UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LIBERTARIAN NATIONAL COMMITTEE, INC.,	)	
Plaintiff,	)	Civ. No. 11-562 (RLW)
v.	)	
FEDERAL ELECTION COMMISSION,	)	JOINT STATUS REPORT
Defendant.	)	

JOINT STATUS REPORT

Pursuant to the Court's minute order dated February 21, 2013, the parties have met and conferred, and they now submit this joint status report briefly setting forth their joint and respective positions on whether the Supreme Court's decision to note probable jurisdiction in *McCutcheon v. FEC* (No. 12-536) should affect further proceedings in this case.

Plaintiff Libertarian National Committee, Inc. ("LNC") and defendant Federal Election Commission agree that the Supreme Court's action in *McCutcheon* should not delay this Court's consideration of the LNC's pending motion for certification pursuant to 2 U.S.C. § 437h and the Commission's pending motion for summary judgment.

The parties disagree, however, on whether the Supreme Court's action in *McCutcheon* will substantively affect the proceedings in this case.

Plaintiff's Position

On February 19, 2013, the United States Supreme Court announced it would hear the merits of *McCutcheon v. FEC*. The Court's decision amply demonstrates that the issues before

this Court remain live constitutional questions and therefore cannot be frivolous under the established interpretation of 2 U.S.C. § 437h.

McCutcheon is being heard on a direct appeal from this Court, where *McCutcheon* was understood as directly challenging the established dichotomy between contributions and expenditures adopted by the U.S Supreme Court in *Buckley v. Valeo*. The *McCutcheon* plaintiffs argued that the challenged contribution limits ought to be reviewed under strict scrutiny because they are a "burden on political speech." Mem. in Support of Prelim. Inj., 5-6 *McCutcheon v. FEC*, No. 1:12-cv-01034, Doc. 8.1 (June 22, 2012). Those plaintiffs "expressly call[ed] for the reconsideration of *Buckley*" on this question to "preserve…[that] argument for the U.S. Supreme Court." *Id.* at 6; 6 n.1.

In ruling against the *McCutcheon* plaintiffs, this Court "acknowledge[d that] the constitutional line between political speech and political contributions grows increasingly difficult to discern." *McCutcheon v. FEC*, No. 1:12-cv-01034, slip op. at 6 (D.D.C. Sept. 28, 2012). This Court further stated that the *McCutcheon* plaintiffs "raise[d] the troubling possibility that *Citizens United* undermined the entire contribution limits scheme" and noted that the case could "ultimately spur a new evaluation of *Buckley*." *Id*. at 13.

Should the high court adopt the *McCutcheon* plaintiffs' view that aggregate contribution limits affect "core political expression," this would revolutionize the jurisprudence of contribution limits. *McCutcheon Juris. Statement* at 4. A re-interpretation of contribution limits as an act of political expression reviewable under strict scrutiny would obviously have great import on this case, which argues that "individuals acting in a testamentary capacity…are not exercising their associational rights, but their right of free speech in desiring to leave a political legacy." First Amend. Compl., 6 *LNC v. FEC*, No. 1:11-cv-00562 Doc. 13 (May 27, 2011).

Furthermore, *McCutcheon* seeks to apply the reasoning of *Randall v. Sorrell*, 548 U.S. 230 (2006), to federal contribution limits. *See McCutcheon Juris. Statement* at 29. *Randall* involved unconstitutionally-low contribution limits to Vermont state-party committees. *Randall*, 548 U.S. at 262. Using simple arithmetic, the *McCutcheon* plaintiffs seek to apply the reasoning of *Randall* to claim that the federal contribution limits are too low, in proportion to the federal electorate's size. *Id*. at 30. McCutcheon and the RNC claim that the *Randall*-approved aggregate contribution limits would be $184,000 per biennium to political parties. *Id*.

If the Supreme Court adopts McCutcheon's *Randall* analysis, then the base contribution limits would be in doubt, and likely would be subject to challenge under the new *Randall/McCutcheon* analysis. The question is before the Court as Question Presented 3, and is therefore a non-frivolous claim in the eyes of the Supreme Court. *See McCutcheon Juris. Statement* at i. This case presents a minor party—the LNC—that also challenges base contribution limits to parties, but in a different, narrower context.

The Supreme Court's decision to note probable jurisdiction in *McCutcheon* may positively impact the merits of Plaintiff's claims when they are considered, on the merits, by the Court of Appeals. But the Supreme Court's decision to review certain contribution limits to political parties, possibly under strict scrutiny, demonstrates that the issues presented in this case remain live constitutional questions that have not been legally foreclosed by Supreme Court precedent. Consequently, they are not frivolous, and this Court should act to quickly certify this case to the Court of Appeals.

Defendant's Position

It is the Commission's position that the Supreme Court's consideration of *McCutcheon* is unlikely to affect the merits of this case. *McCutcheon* involves a challenge to the Federal Election Campaign Act's ("FECA") aggregate contribution limits, 2 U.S.C. § 441a(a)(3), not the base contribution limits at issue here, 2 U.S.C. §§ 441a(a)(1)(B), 441i(a)(1). *See McCutcheon v. FEC*, --- F. Supp. 2d. ---, No. 12-1034, 2012 WL 4466482, at *5 (D.D.C. Sept. 28, 2012) (three-judge court) ("Plaintiffs do not . . . challenge the base contribution limits,[] so we may assume they are valid expressions of the government's anticorruption interest."). In sum, *McCutcheon* involves a different kind of contribution limit under FECA and, in any event, does not involve bequests; thus, the Supreme Court's decision to note probable jurisdiction in *McCutcheon* says nothing about whether the LNC has presented a substantial constitutional question. Accordingly, this Court should proceed to consider whether the merits of the LNC's claim warrant review by the *en banc* Court of Appeals pursuant to section 437h.

Respectfully submitted,

/s/ Alan Gura
Alan Gura
Gura & Possessky, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085/Fax: 703.997.7665
alan@gurapossessky.com

/s/ Allen Dickerson
Allen Dickerson
Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, Virginia 22314
703.894.6800/Fax: 703.894.6811
adickerson@campaignfreedom.org

Anthony Herman
General Counsel
aherman@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law
lstevenson@fec.gov

David Kolker (D.C. Bar No. 394558)
Associate General Counsel
dkolker@fec.gov

Harry J. Summers
Assistant General Counsel
hsummers@fec.gov

COUNSEL FOR PLAINTIFF
LIBERTARIAN NATIONAL
COMMITTEE, INC.

/s/ Kevin P. Hancock
Kevin P. Hancock
Attorney
khancock@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

February 22, 2013