Oral Comments of Bradley A. Smith
Federal Election Commission
Hearing on
Advance Notice of Proposed Rulemaking in Light of *McCutcheon, et al. v. FEC*
February 11, 2015

Thank you Chair Ravel, Vice-Chair Petersen, and Commissioners.

I am pleased to appear here today as the Chairman of the Center for Competitive Politics, and as a member of the public. As you know, I have read, thought, and written a great deal on this subject. And this extensive thought informs the comments I bring to you today from my home in the seat of national power, Granville, Ohio, population 5646.

As we start this long day of comment, it is worth reminding ourselves that the United States today has more disclosure laws in effect that any prior time in our nation's history. Indeed, campaign finance generally is regulated more heavily at the federal level than at any time prior to 1975, and in many ways, regulated more heavily than at any time prior to 2003. Federal laws and regulations governing campaign finance total over 376,000 words, not including advisory opinions, general statements of policy, and the like. That is about 75 percent longer than Plato's *Republic*, generally considered the definitive philosophical treatise on questions facing government. And it is further worth reminding ourselves that for all the outrage generated by those opposed to the Supreme Court's eminently sensible, doctrinally ordinary First Amendment rulings in *Citizens United v. FEC* and *McCutcheon v. FEC*, no federal disclosure laws have been repealed nor were any struck down by the courts in those cases.

While the Courts have not struck down any federal disclosure laws, it is not true, as some have suggested, that the Supreme Court has given its blessing to disclosure laws much broader than those already on the books. The Supreme Court has a long history of striking down overly broad disclosure rules, either facially or as applied, in *Thomas v. Collins*, *NAACP v. Alabama*, *NAACP v. Button*, *Talley v. California*, *Bates v. Little Rock*, *Brown v. Socialist Workers '74 Campaign Committee*, *Meyer v. Grant*, *Buckley v. American Constitutional Law Foundation*, and *McIntyre v. Ohio Elections Commission*, to name some of the most prominent decisions. In *Massachusetts Citizens for Life v. FEC*, the Court struck down laws extending the reach of disclosure through the definition of political committee. And in *Buckley v. Valeo* itself, the Court upheld FECA's disclosure requirements only after dramatically narrowing their reach and scope, prohibiting many of the same things that are proposed for added compulsory disclosure today.

I do believe that there are things that can and should be done to make disclosure and campaign finance laws work more effectively, such as substantially raising the threshold for reporting of contributions and for registering as a political committee. The Commission has

unanimously recommended that Congress make several of these legislative changes to disclosure rules, and Congress would be wise to heed those recommendations. If changes to disclosure rules are to be successful, they will occur in the context of legislative compromise, and cannot be either statutorily or successfully dictated by this agency. Agency action, in fact, would probably make the possibilities for legislative compromise less likely.

In issuing this ANPRM, the Commission relies heavily upon Chief Justice Roberts's indication that "multiple avenues [are] available to *Congress* that would serve the Government's interest in preventing circumvention while avoiding 'unnecessary abridgment' of First Amendment rights.'"

Merely because the Chief Justice suggested, as part of a First Amendment analysis, a number of measures that might be more carefully constructed than a blunt aggregate limit does not mean those measures would necessarily survive the required "closely drawn" analysis in the federal courts. As the *McCutcheon* Court stated, "[w]e do not mean to opine on the validity of any particular proposal."

Nor, for that matter, does the Chief Justice's repeated suggestions that *Congress* could plausibly take up additional anti-circumvention measures necessarily mean that the *FEC* may legislate in Congress's stead. ("Importantly," said the Court, "there are multiple avenues available to *Congress* that would serve the Government's anticircumvention interest"); it wrote "If *Congress* agrees, it might…; *id.* and "[I]f *Congress* believes…it could require"; *and* "*Congress* might also consider…"; and "The point is that there are numerous alternative approaches available to *Congress*…"). Indeed, in only *one* circumstance did the Court suggest that the Commission might have authority to adopt stricter anti-circumvention measures. That was in the context of PACs, where it noted that "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"). Again, even there, the Supreme Court was not issuing an advisory opinion suggesting that the FEC *could* permissibly do this. But the decision to explicitly mention the FEC in only one circumstance, and Congress in others, is telling.

