

# Arizona Capitol Times

## Supreme Court's Campaign Contribution Decision To Have Substantial Impact

by Joseph A. Kanefield, Beau Roysden and Lindsay D. Breedlove

April 28, 2014

Pundits have alternatively saluted and denounced the U.S. Supreme Court's decision this month striking down aggregate campaign contribution limits as unconstitutional. Few, however, have addressed the decision's impact on states, candidates, and contributors in years to come.

In *McCutcheon v. Federal Election Commission*, the court held that contributors have the right to give the legal maximum to as many candidates for Congress and the presidency, as well as to parties and PACs, as they choose, without regard for the aggregate limits on all contributions. The aggregate limits were originally designed to prevent contributors from circumventing individual contribution limits, which exist to prevent corruption and the appearance of corruption in the political process. Although the court concluded that preventing circumvention of individual limits may justify regulation, it held that the aggregate limits were not adequately tailored to that goal and accordingly amounted to an unconstitutional infringement on First Amendment rights.

Because *McCutcheon* involves campaign spending, just like the Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission*, many pundits have compared the two decisions. *Citizens United*, some note, paved the way for unlimited spending on political ads by corporations and unions. *McCutcheon*, by contrast, does not permit unlimited spending by individuals, and so, the argument goes, it will not have the sweeping effects that *Citizens United* triggered.

On the other side of the debate, critics of *McCutcheon* worry that while the court nominally applied its usual degree of scrutiny to contribution limits, the opinion's language suggested that contribution limits must now overcome a higher level of scrutiny typically reserved for expenditure limits. Also troubling, some note, is the court's narrow understanding of corruption; it held that only concerns about quid pro quo corruption — which it defined as the exchange of value for a particular outcome — could justify limits on aggregate contributions.

The questions raised by the court's decision will undoubtedly affect judicial and legislative decisions in the coming years. The most direct impact of the decision will be on aggregate contribution limits in several states. The court noted that eight states have general aggregate limits (Connecticut, Maine, Maryland, Massachusetts, New York, Rhode Island, Wisconsin, and Wyoming). In light of *McCutcheon*, these laws will likely be challenged.

Candidates and contributors may also use *McCutcheon* to challenge the limits on how much money an individual can directly contribute to a single candidate. The higher level of scrutiny that the court appeared to apply to contribution limits, coupled with the narrow definition of corruption it adopted, will make it harder for states and the federal government to justify individual contribution

limits. The 9th Circuit is poised to hear a challenge to Montana's individual limits that was raised on the eve of the 2012 election and has been stayed pending *McCutcheon*.

The federal ban on "soft money" contributions may also face challenges as a result of the *McCutcheon* decision. Soft money refers to the large, unregulated contributions used by political parties to fund mixed-purpose activities, including get-out-the-vote drives, generic party advertising, and legislative advocacy media advertisements. The court upheld the federal ban on soft money in 2003, noting that "[b]oth common sense and the ample record in these cases confirm Congress' belief" that "large soft-money contributions to national party committees have a corrupting influence or give rise to the appearance of corruption." The *McCutcheon* court's more limited understanding of corruption, however, may lead to a different result the next time the question comes before the court.

Congress and state legislatures may also respond to *McCutcheon* in various ways. Specifically, lawmakers may be interested in enacting new anti-circumvention measures. Without "opin[ing] on the validity of any particular proposal," the *McCutcheon* court recognized that additional anti-circumvention measures could pass constitutional muster. Any new federal measures, however, will likely require bipartisan support, which has been elusive. States concerned about circumvention of their base limits may consider similar proposals, and they may be the early adopters given the absence of bipartisan support at the federal level.

One thing is certain: *McCutcheon* will not be the last word in the shifting landscape of campaign finance. Recent polls indicate that the public is very concerned about what it believes to be the corrupting influence of large contributions. This means that while further litigation may threaten the limits that survive *McCutcheon*, any regulatory activity and legislation designed to combat corruption will have broad public support. In the meantime, policymakers will need to carefully review existing laws and regulations on campaign contributions to ensure that they meet the standards articulated by the *McCutcheon* court.