaigns, and eliminated Arizona's aggregate limits on contributions from individuals and PACs to statewide and legislative candidates, freeing individuals and groups to contribute up to the limit to as many candidates as they wish. After *McCutcheon*,

[21] *Id.* at 23 (Roberts, C.J. for the plurality).
[22] *Id.* (Roberts, C.J. for the plurality).
[23] *Id.* at 23-24 (Roberts, C.J. for the plurality).
[24] *Id.* at 15 (Roberts, C.J. for the plurality).
[25] *Id.* at 16 (Roberts, C.J. for the plurality) (citing *Davis,* 554 U. S. at 739).

Massachusetts and Maryland moved quickly to avoid running afoul of the new decision. New York needs to follow suit as well, recognizing the important First Amendment rights at stake and reforming its laws accordingly.

If you have any questions, please feel free to contact me at (703) 894-6800 or at adickerson@campaignfreedom.org. Thank you for considering our comments. We look forward to working with you, your staff, and the state to develop the necessary reforms to New York's law in the wake of *McCutcheon*.