February 20, 1998

Re: NRLC Objections to the Snowe-Jeffords Amendment

Dear Senator:

We write to rebut letters from the National Right to Life Committee (NRLC), dated February 17 and February 20, 1998, in opposition to the Snowe-Jeffords Amendment to the McCain-Feingold Bill. NRLC mischaracterizes what the Snowe-Jeffords Amendment would achieve and misrepresents constitutional doctrine. ***The Amendment would not restrict the ability of advocacy groups such as NRLC to engage in either issue advocacy or electioneering.*** But it would prevent them from (1) hiding from the public the amounts they spend on the most blatant form of electioneering; (2) keeping secret the identities of those who bankroll their electioneering messages with large contributions; and (3) funneling funds from business corporations and labor unions into electioneering. ***These goals, and the means used to achieve them, are constitutionally permissible.***

What the Snowe-Jeffords Amendment Would Do

The Snowe-Jeffords Amendment applies only to advertisements that constitute the most blatant form of electioneering. ***If an ad does not satisfy every one of the following criteria, none of the restrictions or disclosure rules of the Snowe-Jeffords Amendment would be triggered:***

- **Medium:** The ad ***must be broadcast on radio or television***.
- **Timing:** The ad ***must be aired shortly before an election*** -- within 60 days before a general election (or special election) or 30 days before a primary.
- **Candidate-Specific:** The ad ***must mention a candidate's name*** or identify the candidate clearly.
- **Targeting:** The ad must be ***targeted at voters in the candidate's state.***
- **Threshold:** The sponsor of the ad ***must spend more than $10,000*** on such electioneering ads in the calendar year.

If, and only if, an electioneering ad meets all of the foregoing criteria, do the following rules apply:

- **Restriction:** The electioneering ad cannot be paid for directly or indirectly by funds from a business corporation or labor union. Individuals, PACs, and most nonprofits can engage in unlimited advocacy of the sort covered by the Snowe-Jeffords Amendment. The Amendment would prohibit these advocacy groups from financing their electioneering ads with funds from business corporations or labor unions. Since it is already illegal for business corporations and labor unions to engage in electioneering, these limitations are intended to prevent evasion of otherwise valid federal restrictions.

- **Disclosure:** The sponsor of an electioneering ad must disclose the amount spent and the identity of contributors who donated more than $500 toward the ad. This requirement is necessary to prevent contributors from evading federal reporting requirements by funneling contributions intended to influence the outcome of an election through advocacy groups.

The NRLC's Misrepresentations About the Snowe-Jeffords Amendment

The NRLC has so completely distorted the effect of the Snowe-Jeffords Amendment with false and misleading allegations that it is important at the outset to set the record straight.

- ***The Amendment would not prohibit groups such as NRLC from disseminating electioneering communications.*** Instead, it would merely require the NRLC to disclose how much it is spending on electioneering broadcasts and who is bankrolling them.

- ***The Amendment would not prohibit NRLC and others from accepting corporate or labor funds.*** If it wished to accept corporate or labor funds, it would simply have to take steps to ensure that those funds could not be spent on blatant electioneering messages.

- ***NRLC and similar organizations would not have to create a PAC or other separate entity in order to engage in the types of electioneering covered by the Amendment.*** Rather, they would simply have to deposit the money they receive from corporations and unions (or other restricted sources) into separate bank accounts.

- ***The Amendment would not bar or require disclosure of communications by print media, direct mail, or other non-broadcast modes of communication.*** NRLC and similar advocacy groups would be able to organize their members or communicate with the public at large through mass communications such as newspaper advertisements, mass mailings, voter guides, or billboards, to the same extent currently permitted by law. There is no provision in the current version of the Snowe-Jeffords Amendment that changes any of the rules regarding those non-broadcast forms of communication.

