Testimony of

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Mr. Chairman and members of the Committee:

Good morning. My name is Deborah Goldberg. I am the Deputy Director of the Democracy Program at the Brennan Center for Justice at New York University School of Law. By way of introduction, the Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms, including freedom of speech and association.

Because my testimony today will focus on the recent Supreme Court decision, *Nixon v. Shrink Missouri Government PAC*, and its implications for federal campaign finance reform, I would like to explain my role in that case. The Brennan Center represented Missouri State Representative Joan Bray as an intervenor-defendant in support of the state's contribution limits. Representative Bray was permitted to intervene in both the District Court and the Court of Appeals, and she participated as a full party in the Supreme Court, not merely as an *amicus curiae*. I was lead counsel representing her, arguing the case in the Eighth Circuit and drafting her briefs on the merits in the Supreme Court.

The Message of *Shrink Missouri*

What comes through most strikingly from *Shrink Missouri* — and not only from the majority opinion — is the Court's profound concern about the state of our democracy. The Court was painfully aware that "[d]emocracy works 'only if the people have faith in those who govern.'" To ensure the continued "willingness of voters to take part in democratic governance," the Court concluded, the perception of impropriety "that flows from munificent campaign contributions" cannot be left unanswered.

Justice Kennedy was no less concerned than the majority about the "disaffection or distrust that the Court cites as the justification for limits on direct contributions." But he argued that the Court cannot eliminate the threat to democracy simply by upholding such limits. He worried that "unlimited soft money" and "so-called issue advocacy" — two gaping loopholes in the federal campaign financing system that Justice Kennedy identifies by name — are equally responsible for a system that is "confusing, if not dispiriting, to the voter."

Of course, the First Amendment interests implicated by campaign finance regulation are also matters of grave concern. Contribution limits do have some impacts on speech and associational rights, as both *Buckley* and *Shrink Missouri* recognized. But, as Justice Breyer observed, "this is a case where constitutionally protected interests lie on both sides of the legal equation." Campaign finance restrictions can therefore be justified when needed "to protect the integrity of the electoral process — the means through which a free society democratically translates political speech into concrete governmental action."

In sum, the message of *Shrink Missouri* is clear and simple. We cannot allow democracy to founder on the shoals of a campaign finance system that undermines public confidence in government, when we can restore that confidence without treading unduly on First Amendment interests. This Committee should take that message to heart.

The Holdings of *Shrink Missouri*

Of course, the particular holdings of *Shrink Missouri* are as important to the constitutional analysis of proposed campaign finance regulation as the broad message of that decision. To appreciate the holdings fully, it is essential to understand the legal and historical context in which the Court considered the case. The holdings, understood in context, can then provide guidance with respect to campaign finance issues not yet decided by the Court.

Shrink Missouri was the first case to adjudicate the constitutionality of limits on individual contributions to candidates since the Supreme Court decided *Buckley v. Valeo* in 1976. *Buckley*, as this Committee well knows, was a highly controversial decision right from the start. The distinction *Buckley* introduced between contributions and expenditures has been attacked from both ends of the political spectrum. But for the purpose of understanding *Shrink Missouri*, *Buckley* was important basically for two reasons: (1) it was less than a model of clarity on a number of issues going to the heart of its analysis, and (2) it was decided nearly a quarter of a century ago.

The ambiguities in *Buckley* were important because they left enormous room for interpretation. By the time *Shrink Missouri* reached the Supreme Court, the lower federal courts (and sometimes even panels of a single court) were split as to the appropriate standard of judicial review, the evidentiary burden that must be carried by governments seeking to defend contribution limits, and the point at which contribution limits so differed from those upheld in *Buckley* as to be unconstitutional — to name just a few points of contention.

The passage of time was important for two reasons. First, opponents of campaign finance regulation argued that the Supreme Court's First Amendment jurisprudence had materially changed since *Buckley* was decided. More recent cases allegedly increased the quantum of empirical evidence needed to justify limits on contributions. Second, the intervening years had unquestionably eroded the real value of the $1,000 limit upheld in *Buckley*, but it was unclear what, if any, constitutional significance was to be attributed to that fact.

