Written Testimony of
Anne Marie Mackin
Staff Attorney, Center for Competitive Politics

Before the Joint Corporations, Elections and Political Subdivisions Interim Committee
Wyoming State Legislature
June 5, 2014

Co-Chairs Case and Berger and members of the Committee, on behalf of the Center for Competitive Politics, thank you for inviting me to present our analysis of the constitutionality of Wyoming's aggregate campaign contribution limits.

My name is Anne Marie Mackin, and I am an attorney at the Center for Competitive Politics ("CCP"). CCP is a nonpartisan, nonprofit 501(c)(3) organization dedicated to the promotion and protection of First Amendment political rights, including speech, assembly, and petition. Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, CCP engages in scholarship and education about the benefits of increased freedom and fairness in the electoral process. CCP also operates a *pro bono* law center, which is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, CCP presently represents nonprofit associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada, and is also involved in litigation against the state of California.

Today, I will address WYO. STAT. ANN. § 22–25–102(c)(ii) in the wake of the Supreme Court's recent ruling in *McCutcheon v. Federal Election Commission*.[1] This statute prohibits an individual from contributing in excess of $25,000 in the aggregate to all Wyoming candidates and political committees per two-year period. The statute's successor, WYO. STAT. ANN. § 22–25–102(c)(iii), set to take effect in 2015, will continue to cap aggregate contributions, with the increased limit of $50,000.

The *McCutcheon* decision invalidated the federal aggregate limit on contributions by individuals to candidate campaigns and political committees, which is essentially identical to Wyoming's law. In his controlling opinion, Chief Justice John 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]

[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)).

With the 2014 elections rapidly approaching, I appear today to urge you to take quick action to ensure that Wyoming law comports with the *McCutcheon* decision. Such action will ensure that Wyoming does not violate its citizens' First Amendment rights, and will save the state the expense of constitutional litigation, a likely result if the aggregate limits remain in place.

Two key aspects of the *McCutcheon* opinion render aggregate limits – like the provision that WYO. STAT. ANN. § 22–25–102(c)(ii), and its successor, § 22-25-102(c)(iii), contain – difficult for states to defend in court. First, *McCutcheon* reiterated that contribution limits are subject to a high level of constitutional scrutiny. Second, the Court appeared to significantly narrow the constitutionally sufficient justifications for contribution limits. I discuss both of these points in turn.

I. Laws restricting contributions must be closely drawn to the government's interest in preventing corruption or its appearance.

Contribution limits implicate fundamental First Amendment interests.[3] When Congress began to substantially regulate campaign finance in the 1970s, the Supreme Court's *Buckley v. Valeo* decision identified the act of making campaign contributions as a component of the First Amendment right to associate. The Court therefore determined that limits on campaign contributions are 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 that interest.[6] Contribution limits – compared to laws that wholly ban First Amendment activity – impose a lesser burden on the right to associate. Thus, while laws banning associational activity are typically subject to strict scrutiny, laws that limit such activity are often subject to "the closest scrutiny." "Under 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] But importantly, the Court noted that "[i]n 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

[3] *McCutcheon*, slip op. at 7 (Roberts, C.J. for the plurality); *see also Buckley*, 424 U.S. at 14.
[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).

drawn to avoid unnecessary abridgement of associational freedoms. Aggregate contribution limits fail this test.

II. *McCutcheon* held that, as a matter of law, aggregate contribution limits are not "closely drawn" to further the government's anti-corruption interest.

