UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA JAMES,	)	
Plaintiff,	)	Civ. No. 12-1451 (JRB, RLW, JEB)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSITION TO RESPONSE TO ORDER TO SHOW CAUSE
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

Pursuant to the Court's Minute Order of October 11, 2012, defendant Federal Election Commission respectfully submits the following opposition to plaintiff's Response to Order to Show Cause (Docket No. 17) ("Pl.'s Show Cause Br.").

This Court's opinion in *McCutcheon v. FEC*[1] disposes of plaintiff's claims. Plaintiff's plan to contribute more than $100,000 to federal candidates presents at least the same potential of circumventing the anti-corruption provisions of the Federal Election Campaign Act ("FECA") as did Mr. McCutcheon's plan to contribute more than $50,000 to federal candidates. Plaintiff's attempts to distinguish this case from *McCutcheon* fail because they rely entirely on inaccurate and irrelevant assertions of law, none of which can overcome *McCutcheon*'s faithful application of *Buckley v. Valeo*, 424 U.S. 1 (1976), or provide any basis for reaching a different result here.

LEGAL AND FACTUAL BACKGROUND

FECA provides than an individual may contribute no more than $2,500 per election to any federal candidate, 2 U.S.C. § 441a(a)(1), and no more than $46,200 to all federal candidates

[1] Civ. No. 12-1034, slip op. (D.D.C. Sept. 28, 2012).

combined during a two-year election cycle, 2 U.S.C. § 441a(a)(3)(A). The history and purpose of these provisions are set forth in *McCutcheon*, slip op. at 1-3. *See also* Def.'s Opp. to Pl.'s Mot. for Prelim. Inj. at 1-4, *McCutcheon v. FEC*, Civ. No. 12-1034 (D.D.C. July 9, 2012 (Docket No. 16)) ("FEC Br.").

Plaintiff Virginia James is an individual United States citizen who alleges a desire to contribute more than $46,200 but no more than $117,000 to federal candidates during the current election cycle. (Compl. ¶ 5.) So far, James has contributed $27,000 to candidates and $5,000 to a federal political committee ("PAC"). (Compl. ¶¶ 15, 17.) She has also given more than $1 million to "super PACs," *i.e.*, political committees that make no direct contributions but pay for independent expenditures that expressly advocate the election or defeat of candidates.[2]

ARGUMENT

This Court's opinion in *McCutcheon* — particularly its interpretation and application of *Buckley* — controls this case. *McCutcheon* noted that at the time of *Buckley*, FECA imposed two relevant limits on contributions by individuals: A base limit of $1,000 on contributions to candidates, and an aggregate limit of $25,000 per two-year election cycle to all candidates, political parties, and PACs combined. *McCutcheon*, slip op. at 1-2; *see generally* FEC Br. at 1-4 (describing statutory scheme). In assessing the constitutionality of these provisions, *Buckley* acknowledged that the aggregate limit was a "restriction on associational freedom" but held that "this quite modest restraint upon protected political activity serves to prevent evasion" of the base limit on contributions to candidates. 424 U.S. at 38; *see also* FEC Br. at 3, 7-9 (discussing *Buckley*). Recognizing this, *McCutcheon* reiterated *Buckley*'s conclusion that the aggregate limit is constitutional as "'a corollary of the basic individual contribution limitation,'" *McCutcheon*,

[2] A list of plaintiff's contributions can be obtained by entering her name into the FEC's contribution-search page at http://www.fec.gov/finance/disclosure/norindsea.shtml.

slip op. at 9 (quoting *Buckley*, 424 U.S. at 38), which the Supreme Court had found constitutional earlier in its opinion, *see Buckley*, at 26-29.