- ***The Amendment would not affect the ability of any organization to "urge grassroots contacts with lawmakers regarding an upcoming vote in Congress."*** The Amendment has

no effect on a broadcast directing the public, for example, to "Urge your congressman and senator to vote against [or 'in favor of'] the McCain-Feingold bill." The sponsor could even give the telephone number for the audience to call. And the ad would be free from all the Amendment's new disclosure rules and source rules -- even if the ad is run the day before the election. By simply declining to name "Congressman X" or "Senator Y," whose election is imminent and the outcome of which NRLC presumably does not intend to affect, NRLC could run its issue ad free from both the minimal disclosure rules and the prohibition on use of business and union funds.

- ***The Amendment's disclosure rules do not require invasive disclosure of all donors.*** They require disclosure only of those donors who pay more than $500 to the account that funds the ad.

- ***The Amendment would not require advance disclosure of the contents of an ad.*** It would require disclosure only of the amount spent, the sources of the money, and the identity of the candidate whose election is targeted.

Basic Constitutional Principles

NRLC is simply mistaken in suggesting that the minimal disclosure rules and the restrictions on corporate and union electioneering contained in the Snowe-Jeffords Amendment are unconstitutional. The Supreme Court has made clear that, for constitutional purposes, electioneering is different from other speech. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986). Congress has the power to enact campaign finance laws that constrain the spending of money on electioneering in a variety of ways, even though spending on other forms of political speech is entitled to absolute First Amendment protection. *See generally Buckley v. Valeo*, 424 U.S. 1 (1976). Congress is permitted to demand that the sponsor of an electioneering message disclose the amount spent on the message and the sources of the funds. And Congress may prohibit corporations and labor unions from spending money on electioneering. This is black letter constitutional law about which there can be no serious dispute.

There are, of course, limits to Congress's power to regulate election-related spending. But there are two contexts in which the Supreme Court has granted Congress freer reign to regulate. First, Congress has broader latitude to require disclosure of election-related spending than it does to restrict such spending. *See Buckley*, 424 U.S. at 67-68. In *Buckley*, the Court declared that the governmental interests that justify disclosure of election-related spending are considerably broader and more powerful than those justifying prohibitions or restrictions on election-related spending. Disclosure rules, the Court opined, in contrast to spending restrictions or contribution limits, enhance the information available to the voting public. Plus, the burdens on free speech rights are far less significant when Congress requires disclosure of a particular type of spending than when it prohibits the spending outright or limits the funds that support the speech. Disclosure rules, according to the Court, are "the least restrictive means of curbing the evils of campaign ignorance and corruption." Thus, even if certain political advertisements cannot be prohibited or otherwise regulated, the speaker might still be required to disclose the funding sources for those ads if the governmental justification is sufficiently strong.

Second, Congress has a long record, which has been sustained by the Supreme Court, of imposing more onerous spending restrictions on corporations and labor unions than on individuals, political action committees, and associations. Since 1907, federal law has banned corporations from engaging in electioneering. *See* 2 U.S.C. ' 441b(a). In 1947, that ban was extended to prohibit unions from electioneering as well. *Id.* As the Supreme Court has pointed out, Congress banned corporate and union contributions in order "to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." *United States v. UAW*, 352 U.S. 567, 585 (1957). As recently as 1990, the Court reaffirmed this rationale. *See Austin v. Michigan Chamber of Commerce*, 491 U.S. 652 (1990); *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982). The Court emphasized that it is perfectly constitutional for the state to limit the electoral participation of corporations because "[s]tate law grants [them] special advantages -- such as limited liability, perpetual life, and favorable treatment of the accumulation of and distribution of assets." *Austin*, 491 U.S. at 658-59. Having provided these advantages to corporations, particularly business corporations, the state has no obligation to "permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" (quoting *MCFL*, 479 U.S. at 257).

The Snowe-Jeffords Amendment builds upon these bedrock principles, extending current regulation cautiously and only in the areas in which the First Amendment protection is at its lowest ebb.