Prevention of *quid pro quo* corruption, or the appearance of such corruption, is the *only* constitutionally sufficient justification for contribution limits.[9] This is not a new development brought about by *McCutcheon*, but has been the law since *Buckley* was decided in 1976. *Quid pro quo*, Latin for "this for that," narrowly limits what may be considered corruption: it 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]

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: "[c]ampaign 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] The Court further opined on the importance of government restraint in this important context: "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]

Moreover, 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

---

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

justified as tailored to avoid corruption, *aggregate* limits must be independently tested. When the Court examined the federal aggregate contribution limits, those limits failed the analysis.[18]

The problem is that once the aggregate cap is reached, the law bans any contribution to any further candidate. In the federal context, the aggregate limits allowed a contributor to "max out" – that is, contribute the maximum base limit – to nine candidates.[19] Under Wyoming's existing $1,000 per election limit, a contributor is allowed to "max out" to thirteen state candidates, provided they give no money to any political committees and assuming they give the maximum amount to a candidate in both the primary and general elections. Even then, the thirteenth candidate could only receive the max contribution in either the primary or general election – but not both – before hitting the state's $25,000 aggregate limit.

The Supreme Court reasoned that giving the same "maxed out" contribution to the tenth or fourteenth candidate cannot be any more corrupting than giving to the prior nine or thirteen. That is because the individual base limit already operates to prevent *quid pro quo* corruption between each individual candidate by any particular donor. While the numbers are different under the $50,000 aggregate cap set to take effect in Wyoming in 2015, the logic still holds: as long as a contributor follows the base limits, there is no danger of *quid pro quo* corruption that the aggregate limits serve. As the Supreme Court found, aggregate limits are not the least restrictive means of preventing corruption – indeed, aggregate limits "do not serve that function in any meaningful way."[20]

Limits on contributions to political committees (also known as "PACs") suffer similar constitutional infirmities. Giving to PACs "significantly dilute[s]" the power of the single contributor's associational act, because his donation is gathered with many others.[21] Furthermore, once he gives 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 therefore lacks sufficient tailoring to survive constitutional scrutiny.

Aggregate limits are strong medicine. The *McCutcheon* opinion explains: "[a]n 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: "[t]o 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

[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).
[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).

Government may not penalize an individual for 'robustly exercis[ing]' his First Amendment rights."[25]

* * *

WYO. STAT. ANN. § 22–25–102(c)(ii), and its successor, are likely unconstitutional after *McCutcheon*. The Court has now ruled that a heightened standard of review is appropriate for contribution limits generally and aggregate contribution limits in particular. The federal system could not survive the Supreme Court's scrutiny because the federal laws were not properly tailored to the anti-corruption interest. Likewise, since WYO. STAT. ANN. § 22–25–102(c)(ii) and WYO. STAT. ANN. § 22–25–102(c)(iii) so closely resemble the federal statute, they almost certainly fail that test as well.

Even before the *McCutcheon* ruling, states were acting to eliminate their aggregate limits, in part due to a growing recognition that such statutes burden First Amendment rights. In Arizona, for example, Governor Jan Brewer 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.[26]

Moreover, eight states with aggregate limit statutes have already recognized *McCutcheon*'s applicability to their own law. For example, on the day of the *McCutcheon* ruling, the Massachusetts Office of Campaign and Political Finance announced that it "will no longer enforce the $12,500 aggregate limit on the amount that an individual may contribute to all candidates."[27] Shortly thereafter, the Maryland State Board of Elections announced that "[t]he [Maryland] Attorney General has advised that based on the pronouncement in the *McCutcheon* decision, the aggregate contribution limit in [Maryland] Election Law Article § 13-226(b)(2) is unconstitutional and may not be enforced."[28]

Connecticut issued an Advisory Opinion on May 14 noting that it would cease enforcement of its aggregate limit statute,[29] and cited a letter it received from CCP,[30] presenting information similar to that contained in my testimony today. At a May 22 meeting of the New York State Board of Elections, the Board voted unanimously that their aggregate statue was

