IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Virginia James,	)	
	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Civil No. 1:12-cv-01451-JEB-JRB-RLW**
Federal Election Commission,	)	
	)	
	)	
Defendant.	)	
	)	

PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE

On September 28, 2012, this Court issued an opinion and order in *McCutcheon v. FEC,* Civil No. 12-1034, rejecting those plaintiffs' facial challenge to the aggregate limits on contributions to candidate committees. This Court subsequently ordered Plaintiff Virginia James to show cause why her suit should not be dismissed for the reasons set forth in that opinion.

There are three principal reasons why the *McCutcheon* decision does not control here.

First, and most clearly, that ruling relied entirely on the "anti-circumvention" rationale announced in *Buckley v. Valeo,* 424 U.S. 1, 38 (1976).

McCutcheon v. FEC, slip op. at 9 ("we cannot ignore the ability of aggregate limits to prevent evasion of the base limits."). But Ms. James's challenge does not implicate that rationale. Indeed, her preferred course of conduct would substantially *reduce* the possibility that her contributions could be used to circumvent the base limits. Ms. James will contribute only directly to candidate committees, and not to the various entities, such as parties, that both the Supreme Court and this Panel viewed as potential conduits for circumvention. *See McCutcheon* at 9-10.

Second, the *McCutcheon* plaintiffs brought a facial challenge to the aggregate limit on contributions to candidate committees. Ms. James brings a narrow as-applied challenge, one which accepts both the base limitation and the overall limitation imposed by Congress. In such circumstances, as-applied challenges are not foreclosed by a prior ruling on a facial challenge. *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-412 (2006) (*per curium*) ("*WRTL I*") ("In upholding [a section of BCRA] against a facial challenge, we did not purport to resolve future as-applied challenges.").

Third, even if this Panel did view *McCutcheon* as raising merely an as-applied challenge, the differences between that case and this are extensive. *McCutcheon* challenged the aggregate limits to party committees; Ms. James specifically does not wish to contribute to party committees. *McCutcheon* involved

a plaintiff who wished to give substantial sums to committees that could then contribute those funds to candidates, potentially circumventing the limits on contributions to individual candidate committees. Ms. James wishes to give directly to individual candidates, eliminating any possibility of circumventing the limits on such contributions.[1] *McCutcheon* asked this Court to eliminate all aggregate limits, potentially allowing individuals to contribute millions of dollars in each election cycle. *McCutcheon* at 3 n. 1 (noting that an estimate of $3.5 million for individual contributions was, in fact, conservative). Ms. James specifies that she does not intend to give more than the $117,000 Congress already allows.[2] She challenges only the distribution of those funds, and does so in a way that would *lessen* the possibility of circumvention.

I. The *McCutcheon* opinion does not address Ms. James's argument.

This Court upheld the aggregate limit on contributions to candidate committees on pages 9 and 10 of its Memorandum Opinion. It explicitly noted that it did so based on the "ability of aggregate limits to prevent evasion of the base limits." *McCutcheon* at 9. Ms. James's challenge, however, is premised on the fact that her desired activities do not implicate this anti-circumvention concern.

[1] James V.Complaint ¶¶ 13, 21, ECF No. 1.
[2] James V.Complaint ¶¶ 20, 23.

The decision in *Buckley v. Valeo* established that aggregate limits could be enacted

> "to prevent evasion of [individual] contribution limitation[s] by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions *to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." Buckley*, 424 U.S. at 38 (emphasis added).

The *McCutcheon* case presented just such a situation: it sought to lift the aggregate limits on non-candidate committees, precisely the entities *Buckley* identifies as potential conduits for unearmarked contributions.

This Court's opinion in *McCutcheon* therefore appropriately keyed its analysis to *Buckley's* concerns. Specifically, it noted a telling hypothetical: what if an individual contributes $500,000 to a joint fundraising committee, which was then funneled through party committees and spent on coordinated expenditures in support of a particular candidate? *McCutcheon* at 9-10. In such a situation, the supported candidate would "know precisely where to lay the wreath of gratitude." *Id.* at 10. Moreover, despite the transaction costs inherent in such a scheme, "it is not hard to imagine a situation where the parties implicitly agree to such a system" because, in part, of the lack of "meaningful separation between the national party committees and the public officials who control them." *Id.* Consequently, this Court found that the aggregate limits were justified.

But no part of this analysis – the joint fundraising committee, the role of political parties, the possibility of coordinated expenditures, or the size of the underlying contribution – bear any resemblance to Ms. James's claims.