Regarding limits on individual contributions to candidates, the *only* thing that has changed since *Buckley* is that the dollar amounts have been raised: The base limit is now $2,500, and the aggregate limit is now $46,200. *See* 2 U.S.C. § 441a(a)(1); *McCutcheon*, slip op. at 3. As *McCutcheon* held, the fact that these dollar amounts are now different than they were at the time of *Buckley* is not of constitutional concern. *McCutcheon*, slip op. at 10-11 (rejecting argument that Court should "parse legislative judgment about what limits to impose"). Accordingly, the only way plaintiff can prevail here is by demonstrating that *Buckley*'s upholding of the aggregate limit is no longer good law — an exceedingly difficult burden to meet, given that the Supreme Court has never overruled that holding or called it into question. *McCutcheon*, slip op. at 6 ("[W]e decline Plaintiffs' invitation to anticipate the Supreme Court's agenda.") (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

McCutcheon emphatically confirms *Buckley*'s continued viability as to the important anti-circumvention interest served by FECA's aggregate contribution limits. *McCutcheon*, slip op. at 9. Indeed, *McCutcheon* disposes of plaintiff's claims in their entirety because candidates — like political parties and PACs — can serve as conduits for circumventing the individual contribution limits. Just as a contributor could give $5,000 to a number of PACs that in turn give to one candidate, a contributor could give $5,000 to multiple candidates who in turn give to one candidate. This is not mere speculation. Members in "safe" legislative districts (or with ample resources) collectively contribute millions of dollars to other members of their party facing more

difficult elections.[3] For example, in this election cycle alone, federal candidates have used the contributions they received to make the following contributions to other candidates:

- 57 contributions totaling $71,000 from federal candidates' committees to the campaign of Kathy Hochul
- 45 contributions totaling more than $60,000 from federal candidates' committees to the campaign of Joe Donnelly
- 44 contributions totaling more than $59,000 from federal candidates' committees to the campaign of Francisco Canseco
- 43 contributions totaling $57,500 from federal candidates' committees to the campaign of Betty Sutton
- 45 contributions totaling $57,000 from federal candidates' committees to the campaign of Lois Capps
- 35 contributions totaling $54,000 from federal candidates' committees to the campaign of Louise Slaughter

As these examples demonstrate, plaintiff's desired relief would allow her to give over $100,000 to candidates with ample war chests, knowing that they are in turn likely to contribute that money to the campaigns of their threatened colleagues. *See Buckley*, 424 U.S. at 38 (noting that aggregate limit prevents contributor from evading limit on contributions to a candidate "through the use of unearmarked contributions to political committees likely to contribute to that candidate"); 2 U.S.C. § 431(5) (defining a candidate's "principal campaign committee" as one type of political committee).[4] Plaintiff baldly asserts that her contributions are "not capable of

[3] Except where noted otherwise, all contribution and transfer figures in this brief were calculated from the FEC databases at http://www.fec.gov/finance/disclosure/ftpdet.shtml and http://www.fec.gov/data/DataCatalog.do?cf=downloadable. At the time of filing, the databases for the current election cycle include transactions from January 2011 through September 2012.

[4] The phenomenon of "leadership PACs" — *i.e.*, a PAC established by an elected official to collect and spend funds in support of his colleagues — further demonstrates candidates' willingness to serve as conduits between individual contributors and other candidates. There are hundreds of leadership PACs, and they have raised over $100,000,000 in the current election cycle alone. *See* FEC, *2012 Leadership PACs and Sponsors*,

creating an anti-circumvention concern" (*see* Pl.'s Show Cause Br. at 10), but she provides no facts or argument whatsoever to support this contention, which must in any event fail in light of the plain holdings of *McCutcheon* and *Buckley*, as discussed above. Channeling funds through this method could easily circumvent the $2,500 base limit on plaintiff's direct contributions to each of the targeted candidates, and the aggregate limit is a constitutional method of preventing such circumvention.[5] *See McCutcheon*, slip op. at 9-10.

Furthermore, there is no limit on the amount that a candidate can contribute to a political party. Candidates in safe seats accordingly transfer campaign funds to their parties on a massive scale, including more than $24 million to the national Democratic Party and more than $35 million to the national Republican Party in this election cycle. These transfers finance the parties' activities on behalf of candidates in contested races — activities such as "coordinated expenditures, which have no 'significant functional difference' from . . . direct candidate contributions." *McCutcheon*, slip op. at 9-10 (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 460 (2001)). Thus, in the absence of the aggregate limit, there would be a potential for circumvention identical to that which this Court recognized in *McCutcheon*: contributors giving a large number of contributions within the base limits (but aggregating well above the aggregate limits) with the understanding that many of these contributions will end up in the hands of the parties to be spent in support of the contributors' preferred candidates. As

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http://www.fec.gov/data/Leadership.do?format=html&election_yr=2012 (last visited Oct. 19, 2012). Officeholders have used these funds to contribute more than $30,000,000 to other federal candidates. *See* OpenSecrets.org, *Leadership PACs*, http://www.opensecrets.org/pacs/industry.php?txt=Q03&cycle=2012 (last visited Oct. 19, 2012).