Congress Is Not Stuck with "Magic Words"

The Supreme Court has never held that there is only a single constitutionally permissible route a legislature may take when it defines "electioneering" to be regulated or reported. The Court has not prescribed certain "magic words" that are regulable and placed all other electioneering beyond the reach of any campaign finance regulation. NRLC's argument to the contrary is based on a fundamental misreading of the Supreme Court's opinion in *Buckley v. Valeo*.

In *Buckley*, the Supreme Court reviewed the constitutionality of the Federal Election Campaign Act (FECA). One section of FECA imposed a $1,000 limit on expenditures "relative to a clearly identified candidate," and another section imposed reporting requirements for independent expenditures of over $100 "for the purpose of influencing" a federal election. The Court concluded that these regulations ran afoul of two constitutional doctrines -- vagueness and overbreadth-- that pervade First Amendment jurisprudence.

The vagueness doctrine demands precise definitions. Before the government punishes someone -- especially for speech -- it must articulate with sufficient precision what conduct is legal and what is illegal. A vague or imprecise definition of electioneering might "chill" some political speakers who, although they desire to engage in discussions of political issues, may fear that their speech could be punished.

Even if a regulation is articulated with great clarity, it may still be struck as overbroad. A restriction that covers regulable speech (and does so clearly) can be struck if it sweeps too broadly and covers a substantial amount of constitutionally protected speech as well. But under the overbreadth doctrine, the

provision will be upheld unless its overbreadth is substantial. A challenger cannot topple a statute simply by conjuring up a handful of applications that would yield unconstitutional results.

Given these two doctrines, it is plain why FECA's clumsy provisions troubled the Court. Any communication that so much as mentions a candidate -- any time and in any context -- could be said to be "relative to" the candidate. And it is difficult to predict what might "influence" a federal election.

The Supreme Court could have simply struck FECA, leaving it to Congress to develop a narrower and more precise definition of electioneering. Instead, the Court intervened by essentially rewriting Congress's handiwork itself. In order to avoid the vagueness and overbreadth problems, the Court interpreted FECA to reach only funds used for communications that "expressly advocate" the election or defeat of a clearly identified candidate. In an important footnote, the Court provided some guidance on how to decide whether a communication meets that description. The Court stated that its revision of FECA would limit the reach of the statute "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley*, 424 U.S. at 44 n.52.

But the Court emphatically did not declare that all legislatures were stuck with these magic words, or words like them, for all time. To the contrary, Congress has the power to enact a statute that defines electioneering in a more nuanced manner, as long as its definition adequately addresses the vagueness and overbreadth concerns expressed by the Court.

Any more restrictive reading of the Supreme Court's opinion would be fundamentally at odds with the rest of the Supreme Court's First Amendment jurisprudence. Countless other contexts -- including libel, obscenity, fighting words, and labor elections -- call for delicate line drawing between protected speech and speech that may be regulated. In none of these cases has the Court adopted a simplistic bright-line approach. For example, in libel cases, an area of core First Amendment concern, the Court has rejected the simple bright-line approach of imposing liability based on the truth or falsity of the statement published. Instead the Court has prescribed an analysis that examines, among other things, whether the speaker acted with reckless disregard for the truth or falsity of the statement and whether a reasonable reader would perceive the statement as stating actual facts or merely rhetorical hyperbole. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14-17 (1990). Similarly, in the context of union representation elections, employers are permitted to make "predictions" about the consequences of unionizing but they may not issue "threats." The courts have developed an extensive jurisprudence to distinguish between the two categories, yet the fact remains that an employer could harbor considerable uncertainty as to whether or not the words he is about to utter are sanctionable. The courts are comfortable with the uncertainty of these tests because they have provided certain concrete guidelines.