With this background in mind, the *Shrink Missouri* plaintiffs and their allies asked the Supreme Court to take the most expansive view possible of the First Amendment and the most restrictive view possible of campaign finance restrictions. Specifically, opponents of Missouri's limits argued that:

- Strict scrutiny — the toughest standard of constitutional review — should apply to contribution limits as well as expenditure limits.

- The Court should reject the appearance of corruption as a threat to democracy sufficiently serious to justify campaign finance restrictions.

- Government should be subject to a heightened evidentiary burden whereby only "demonstrable evidence" of "real harm" — that is, proof of actual corruption — could justify contribution limits.

- Corruption should be understood only as *quid pro quo* exchanges of contributions for votes on legislation.

- Because of inflation since 1976, contribution limits in the range of $1,000 violate the First Amendment.

- The Court should overrule *Buckley*, abandon the distinction between contributions and expenditures, and hold limits on both unconstitutional.

In no uncertain terms, the Court rejected each and every one of these arguments.

Point by point, the Court clarified the ambiguities in *Buckley* and resolved the questions created by the passage of time.

- The Court confirmed "in so many words" that different standards govern expenditure and contribution limits and that "contribution limits would more readily clear the hurdles before them."

- The Court stated: "Even without the authority of *Buckley*, there would be no serious question about the legitimacy of the interests claimed" by Missouri — namely, the interests in preventing *both* "corruption and the appearance of it."

- The Court asserted that the plaintiffs were "wrong in arguing" that First Amendment decisions over the years "had enhanced the State's burden of justification beyond what *Buckley* required." Under *Shrink Missouri*, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." The Court found nothing novel nor implausible about the need to guard against real and perceived corruption.

- *Shrink Missouri* reaffirmed *Buckley*'s concern not only about *quid pro quo* corruption but also about "the broader threat from politicians too compliant with the wishes of large contributors." According to the Court, governments are entitled to "address the power of money 'to influence governmental action' in ways less 'blatant and specific' than bribery."

- The Court declared that "the dictates of the First Amendment are not mere functions of the Consumer Price Index." Rather, the constitutional test for a particular limit — "$1,000, or any other amount" — was "whether the contribution limitation was so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless."

- The Court declined to overrule *Buckley* in any respect.

Shrink Missouri, in other words, flatly rejects many of the arguments routinely made by long-time critics of campaign finance regulation. To the extent that those arguments prevailed in lower federal courts or state courts, the decisions in those cases are no longer good law.

The question that remains is what *Shrink Missouri* means for the future. Since the major loopholes in federal law undermining public confidence in government are clearly those identified by Justice Kennedy, the remainder of my testimony will focus on efforts to regulate "soft money" and sham "issue advocacy."

The "Soft Money" Loophole

Current federal efforts to limit the sources and amounts of campaign contributions are being frustrated by the so-called "soft money loophole," which permits contributors who are barred from giving money directly to federal candidates to circumvent the law by giving the forbidden money to the candidate's political party, under the fiction that the party will not use the money to benefit the candidate's campaign. Two hundred and sixty-two million dollars in such gray-market campaign contributions flowed through the soft money loophole in the 1996 elections, almost all of which should have been outlawed under the Federal Election Campaign Act ("FECA") because it came from corporations or unions or from wealthy individuals who had already contributed the maximum allowed by law. Experts predict that the amount of soft money will double for the 2000 elections.

Theoretically, the soft money spent in 1996 was supposed to be used for "party-building" activities at the state and local level. In fact, both parties coordinated soft money expenditures with the Presidential candidates' campaigns to assure that the money provided maximum assistance to candidates' campaigns. For example, both parties spent enormous amounts of soft money on advertising clearly designed and targeted to reinforce the themes of the candidates' campaigns, distinguishable from the candidate's own messages only by the absence of magic words such as "vote for" or "vote against." Unless the soft-money loophole is closed quickly and firmly, existing campaign regulations will be rendered irrelevant.