Ms. James does not argue that aggregate limits are unconstitutional. She argues that a law that forbids certain direct contributions to candidates, while allowing those same funds to go to PACs and parties which may, in turn, contribute to those same candidates, cannot withstand constitutional scrutiny. The *McCutcheon* opinion explains the dangers of circumvention, and the role of party committees and PACs in increasing that danger. Such reasoning applied to *McCutcheon,* with its particular plaintiffs: a party committee and an individual wishing to entirely remove aggregate limits. But it does not apply to Ms. James.

II. *McCutcheon* challenged the candidate sub-aggregate limit facially, but Ms. James makes an as-applied challenge.

McCutcheon challenged the "biennial limit on contributions to candidate committees (currently $46,200 per biennium) at 2 U.S.C. § 441a(a)(3)(A) as unconstitutional because it lacks a constitutionally cognizable interest to justify it."[3] McCutcheon sought "a declaratory judgment holding the biennial contribution limit at 2 U.S.C. § 441a(a)(3)(A) unconstitutional because the provision lacks a

[3] McCutcheon V.Compl. ¶ 122, ECF No. 1.

cognizable interest."[4] McCutcheon also sought a declaration that the candidate sub-aggregate limit was unconstitutional because it was too low.[5] That is, the challenge was a facial challenge to the sub-aggregate limit on total candidate contributions.

Moreover, this Court treated the *McCutcheon* claims as facial in rendering its decision. To prevail in a facial challenge, the plaintiffs must show that no set of circumstances exists under which the law would be valid. *Reno v. Flores*, 507 U.S. 292, 301 (1993) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987) and *Schall v. Martin*, 467 U.S. 253, 268 n. 18 (1984)). Facial challenges go beyond the specific facts of the claimant to examine "whether, given all of the challenged provision's potential applications, the legislation creates such a risk of curtailing protected conduct as to be constitutionally unacceptable 'on its face.'" *Sanjour v. EPA*, 56 F.3d 85, 92 n. 10 (D.C. Cir. 1995).

Here, the Court examined the aggregate limit itself, and made use of hypothetical situations under which the aggregate limits could be upheld. For example, the Court posited that an individual could give $500,000 in a single check to a joint fundraising committee, triggering *Buckley's* anti-circumvention interest. *McCutcheon*, slip op. at 9. Furthermore, the Court rejected McCutcheon's arguments that the limits were unconstitutionally low and unconstitutionally overbroad. *Id.* at 10. In so doing, the Court used analysis consistent with a facial

[4] *Id.* Prayer for Relief ¶ 10.
[5] *Id.* Prayer for Relief ¶ 12.

challenge, not as an as-applied challenge. Importantly, the decision makes no mention of the specific contributions the parties wished to make.

A decision on a facial challenge does not foreclose later, as-applied challenges. In *WRTL I*, the Supreme Court specifically held that the fact that a statute was upheld facially does not protect it from an as-applied challenge. *WRTL I*, 546 U.S. at 411-412. Even though *McConnell v. FEC,* 540 U.S. 93 (2003), upheld the Bipartisan Campaign Reform Act ("BCRA"), Pub.L. 107-155, 116 Stat. 81 (2002), § 203, that decision did not preclude subsequent as applied challenges to portions of BCRA. *WRTL I*, 546 U.S. at 411-412; *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456 (2007) ("*WRTL II*").

Indeed, the plaintiffs in *WRTL I* went on to succeed in their as-applied challenge in *WRTL II*. *See WRTL II*, 554 U.S. at 482. While the *McConnell* plaintiffs could not, on their record, "carr[y] their heavy burden of proving" that BCRA was facially overbroad, the Court nonetheless turned its attention to the specific facts presented by WRTL in their as-applied challenge. *WRTL II*, 551 U.S. at 456. Ultimately the Court found that, as applied to the specific ads written by WRTL, BCRA was unconstitutional. *Id.* at 481.

This case presents a similar situation. The *McCutcheon* plaintiffs did not succeed in demonstrating that the limits on aggregate contributions to candidates were either facially unconstitutional or "too low." Nor did they plead specific facts

– such as the maximum contributions the parties intended to make or receive – that would have made an as-applied analysis appropriate.

By contrast, Ms. James does plead such facts. And, while a successful facial challenge to 2 U.S.C. § 441a(a)(3)(A) would have resolved her claims, the decision in *McCutcheon* does not prevent Ms. James from presenting her specific case, on an as-applied basis, to this Court. Just as *McConnell* involved a general attack on BCRA, while *WRTL* involved specific ads with specific language, so *McCutcheon* represented a facial attack on BCRA's aggregate limits, while this case presents specific contributions with specific limits.