[25] *Id*. at 16 (Roberts, C.J. for the plurality) (citing *Davis*, 554 U. S. at 739).
[26] Cristina Silva, "Brewer increases Arizona campaign finance limits," *Arizona Capitol Times*. Retrieved on May 30, 2014. Available at: http://azcapitoltimes.com/news/2013/04/12/jan-brewer-increases-arizona-campaign-finance-limits/ (April 12, 2013).
[27] "OCPF's statement on today's Supreme Court decision, McCutcheon vs. FEC," Massachusetts Office of Campaign and Political Finance. Retrieved on May 30, 2014. Available at: http://www.ocpf.net/releases/statement.pdf (April 2, 2014).
[28] Bobbie S. Mack et al., "Contribution Limits," Maryland State Board of Elections. Retrieved on May 30, 2014. Available at: http://elections.maryland.gov/campaign_finance/documents/aggregate_limits_04112014_final.pdf (April 11, 2014).
[29] Anthony J. Castagno, "ADVISORY OPINION 2014-03: Application and Enforcement of Connecticut's Aggregate Contribution Limits from Individuals to Candidates and Committees after *McCutcheon*," State of Connecticut State Elections Enforcement Commission. Retrieved on May 30, 2014. Available at: http://www.ct.gov/seec/lib/seec/laws_and_regulations/ao_2014-03.pdf (May 14, 2014).
[30] *Id*. at 1.

unenforceable and agreed to cease its enforcement.[31] The Maine Commission on Governmental Ethics and Election Practices announced in a policy statement after their May 28 meeting that it will cease enforcing its aggregate limit for the duration of the 2014 election cycle, and likely permanently thereafter.[32] Similarly, the Rhode Island State Board of Elections voted in April to back legislation that would repeal the state's aggregate limit provision.[33] Additionally, Wisconsin had its aggregate limit struck down in Court,[34] and a district judge temporarily blocked the state of Minnesota from enforcing a statute similar in function to an aggregate limit.[35]

Wyoming should follow suit, recognizing the important First Amendment rights at stake and reforming its laws accordingly.

All told, Wyoming's aggregate limit statute is essentially identical to the invalidated federal statute, and consequently is almost certainly unconstitutional under the *McCutcheon* ruling.[36] If Wyoming fails to either amend or repeal this statute to conform to the Court's ruling, it risks a lawsuit. CCP has provided *pro bono* representation in similar situations, and would consider doing so here as well.

Most importantly, by taking action to implement the Court's ruling, the members of this Committee will be upholding their oaths of office by supporting and defending the Constitution of the United States and protecting the First Amendment rights of the constituents they represent and serve.

Thank you again for the opportunity to appear before you today, and for holding a hearing on this very sensitive First Amendment issue. I welcome any questions you have at this time. Moreover, should you have any further questions after this hearing, please contact me by phone at (703) 894-6800, or by email at amackin@campaignfreedom.org.

---

[31] Michael Gormley, "State: No limit on individual political donations," *Newsday*. Retrieved on May 30, 2014. Available at: http://www.newsday.com/long-island/politics/state-no-limit-on-individual-political-donations-1.8186788 (May 26, 2014).

[32] "Policy Statement of the Maine Ethics Commission on Enforceability of Aggregate Contribution Limits," State of Maine Commission on Governmental Ethics and Election Practices. Retrieved on May 30, 2014. Available at: http://www.maine.gov/ethics/pdf/ProposedStatementNottoEnforceAggLimit.pdf (2014).

[33] Michael P. McKinney, "R.I. Board of Elections backs repeal of 'total' campaign contribution limit," *Rhode Island Providence Journal*. Retrieved on May 30, 2014. Available at: http://www.providencejournal.com/breaking-news/content/20140417-r.i.-board-of-elections-backs-repeal-of-total-campaign-contribution-limit.ece (April 17, 2014).

[34] "Federal judge signs off on deal ending aggregate donation cap in Wisconsin," *The Associated Press*. Retrieved on May 30, 2014. Available at: http://www.tribtown.com/view/story/1748cb5d3c7346eb85cca3ac5a9bcf49/WI--Wisconsin-Campaign-Finance (May 22, 2014).

[35] Devin Henry, "Judge halts Minnesota campaign finance law," *MinnPost*. Retrieved on May 30, 2014. Available at: http://www.minnpost.com/effective-democracy/2014/05/judge-halts-minnesota-campaign-finance-law (May 19, 2014).

[36] WYO. STAT. ANN. § 22–25–102(c)(ii).