Fortunately, *Shrink Missouri* supports my view that no serious legal impediment exists to closing the soft money loophole. Opponents of limits on soft money have sometimes claimed that the Supreme Court's 1996 opinion in *Colorado Republican Federal Campaign Committee v. FEC* precluded such regulation. But the *Shrink Missouri* court put that argument to bed, recognizing explicitly that the issue in *Colorado Republican* was "limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits." Under *Buckley*, as interpreted by *Shrink Missouri*, Congress should be able to subject all *contributions* to political parties to the same kind of source and amount restrictions that apply to contributions to candidates.

Such restrictions on contributions to political parties, which would amount to a soft money ban, are justifiable for two reasons. First, soft money is raised by officeholders and candidates, or party officials able to deliver access to officeholders and candidates, raising the same concerns about the appearance and reality of corruption that justified the contribution limits in *Buckley* and *Shrink Missouri*. In view of recent political events, no one can seriously question the depth of public concern about the corrosive influence of soft money.

Second, the Supreme Court has repeatedly recognized the government's legitimate interest in preventing circumvention of FECA. *Buckley* upheld a $25,000 annual ceiling on total contributions on the grounds that the limit "serves to prevent evasion [of FECA's basic rules] 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." In *California Medical Association v. FEC*, the Court invoked the same reasoning to uphold a $5,000 limit on contributions to multi-candidate PACs. The possibility that major donors will make end runs around FECA by giving "huge contributions to the candidate's political party" is now not merely a risk, but a reality. Therefore, I believe that there is no legitimate constitutional objection to banning soft money.

Before *Shrink Missouri*, the only time the Supreme Court even alluded to soft money was in *Colorado Republican*. Although only regulated, "hard" money was at issue in that case, the plurality commented: "We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties." The gravity of that matter is not only evident but compounded by the fact that soft money is also being used to evade FECA's ban on corporate and union contributions to candidates. The Supreme Court's decisions in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (upholding a ban on the solicitation of campaign contributions from the general public to corporate PACs), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a ban on the use of corporate money for independent expenditures in state elections), offer clear constitutional support for the regulation of soft money from corporate and union sources.

Of course, a soft money ban must be drafted with sensitivity to federalism concerns. The ban must draw a thoughtful line between the activities of state and local political parties that principally affect non-federal races and those that influence federal elections. Soft money bans can make that distinction by providing exemptions for contributions that fund state or local political conventions, state and local party activity exclusively on behalf of state or local candidates, grassroots campaign materials (*e.g.*, buttons, bumper stickers, or lawn signs) that name only state and local candidates, the purchase of state and local headquarters and equipment, and the non-federal share of state and local parties' administrative and overhead expenses. By so insulating state and local party activity that will primarily affect non-federal races, a soft money ban can appropriately respect the values of federalism, while protecting the integrity of the federal campaign finance system.

In sum, where regulation of contributions — especially corporate, union, or extremely large individual contributions — is at issue, the Supreme Court has repeatedly signaled that broad power exists to restrict the flow of funds to the campaign process. If Congress wishes to do so, it may close the soft money loophole immediately, before it totally delegitimizes the 2000 elections.

The Sham "Issue Advocacy" Loophole

The second loophole that destroys the effectiveness of current campaign finance rules allows individuals and groups to participate vigorously in election debate, while pretending to be interested only in educating the electorate on a particular issue. In the 1996 and 1998 federal elections, corporations, unions, and advocacy groups spent hundreds of millions of dollars for advertisements that were wholly unregulated by the federal government because, the sponsors of the ads claimed, they were engaged in "issue advocacy" rather than electioneering. However, rather than educating the public broadly about issues, the typical sham "issue ad" mentioned a single candidate, targeted the segment of the public eligible to vote for that candidate, began to run when an election was imminent, and ended abruptly on Election Day. Unless the sham "issue advocacy" loophole is firmly closed, wealthy contributors who cannot give money directly to a candidate, because they are corporations or unions or individuals who have hit the maximum, will simply recycle the funds as sham "issue advocacy" carefully orchestrated to help a candidate, but skirting regulation.