Any actions that the Commission takes must contain the "reasoned analysis" necessitated by the Administrative Procedure Act, and must then survive review under *Chevron v. Natural Resources Defense Council*.

Before considering the contents of any proposed rule change, then, the Commission must first consider whether existing rules are sufficient. Under current regulations, a "person may contribute to a candidate…and also to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as… [t]he contributor does not give with the knowledge that a substantial portion will be contributed to, … that candidate for the same election." 11 C.F.R. § 110.1(h).

In other words, the Commission's rules already prohibit earmarking, and, even before *McCutcheon*, donors were theoretically able to use contributions to PACs to skirt the limit on contributions to individual candidates. Yet, nothing suggests that this was a major problem for

the Commission. The Commission has successfully prosecuted cases under 110.1(h), both in federal court, see e.g. FEC v. Nat'l Republican Senatorial Comm., 966 F.2d 1471 (D.C. Cir. 1992), and in obtaining settlements at the Commission level, see e.g. MURs 4568 (Triad Management Services Inc.), 4633 (Riley for Congress), 4634 (Sam Brownback for Congress), 4736 (Rick Hill for Congress), and 5274 (Missouri State Democratic Committee).

During the course of the *McCutcheon* case, counsel for the United States and *amici curiae* floated numerous hypotheticals suggesting that absent an aggregate cap on contributions, informal earmarking that skirted the existing legal prohibitions might occur. These theories are highly unlikely to occur in reality, and there's no evidence they occurred in the 2014 election cycle. The *McCutcheon* majority itself found such theories "implausible" and "unlikely." The Court noted that the district court erred by engaging in such "speculation." It considered such scenarios "divorced from reality," and it clearly stated that the government may not by statute "further the impermissible objective of simply limiting the amount of money in political campaigns" by claiming "circumvention," given the "improbability of circumvention."

In short, while the Court suggested that certain regulatory steps short of an aggregate ban on contributions might be a less restrictive way for the government to accomplish its objectives, it made clear that such means must address an actual, and not a hypothetical, problem. Moreover, it expressed clear doubts that large-scale circumvention of existing laws and regulations is likely.

Thus, any new rules would require some support beyond the mere fear that terrible things might occur – things which, we emphasize, do not appear to have occurred in the most recent, post-*McCutcheon,* election cycle. And if such alleged evils are not readily apparent in the FEC's files, it is unlikely that this burden can be met.

Unfortunately, time constraints don't allow for us to have a more serious discussion today. Let me conclude, then, by noting that I have heard much made of the fact that the Commission has received over 30,000 comments on this ANPRM, most clamoring for more restrictions on political speech and campaign financing, according to Commissioner Weintraub. Of course, just last year, the Internal Revenue Service received about 170,000 comments urging it not to regulate political speech. And it was a little over a decade ago that this agency received well over 100,000 comments, the substantial majority opposed, to an NPRM that would have expanded the Agency's reach, particularly in terms of disclosure. At that time, Commissioner Weintraub stood with me against overreacting to events of the day – remember the evil *du jour* back then was "527s." Who hears about 527s anymore? Today's villain *du jour* makes up something in the vicinity of 5 percent of political spending, probably less. And we know that because far from being truly "dark," the groups that do that spending must disclose that spending.

So rather than spend time on divisive measures of dubious constitutionality in response to alleged problems of dubious dimension, I would urge this Commission to focus on modest but real reforms to its processes that can be accomplished. A bipartisan group, which I participated in, recently submitted a Petition for Rulemaking with several such ideas, and I would offer that as a place to start. Thank you.