In no area of First Amendment jurisprudence has the Court mandated a mechanical test that ignores either the context of the speech at issue or the purpose underlying the regulatory scheme. In no area of First Amendment jurisprudence has the Court held that the only constitutionally permissible test is one that would render the underlying regulatory scheme unenforceable. It is doubtful, therefore, that the Supreme

Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test.

The Snowe-Jeffords Amendment's Prohibition is Precise and Narrow

The Snowe-Jeffords Amendment presents a definition of electioneering carefully crafted to address the Supreme Court's dual concerns regarding vagueness and overbreadth. Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns. Any sponsor of a broadcast will know, with absolute certainty, whether the ad depicts or names a candidate, how many days before an election it is being broadcast, and what audience is targeted. There is little danger that a sponsor would mistakenly censor its own protected speech out of fear of prosecution under such a clear standard.

The prohibition is also so narrow that it easily satisfies the Supreme Court's overbreadth concerns. Any speech encompassed by the prohibition is plainly intended to convince voters to vote for or against a particular candidate. A sponsor who wishes simply to inform the public at large about an issue immediately before an election could readily do so without mentioning a specific candidate and without targeting the message to the specific voters who happen to be eligible to vote for that candidate. It is virtually impossible to imagine an example of a broadcast that satisfies this definition even though it was not intended to influence the election in a direct and substantial way. Though a fertile imagine might conjure up a few counter-examples, they would not make the law *substantially* overbroad.

The careful crafting of the Snowe-Jeffords Amendment stands in stark contrast to the clumsy and sweeping prohibition that Congress originally drafted in FECA. Unlike the FECA definition of electioneering, the Snowe-Jeffords Amendment would withstand constitutional challenge without having to resort to the device of narrowing the statute with magic words. Congress could, if it wished, apply the basic rules that currently govern electioneering to all spending that falls within this more realistic definition of electioneering. Congress could, for example, declare that only individuals and PACs (and the most grassroots of nonprofit corporations) could engage in electioneering that falls within this broadened definition. It could impose fundraising restrictions, prohibiting individuals from pooling large contributions toward such electioneering.

But, of course, the Snowe-Jeffords Amendment does not go that far. The flat prohibition applies not to advocacy groups like NRLC, but only to business corporations and labor unions -- and to the sorts of nonprofits that are already severely limited in their ability to lobby. The expansion in the definition of electioneering will not constrain NRLC from engaging in grassroots advocacy or spending the money it raises from its members for electioneering purposes. An individual, any other group of individuals, an association, and most nonprofit corporations can spend unlimited funds on electioneering that falls within the expanded definition and can raise funds in unlimited amounts, so long as they take care to insulate the funds they use on electioneering from funds they collect from business corporations, labor unions, or business activities. Since all corporations and labor unions receive reduced First Amendment protection

in the electioneering context -- remember, they can be flatly barred from electioneering at all -- the application of the new prohibition only to labor unions and certain types of corporation is certainly constitutional.

The Extended Disclosure Requirement

NRLC incorrectly argues that the Snowe-Jeffords Amendment's disclosure requirements infringe on the public's First Amendment right to engage in secret electioneering. In short, there is not such right. In *McIntyre v. Ohio Elections Commission*, 115 S. Ct. 1511 (1995), the Court was careful to distinguish the anonymous pamphleteering against a referendum at issue in that case from the disclosure rules governing electioneering for or against a particular candidate for office that were permitted in *Buckley*. Similarly, NRLC improperly relies on *NAACP v. Alabama*, 357 U.S. 449 (1958), which recognizes a limited right of anonymity for groups that have a legitimate fear of reprisal if their membership lists or donors are publicly disclosed. NRLC, like any other group, may be entitled to an exemption from electioneering disclosure laws if it can demonstrate a reasonable probability that compelled disclosure will subject its members to threats, harassment, or reprisals. *See McIntyre*, 112 S.Ct. at 1524 n.21. But the need for these kinds of limited exceptions certainly do not make the general disclosure rules contained in Snowe-Jeffords unconstitutional.

