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Statement of

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For the Illinois Reform Commission

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The Brennan Center for Justice thanks the Commission for convening this meeting. The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on democracy and justice. Our remarks here focus briefly on some of the constitutional issues related to campaign finance regulation, especially contribution limits. For a more detailed analysis, we refer you to our 200-page treatise, *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws,* which you may download chapter-by-chapter at http://www.brennancenter.org/content/resource/writing_reform_2008/. For specific questions, please feel free to contact Ciara Torres-Spelliscy at 212-998-6025 or ciara.torres-spelliscy@nyu.edu.

Contributions Limits Promote Accountability and Public Trust

Contribution limits promote accountability. Limits on the size of contributions to candidates encourage candidates to reach out to a broad base of supporters, including moderate-income constituents. A candidate who needs widespread support from ordinary people is more likely to respond to their needs. Contribution limits also promote public confidence that elected representatives will be accountable to voters rather than wealthy donors.

Reasonable Contribution Limits Are Constitutional

Federal law limits the amount that individuals, political action committees ("PACs"), and political parties may contribute to federal candidates, PACs, and political parties. Federal law also limits the aggregate amount of contributions that an individual may make in a two-year period.[1] Corporations, labor unions, and national banks may not use treasury funds to make

[1] Federal Elections Commission, *Contribution Limits* available at http://www.fec.gov/pages/brochures/contrib.shtml#Chart.

contributions in federal elections.[2] All of these limits have been upheld by the Supreme Court.[3]

Illinois is one of only five states without any contribution limits.[4] Most states have separate contribution limits for individuals, corporations, unions, PACs, and political parties. Limits typically rise with the size of jurisdiction for which the candidate seeks office. State contribution limits have been upheld by the Supreme Court and by lower courts.[5]

Many states, in addition to limiting the amount that may be contributed to an individual candidate, also limit the aggregate amount of contributions a donor may make during a given time period or the amount that a candidate may accept from PACs in the aggregate. Both sorts of aggregate contribution limits are constitutional.[6]

Only once has the Supreme Court invalidated contribution limits. In *Randall v. Sorrell* (2006), the Court held that Vermont's contribution limits, considered with other factors, were so low as to prevent candidates from amassing sufficient funds for competitive campaigns.[7] Vermont's limits were the lowest in the nation—individuals, PACs and political parties in Vermont were allowed to give, per election *cycle*, only $400 to candidates for statewide offices; $300 to candidates for state senator; and $200 to candidates for state representative.[8] *Randall* also noted that the limits were not indexed for inflation; volunteer expenses counted toward contribution limits; limits on contributions from individuals and political parties were the same; and there was no special justification (such as a history of corruption) for the low limits.[9]

Mandatory Spending Limits Are Unconstitutional

Buckley v. Valeo reviewed the Federal Election Campaign Act, which was passed after the Watergate scandal and contained both contribution and expenditure limits. *Buckley* held that it is constitutional to limit contributions, but it is unconstitutional to limit expenditures (amounts spent directly on campaigns).[10] This holding invalidating expenditure limits was reaffirmed in *Randall,* which rejected Vermont's spending limits.[11]

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[2] *McConnell v. FEC*, 540 U.S. 93, 201-2 (2003) (reaffirming limits on corporate contributions).
[3] *See McConnell,* 540 U.S. 93 (upholding the soft-money ban); *California Medical Assn. v. FEC*, 453 U.S. 182 (1981) (upholding $5,000 contribution limit to multi-candidate PACs); *Buckley v. Valeo,* 424 U.S. 1, 21, 25-26, 30 (1976) (per curiam) (upholding $1,000 contribution limit to federal candidates).
[4] The other states without contribution limits are Utah, Missouri, Oregon and Virginia. In addition to limits on the source or amount of contributions, some states have temporal limits that ban contributions when the legislature is in session.
[5] *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 382 (2000) (upholding Missouri's limits); *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1092-96 (9th Cir. 2003) (upholding Montana's limits).
[6] *Buckley*, 424 U.S. at 27 (upholding $25,000 aggregate annual limit on individual contributions); *see Eddleman*, 343 F.3d 1085 (upholding Montana's aggregate contribution limits for PACs).
[7] *Randall v. Sorrell*, 126 S. Ct. 2479, 2495 (2006).
[8] *Id.* at 2486.
[9] *Id.* at 2486, 2495, 2496, 2499.
[10] *Buckley*, 424 U.S. at 19.
[11] *Randall*, 126 S. Ct. at 2485.

Voluntary Spending Limits in Public Funding Systems Are Constitutional

It should be noted that *voluntary* spending limits are permissible in the context of public financing systems. Public funding is available for presidential elections and elections for various offices in several states. In exchange for receiving public funds, the candidates agree to limit their campaign spending. The Supreme Court and lower federal courts have upheld expenditure limits accepted as a condition of receiving public funding.[12]

Limits on Corporate Independent Expenditures and Electioneering Communications Are Constitutional

Independent expenditures are expenditures made without coordination with a candidate or political party. Federal law bans the use of corporate, union, and bank treasury funds for expenditures in federal elections, including independent expenditures.[13] The Bipartisan Campaign Reform Act ("BCRA," also known as "McCain-Feingold") extends that ban to "electioneering communications," which are defined as targeted broadcast advertisements referring to a federal candidate and run in the period immediately before an election. 2 U.S.C. § 441b. The Supreme Court has upheld bans on corporate independent expenditures and electioneering communications, when the affected corporate entities were permitted to form "separate segregated funds" or PACs to conduct the spending.[14]

However, in 2007, the Supreme Court limited the federal corporate treasury ban to those electioneering communications that include express advocacy or its functional equivalent.[15] In other words, in federal elections, corporations may use treasury funds to pay for electioneering communications that only contain issue advocacy. If Illinois wishes to adopt a ban on corporate and union electioneering communications during the pre-election period, then it should apply to communications that are express advocacy or the "functional equivalent" of express advocacy.

Paralleling federal law, states may require disclosure of who pays for electioneering communications.[16] This disclosure requirement was upheld in *McConnell* where the Court found disclosure to be justified by "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions."[17]

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[12] *See Buckley*, 424 U.S. 1 (upholding the presidential public financing system under Federal Election Campaign Act).

[13] Federal Election Commission, *Independent Expenditures Brochure* available at http://www.fec.gov/pages/brochures/indexp.shtml.

[14] *McConnell*, 540 U.S. at 229-30; *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

[15] *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). The Federal Election Commission ("FEC") approved a new rule carving out an exemption from BCRA's restriction on corporate and union electioneering communications, based on the WRTL II decision. See 11 C.F.R. § 114.15.

[16] BCRA requires all individuals and entities spending more than $10,000 on electioneering communications to file reports naming every funder, donor, or shareholder that contributes $1,000 or more "during the period beginning on the first day of the preceding calendar year and ending on the disclosure date." In addition, once the threshold of $10,000 is reached, each expenditure of $200 or more must be disclosed within 24 hours. Contracts to make such expenditures also must be disclosed. 2 U.S.C. § 434(f)(2), (5) (BCRA § 201).

[17] *McConnell*, 540 U.S. at 196. There is an as-applied challenge to BCRA's disclosure requirements pending before the Supreme Court. The case is *Citizens United v. FEC*, 530 F.Supp.2d 274 (D.D.C. 2008); *cert. granted* (U.S. Nov. 14, 2008) (No. 08-205).