Fortunately, there is not, in my view, any serious constitutional impediment to closing the sham "issue advocacy" loophole. A reasonable and constitutional line may be drawn that distinguishes between regulable electioneering speech and non-electioneering political speech. The distinction would recognize examples of true "issue advocacy," such as the Harry and Louise ads run by the Health Insurance Association of America in opposition to President Clinton's national health care reform proposal or the anti-NAFTA ads run by labor unions in late 1993, while that legislation was pending. But it would prevent sham "issue ads," which are thinly veiled attempts to promote the election or defeat of a named candidate, from undermining the valid limitations *Buckley* allowed on electioneering activity.

The distinction I mentioned is grounded on some non-controversial legal principles. Under current law, there is no doubt that it is permissible for Congress to draw *some* line distinguishing electioneering speech from true "issue advocacy." If speech falls on the "electioneering" side of the line, three consequences follow:

1. **Disclosure:** Congress may require the speaker — whether a PAC, a corporation or union, a political party, an individual, or a candidate — to disclose the sources of the money and the nature of the expenditures in support of the speech.

2. **Source restrictions:** Congress may absolutely bar certain speakers from spending money on electioneering, through direct expenditures or contributions. Congress may preclude corporations and unions from spending money to engage in electioneering. Congress may prohibit foreigners from electioneering.

3. **Amount restrictions:** Congress may restrict the size of contributions to a collective fund — the limit on contributions to PACs, for example.

Do these restrictions impose some burden on speech and associational rights? Of course they do. Wherever one draws the electioneering line, there will be limits on the political messages that corporations and unions can fund. Only individuals or groups that amass individual contributions in limited amounts will be able to finance certain communications. And these speakers will be required to reveal certain information, such as how much they spent and who supported their message, even if they would prefer to conceal that information.

But these regulations are indisputably constitutional, even though they impinge on the freedom of speech. Since 1907, corporations have been barred from electioneering; since 1947, those restrictions have been extended to labor unions. Since 1974, the law has restricted the size of contributions that can be made to a group funding electioneering communications. The Supreme Court has upheld these types of restrictions on electioneering. Of course, a great deal rides on what qualifies as "electioneering." If the government defines the concept too broadly, it could end up restricting speech on issues of public importance that happen to have an influence on elections — a result that is antithetical to the First Amendment. If the definition is too narrow, we might as well not bother regulating campaign finance, because the loophole created will make a mockery of the law.

That is where we find ourselves today. We are now in a world where ad sponsors deny they are electioneering unless the advertisement contains a "magic word" — like "vote for," "vote against," "elect," or "defeat." So all players — corporations, unions, foreigners, and parties — openly seek to influence elections by running or paying for ads that look, smell, waddle, and quack like campaign ads, but leave out the magic words. The electioneers use money from prohibited sources, they raise it in prohibited amounts, and they close their books to public scrutiny. In many cases, their stated goal is to influence the election. They brag about their success in influencing the election, and yet they claim First Amendment immunity from regulation, notwithstanding that clearly regulable motive.

I do not believe that we are stuck with a constitutional doctrine that nominally allows us to place restrictions on electioneering, but in reality frees individuals and groups to accomplish the same result through naked subterfuge. The federal courts are not so irrational that they will acknowledge the government's power to regulate in an area while simultaneously imposing rules that make all regulation unworkable.

When the Supreme Court first devised the "express advocacy" test in *Buckley*, it did so in the context of a poorly drafted statute (FECA) whose definition of regulable electioneering contained problems both of vagueness and overbreadth. Under First Amendment "void for vagueness" jurisprudence, the government cannot punish someone without providing a sufficiently precise description of what conduct is legal and what is illegal. A vague or imprecise definition of electioneering might serve to "chill" some political speakers who, although they desire to engage in discussions of political issues, may be afraid that their speech could be construed as electioneering. The *Buckley* Court found that the regulated conduct, which included expenditures "relative to a clearly identified candidate" and "for the purpose of influencing an election" was not defined with sufficient precision to provide the certainty necessary for those wishing to engage in political speech.

Similarly, the overbreadth doctrine in First Amendment jurisprudence is concerned with a regulation that, however precise, sweeps too broadly and reaches constitutionally protected speech. The *Buckley* Court was concerned that FECA's attempt to regulate any expenditure that is done "for the purpose of influencing" a federal election or that is "relative to a clearly identified candidate" could encompass not only direct electioneering, but also protected speech on issues of public importance.