[5] As *Buckley* and *McCutcheon* each recognized, it is irrelevant for constitutional purposes whether plaintiff herself intends to engage in such circumvention. *See McCutcheon*, slip op. at 12 ("The *Buckley* Court rejected challenges that the contribution limits are overbroad because most contributors are not seeking a quo for their quid . . . . [W]e join the *Buckley* Court in rejecting [that claim] . . . .") (citing 424 U.S. at 30).

this Court held, "it may seem unlikely that so many separate entities would willingly serve as conduits for a single contributor's interests. But *it is not hard to imagine a situation where the parties implicitly agree to such a system*, and there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction." *McCutcheon*, slip op. at 10 (emphasis added; internal citations omitted).

In addition to asking the Court to disregard *McCutcheon* and *Buckley*, plaintiff claims that the aggregate limit on contributions to candidates is unconstitutional because it "force[s her] to associate with groups or organizations simply to contribute up to the full biennial aggregate limits." (Pl.'s Show Cause Br. at 10.) She argues that, rather than being limited to $46,200 in candidate contributions, she must be allowed to contribute $117,000 directly to candidates because "Congress already allows" that amount through the candidate and non-candidate aggregate limits combined. (*Id*. at 3.) Plaintiff's argument seems to be premised on a complete misunderstanding of the relevant statutory provisions. There is no $117,000 aggregate contribution limit. Rather, FECA establishes *separate* aggregate limits for contributions to candidates, 2 U.S.C. § 441a(a)(3)(A), and for contributions to non-candidate entities, 2 U.S.C. § 441a(a)(3)(B). *See McCutcheon*, slip op. at 2 (noting that statute comprises "a set of aggregate limits" and differentiating it from prior version, which contained a single aggregate limit). Plaintiff cites no authority of any kind to support her tacit assumption that the Constitution prohibits Congress from establishing these limits separately.

More specifically, there is no case law remotely suggesting that the First Amendment requires the total aggregate limit for contributions to all entities to be the same as the aggregate limit for direct contributions to candidates. To the contrary, *McCutcheon*'s holding that the aggregate limits are constitutional anti-circumvention measures, slip op. at 9-10, rejected

challenges to *each* of the aggregate limits, including the *McCutcheon* plaintiffs' explicit challenge to the aggregate limit on candidate contributions (separate and apart from their challenge to the non-candidate limit). *See McCutcheon*, slip op. at 4 (noting McCutcheon's allegation that his intended contributions "would amount to aggregate candidate contributions of $54,400, *and* [non-candidate] contributions of $75,000") (emphasis added);[6] *see also McCutcheon v. FEC*, Civ. No. 12-1034, Compl. ¶¶ 121-142 (D.D.C. June 22, 2012) (devoting two counts of five-count complaint to challenging aggregate limit on contributions to candidates). Plaintiff's attempt to avoid that holding by recharacterizing it as addressing only a non-existent $117,000 limit has no basis in either the Court's opinion or the pleadings that led to it.

Moreover, the fundamental import of plaintiff's argument is that the limit of $46,200 on contributions to candidates is simply too low in comparison to (or when combined with) the $70,800 limit on other contributions. That claim cannot survive *McCutcheon*, in which this Court declined to second-guess Congress's judgment as to the exact dollar amount of each aggregate limit. *See McCutcheon*, slip op. at 11 (refusing to impute constitutional significance to plaintiffs' "argu[ment] that if an individual wanted to contribute equally to one candidate . . . in all 468 federal races . . . , he would be limited to contributing $85.29 per candidate") (internal quotation marks omitted). And like the individual plaintiff in *McCutcheon*, Ms. James remains free to "to volunteer, join political associations, and engage in independent expenditures," *id*. at 12 (citing *Wagner v. FEC*, Civ. No. 11-1841, 2012 WL 1255145, at *9 (D.D.C. Apr. 16, 2012)),