Since the new prohibition in the Snowe-Jeffords Amendment does not apply to the funds of individuals, associations, or most nonprofit corporations, the First Amendment implications for them are diminished. They will simply be required to report their spending on speech that falls within the broadened definition of electioneering, just as they currently must report the sources and amounts of their independent expenditures. They would be required to disclose the cost of the advertisement, a description of how the money was spent, and the names of individuals who contributed more than $500 towards the ad. Contrary to the NRLC's claim, they will never be required to disclose in advance any ad copy that they intend to air.

The overbreadth and vagueness rules are particularly strict when applied to rules that restrict speech -- such as the aspect of the Snowe-Jeffords Amendment that bars business corporations and labor unions from spending any funds on electioneering. But, as the Supreme Court has observed, disclosure rules do not restrict speech significantly. Disclosure rules do not limit the information that is conveyed to the electorate. To the contrary, they increase the flow of information. For that reason, the Supreme Court has made clear that rules requiring disclosure are subject to less exacting constitutional strictures than direct prohibitions on spending. *See Buckley*, 424 U.S. at 68. There is no constitutional bar to expanding the disclosure rules to provide accurate information to voters about the sponsors of ads indisputably designed to influence their vote.

Conclusion

The Snowe-Jeffords Amendment is a sensitive and sensible approach to regulating spending that has made a mockery of federal campaign finance laws. It regulates in the two contexts -- corporate and union spending and disclosure rules -- in which the Supreme Court has been most tolerant of regulation. The provisions are sufficiently clear to overcome claims of unconstitutional vagueness and sufficiently narrow to allay overbreadth concerns. The Amendment will not restrict the ability of advocacy groups such as NRLC to engage in either issue advocacy or electioneering, but it will subject their electioneering spending to federal disclosure requirements, which is constitutionally permissible.

Respectfully submitted,

Burt Neuborne
John Norton Pomeroy Professor of Law
NYU School of Law

Norman Ornstein
Resident Scholar
American Enterprise Institute

Daniel R. Ortiz
John Allan Love Professor of Law
University of Virginia School of Law

E. Joshua Rosenkranz
Executive Director
Brennan Center for Justice
at NYU School of Law

See attached for additional signatories.

Additional Scholars Endorsing Letter on Snowe-Jeffords Amendment

Prof. Robert Aronson
Professor of Law
University of Washington School of Law

Prof. Thomas E. Baker
Alvin R. Allison Professor of Law
Texas Tech University School of Law

Prof. Robert W. Benson
Professor of Law
Loyola Law School

Prof. William Cohen
C. Wendell & Edith M. Carlsmith Professor of Law
Stanford Law School

Prof. Victoria J. Dodd
Professor of Law
Suffolk University Law School

Prof. Ann E. Freedman
Associate Professor
Rutgers, The State University of New Jersey School of Law, (Camden)

Prof. Elwood B. Hain, Jr.
Professor of Law
Whittier Law School

Prof. Francis H. Heller
Roy A. Robert Professor of Law and Political Science Emeritus
University of Kansas School of Law

Prof. Philip B. Heymann
James Barr Ames Professor of Law
Harvard Law School

Prof. Paul M. Kurtz
J. Alton Hosch Professor & Associate Dean
University of Georgia School of Law

Prof. Harold G. Maier
David Daniels Allen Distinguished Professor of Law
Vanderbilt University School of Law

Prof. Karl M. Manheim
Professor of Law
Loyola Law School

Hon. Abner J. Mikva (Ret.)
Walter V. Schaefer Fellow in Public Policy & Visiting Professor of Law
University of Chicago Law School

Prof. J. Wilson Parker
Professor of Law
Wake Forest University School of Law

Prof. William J. Rich
Professor of Law
Washburn University School of Law

Prof. Ralph Michael Stein
Professor of Law
Pace University School of Law