The Court chose to save FECA from invalidation by reading it very narrowly. However, the Court did not say that Congress could never devise alternate language that would be both sufficiently precise and sufficiently narrow. The decision to narrowly construe a statute to save it from potential vagueness and overbreadth problems does not prevent further legislative refinements that eliminate those problems. The key for Congress is to draw a line that distinguishes between regulable electioneering and protected "issue advocacy" in a way that minimizes the vagueness and overbreadth concerns identified by the Court, while capturing the activities we want to regulate.

How is this to be accomplished? There are two possible approaches that should, in my view, survive court challenge. One is an objective approach, based on a series of measurable factors. The other is a subjective approach based on self-disclosure.

Several of the proposals recently before Congress, including the McCain-Feingold bill in the Senate and the Shays-Meehan bill in the House, adopt the objective approach. Under this type of approach, ads are typically subject to regulatory control if they identify a specific federal candidate, within a certain limited period prior to an election. To make the statute more protective of First Amendment values, a statute could specify a dollar threshold (protecting all spending below $10,000, for example) and limit the statute's application to ads that appear in specified mass media (such as radio, television, cable, etc.) or where they will be observable by the candidate's constituency. One additional refinement, which would further guard against both vagueness and overbreadth, would treat an ad's satisfaction of the objective criteria specified in the statute only as presumptive proof of regulable electioneering. The use of a rebuttable presumption can provide a safety net for the unusual cases that detractors of these laws are so fond of invoking — such as ads denouncing President Johnson during the height of the Vietnam War. In the real world in which we all live, however, ads that run close to an election that name candidates are almost invariably regulable electioneering ads.

A second approach that has not yet been tried, but may be promising, is a self-disclosure system. In such a system, the regulatory regime would begin with a set of objective factors such as those outlined above. If all of the factors were present, the Federal Election Commission ("FEC") would then require that the sponsor of the ad file a disclosure form affirming either that the ad *was* intended to influence the election or defeat of the identified candidate or that it was *not* so intended (even in part). As a general rule, the FEC would accept sponsors' designations of their own ad as "issue advocacy" rather than electioneering. But the FEC would have the authority to challenge a sponsor's designation, with the government bearing the burden of proof. Sponsors filing false designations would be fined in an amount up to three times the amount paid for the offending adverstisement.

What would this self-disclosure system accomplish? Assuming a reasonable degree of truthful compliance, the self-disclosure system would allow the government to distinguish between ads that were intended to influence a candidate's election or defeat and those that truly were not — a result that is, after all, the sole objective of the law. Although the approach may be subject to some skepticism, one would hope that most advocacy groups that spend substantial amounts of money on sham "issue advocacy" praising or denouncing a particular candidate would be ashamed to avow publicly that they did not intend to influence the election or defeat of that candidate. At the very least, advocacy groups will no longer be able to trumpet their success in electing or defeating targeted candidates, while simultaneously affirming that they were engaged only in issue advocacy. Moreover, corporate and union sponsors could be prohibited entirely from using general treasury funds for self-disclosed electioneering ads. Advocacy organizations that were genuinely engaged in issue advocacy, on the other hand, would be able to continue their activities unregulated.

In sum, it is constitutionally permissible for Congress to enact legislation that regulates ads that are intended to influence the electoral fate of particular candidates, as long as the legislation does not unduly sweep within its reach ads that are intended to discuss issues only. The "magic words" test clearly does not accomplish this permissible objective in an acceptable manner. The Supreme Court does not purposely permit government to regulate in an area while imposing rules that make all attempts at regulation worthless. Congress has the power to pass legislation that remedies the vagueness and overbreadth problems that plagued FECA by providing a better method for differentiating between electioneering and true issue advocacy.

Conclusion

If Congress did close the loopholes that I have addressed — the soft money loophole and the bogus issue advocacy loophole — it would solve two notorious, and increasingly insidious, failures of the current federal campaign finance system. These loopholes are so seriously damaging that even Supreme Court Justices are railing against them. In my view, there is no First Amendment obstacle to closing the loopholes, and, given the threat they present to equally fundamental constitutional values, there is also no excuse for ignoring them.