[6] As this quotation indicates, plaintiff's statement (Pl.'s Show Cause Br. at 7) that *McCutcheon* "makes no mention of the specific contributions the parties wished to make" is incorrect. *See also McCutcheon*, slip op. at 4 ("[McCutcheon] wants to contribute $1,776 to twelve other candidates and enough money to the RNC, NRSC, and NRCC to bring his total contributions up to $25,000 each.").

to further "associate one-on-one with candidates" as she desires (Pl.'s Show Cause Br. at 10).[7] All of these holdings necessarily control plaintiff's novel attempt to conflate FECA's aggregate limits: She cannot prevail without demonstrating the unconstitutionality of either the existence or size of the aggregate limit on *contributions to candidates* specifically, and *McCutcheon* upheld that limit in both respects.

Plaintiff's final and equally meritless argument is that her complaint cannot be foreclosed by *McCutcheon* because this case has been styled an "as-applied" challenge. (*See* Pl.'s Show Cause Br. at 5-8.) As a general matter, plaintiff is correct that a decision upholding a statute on its face does not necessary foreclose subsequent as-applied challenges. *See Wis. Right to Life Inc. v. FEC*, 546 U.S. 410 (2006) (per curiam). But as another three-judge court in this District has noted in rejecting the same preclusion-avoidance argument plaintiff raises here:

> In general, a plaintiff cannot successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision. Doing so is not so much an as-applied challenge as it is an argument for overruling a precedent.

Republican Nat'l Comm. v. FEC, 698 F. Supp. 2d 150, 157 (D.D.C.) (three-judge court), *aff'd mem.*, 130 S. Ct. 3544 (2010). Because Ms. James desires to contribute to candidates more than twice what Mr. McCutcheon had wished to contribute — $117,000 versus $54,400 — this Court's rejection of Mr. McCutcheon's challenge to this aggregate limit necessarily precludes her more ambitious request. The reasoning of *Republican National Committee* thus applies with full force: Plaintiff's "as-applied" challenge cannot succeed without the Supreme Court

[7] The Court's observation that contribution limits leave contributors free to support candidates in other ways is particularly applicable to plaintiff, who has given over $1 million during this election cycle to finance independent advocacy for or against candidates. *See supra* p. 2; *see also Buckley*, 424 U.S. at 21-22 (noting that contribution limits leave contributors free to "discuss candidates and issues" or "become a member of any political association and to assist personally in the association's efforts on behalf of candidates").

overruling *Buckley* and this Court overruling *McCutcheon*. Because the former is impossible here and plaintiff provides no basis for the latter, her claim is foreclosed.

* * *

"Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation," Congress has the power to "[p]revent[ ] corrupting activity from shifting" to take advantage of gaps in the statutory regime. *McConnell v. FEC*, 540 U.S. 93, 165-66 (2003). "Circumvention, after all, can be 'very hard to trace.'" *McCutcheon*, slip op. at 9 (quoting *Colo. Republican*, 533 U.S. 431, 462 (2001)). Thus, Congress must have "sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process." *McConnell*, 540 U.S. at 137. The aggregate limit on contributions to candidates protects that integrity while leaving contributors free to "discuss candidates and issues" or "become a member of any political association and to assist personally in the association's efforts on behalf of candidates," *Buckley*, 424 U.S. at 21-22, or "to volunteer, join political associations, and engage in independent expenditures." *McCutcheon*, slip op. at 12 (citing *Wagner v. FEC*, Civ. No. 11-1841, 2012 WL 1255145, at *9 (D.D.C. Apr. 16, 2012)). The role the aggregate limit plays within this "coherent system" of regulation, *id*. at 10, is therefore constitutional because of "the need to prevent circumvention of the entire scheme," *McConnell*, 540 U.S. at 171-72, and "evasion of the base limits." *McCutcheon*, slip op. at 9.

CONCLUSION

For the foregoing reasons, the Court should hold that this case is controlled by *Buckley* and *McCutcheon*.

Respectfully submitted,

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