III. Even if *McCutcheon* is viewed as an as-applied challenge to the aggregate limit on contributions to candidate committees, the facts in that case differ significantly from the facts presented here.

Generally, as applied challenges are fact-driven. In as applied challenges, different facts can yield different results, even where the same statue is challenged. To the extent, if any, that Mr. McCutcheon challenged the candidate sub-aggregate limit as-applied, the facts in his case are significantly different from those presented here.

Mr. McCutcheon intended to give $54,400 to Federal candidates in the 2012 election cycle.[6] In the next biennium, he intended to give an amount north of

[6] McCutcheon V.Complaint ¶¶ 27, 28.

$60,000 to candidate committees.[7] Importantly, he did not say precisely how much he intended to give in future years.

Combined with his giving to non-candidate committees (a planned $97,000 in the 2012 cycle and an unstated amount in the future), Mr. McCutcheon plainly intended to exceed the $117,000 overall cap on political contributions.[8] Pointedly, McCutcheon sought to donate $25,000 each to the Republican National Committee, the National Republican Senatorial Committee, and the National Republican Congressional Committee.[9]

Furthermore, the *McCutcheon* plaintiffs included both a contributor and a political party, the Republican National Committee ("RNC"). Indeed, the RNC asserted a right to receive the contributions from Mr. McCutcheon.[10] In connection thereto, McCutcheon challenged the limits to national parties and non-candidate committees.[11] Therefore, McCutcheon challenged, by implication, the biennial aggregate contribution limit of $117,000.[12] *McCutcheon* at 4.

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[7] *Id.* ¶32.
[8] *Id.* ¶¶ 37, 38.
[9] *Id.* ¶¶ 34, 35.
[10] *Id.* ¶ 78.
[11] *Id.* ¶¶ 85, 107, 113.
[12] McCutcheon sought to contribute $54,400 to candidates and $97,000 to non-candidate committees, totaling $151,400.

Ms. James's case differs substantially. She specifically wishes *not* to associate with any political party.[13] She brings this challenge alone, without any party, political action committee, or other entity.[14] She is not challenging any of the other sub-aggregate contribution limits. She is not challenging the biennial aggregate limit of $117,000.[15] She merely wishes to associate one-on-one with candidates and not be forced to associate with groups or organizations simply to contribute up to the full biennial aggregate limits.[16]

With different facts comes a different analysis. Ms. James and Mr. McCutcheon include different types of parties and are challenging different aspects of the aggregate limits. Most importantly, Ms. James's contributions would be (1) limited, and (2) not capable of creating an anti-circumvention concern. Therefore, even if the *McCutcheon* verified complaint may be read as asserting an as-applied challenge, and even if this Panel intended to address such a claim in its opinion, Ms. James is not similarly situated to the *McCutcheon* plaintiffs. She consequently deserves full and separate consideration of her claims.

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[13] James V.Compl. ¶ 19; James Opp'n to Designation as a Related Case, p. 2, ECF No. 9.
[14] James V.Compl. ¶ 11.
[15] James V.Compl. ¶¶ 20, 23; James Opp'n to Designation as a Related Case, pp. 2-3.
[16] James V.Compl. ¶¶ 13, 21, 23; James Opp'n to Designation as a Related Case, pp. 2-3.

Conclusion.

McCutcheon does not control the outcome of Ms. James's case. The opinion's reasoning is inapplicable, on its face, to the particular claims she brings before this Court. Moreover, under *WRTL I*, an as-applied challenge may be brought even if a facial challenge to the same statute previously failed. Finally, the facts in *McCutcheon* differ significantly from those posed by this case, so Ms. James is not similarly situated to the *McCutcheon* plaintiffs. Therefore, for the forgoing reasons, this case should not be dismissed for the reasons set forth in *McCutcheon*.

Plaintiff hastens to add that the election in which Ms. James wishes to participate in less than one month away. Consequently, she requests that this Court schedule a hearing on her claims for the earliest possible time, so that her claims may be heard while there is still time for her to exercise her rights.

Respectfully submitted this 9th day of October, 2012.

/s/ Allen Dickerson
Allen Dickerson
DC Bar No. 1003781
Tyler Martinez*
Anne Marie Mackin*
Center for Competitive Politics
124 West Street South,
Suite 201

Alexandria, Virginia 22314
Phone: 703.894.6800

*Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of October, 2012, I caused the foregoing documents to be filed electronically using the CM/ECF system, causing notice to be sent to the parties listed below:

Adav Noti anoti@fec.gov
Counsel for Defendant, FEC

s/ Allen Dickerson
Allen Dickerson

Counsel for Plaintiff