No. 98-963

In the Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI, ET AL., PETITIONERS

v.

SHRINK MISSOURI GOVERNMENT PAC, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Missouri's limit of $1075 per election on the amount that any person may contribute to a candidate for statewide public office violates the First Amendment.

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INTEREST OF THE UNITED STATES

This case presents a First Amendment challenge to a Missouri statute that currently imposes a limit of $1075 per election (subject to adjustment for inflation) on the amount that any person may contribute to the campaign of any candidate for statewide public office. The Federal Election Campaign Act of 1971, as amended, prohibits campaign contributions in excess of $1000 per election to candidates for federal office. 2 U.S.C. 441a(a)(1)(A). Because the resolution of respondents' constitutional challenge could affect the validity of the federal contribution limit, the United States has a substantial interest in this case.

STATEMENT

1. This case involves a First Amendment challenge to campaign contribution limits established by the Missouri legislature. In July 1994, the legislature enacted Senate Bill 650, which amended the State's campaign finance law to restrict the amounts that can be contributed to candidates for public office. See Pet. App. 2a. Senate Bill 650 imposed a limit of $1000 per election on the amount that any person could contribute to any candidate for statewide public office. Mo. Ann. Stat. § 130.032.1(1) (West Supp. 1999); see *Carver* v. *Nixon*, 72 F.3d 633, 635 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996).[1] The law further provides that the contribution limits "shall be increased on the first day of January in each even-numbered year by multiplying the base year amount by the cumulative consumer price index." Mo. Ann. Stat. § 130.032.2 (West Supp. 1999). As adjusted in 1998 for changes in the consumer price index, the statute currently imposes a limit of $1075 per election

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[1] By its terms, Senate Bill 650 was scheduled to become effective on January 1, 1995. Pet. App. 2a; *Carver*, 72 F.3d at 634. In November 1994, 74% of Missouri voters approved a ballot initiative (Proposition A) that imposed substantially more restrictive limits on campaign contributions, including a limit of $300 per "election cycle" (*i.e.*, for the primary and general elections combined, see Pet. App. 26a n.2) on contributions to candidates for statewide office. See *Carver*, 72 F.3d at 635; Pet. App. 26a-27a. The Missouri Attorney General took the position that the more restrictive limits imposed by Proposition A superseded the limits contained in Senate Bill 650. *Carver*, 72 F.3d at 635; Pet. App. 27a. The Eighth Circuit subsequently determined that the Proposition A limits violated the First Amendment, see *Carver*, 72 F.3d at 640-645, and the limits imposed by Senate Bill 650 then took effect. Pet. App. 3a.

on contributions to candidates for statewide office. Pet. App. 3a, 24a; J.A. 8, 37.[2]

The Federal Election Campaign Act of 1971 (FECA), as amended, similarly prohibits any person from making contributions "to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000." 2 U.S.C. 441a(a)(1)(A). In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court considered a broad range of constitutional challenges to various provisions of the FECA. The Court upheld the $1000 limit (then codified at 18 U.S.C. 608(b)(1) (Supp. IV 1974)) on contributions to candidates for federal office. 424 U.S. at 23-35. The Court explained that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

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[2] The statewide offices subject to the $1075 limit are the offices of governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general. Mo. Ann. Stat. § 130.032.1(1) (West Supp. 1999); Pet. App. 3a. The $1075 limit also applies "to any other office, including judicial office, if the population of the electoral district, ward, or other unit * * * is at least" 250,000 persons. Mo. Ann. Stat. § 130.032.1(6) (West Supp. 1999). As adjusted for changes in the consumer price index, Senate Bill 650 currently imposes the following additional contribution limits: (1) $525 to candidates for state senator, or for any office where the population of the electoral district is 100,000 or more but less than 250,000; and (2) $275 to candidates for state representative, or for any office where the population of the electoral district is less than 100,000. Mo. Ann. Stat. § 130.032.1(2)-(5) (West Supp. 1999); Pet. App. 3a, 25a; J.A. 8, 37. Only the $1075 limit for candidates for statewide public office is at issue in this Court. See note 6, *infra*.

2. The plaintiffs in this case (respondents in this Court) are Shrink Missouri Government PAC (Shrink Missouri), a political action committee organized and doing business in Missouri, and Zev David Fredman, a Missouri resident and registered voter and unsuccessful candidate for the Republican Party's nomination for state auditor in the most recent election cycle. Pet. App. 3a, 29a. The defendants (petitioners in this Court) are the Attorney General of Missouri, the Chairman of the Missouri Ethics Commission and the individual members of the Commission, and the prosecuting attorney of St. Louis County. *Id.* at 29a. Respondents filed suit in federal district court, arguing that the contribution limits imposed by Senate Bill 650 violate their First Amendment rights of free speech and association. *Id.* at 3a; J.A. 5-11 (complaint).

The district court entered summary judgment in favor of petitioners. Pet. App. 24a-41a. The court observed that "[a] State indisputably has a compelling interest in preserving the integrity of its election process," *id.* at 30a (quoting *Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)), and that "[a] perception of influence peddling is 'real harm' regardless of whether such peddling is actually afoot," *id.* at 31a. It also stated that "[a]s the recipients of campaign contributions, members of the legislature are uniquely qualified to gauge whether allowing those contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefor." *Id.* at 32a.

The district court ultimately concluded that "*Buckley* controls the issues in this case." Pet. App. 39a. It held, in particular, that "the effect of inflation since *Buckley* was decided has not created a 'difference in kind' between a $1,000 contribution in 1976, and a $1,075

contribution in [1998]." *Id.* at 37a. The court stated that "the median income of a Missouri household in 1994 was $31,046, an amount that, in constant 1995 dollars, was actually less than it had been nine years earlier ($31,073 in 1985)." *Id.* at 40a. The court explained that "despite Missouri's contribution limits, candidates for state elected office are still quite able to raise funds sufficient to run effective campaigns." *Id.* at 37a. It noted as well that in the years before enactment of Senate Bill 650, only a small percentage of Missouri campaign contributors had made contributions in excess of the limits subsequently imposed by the legislature. *Id.* at 39a. The district court concluded that a decision invalidating Missouri's contribution limits would "constitute an indirect—but still improper—overruling of" this Court's decision in *Buckley*. *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-19a.[3] The court acknowledged that a State's interest in preserving the integrity of its electoral system is an "indisputably compelling" one. *Id.* at 5a. It held, however, that petitioners had failed to demonstrate that contributions exceeding the limits contained in Senate Bill 650 would actually threaten that interest. *Id.* at 5a-7a. The court distinguished *Buckley* on the following ground:

> In reaching its conclusions concerning the constitutionality of federal campaign contribution restrictions, the *Buckley* Court noted the perfidy that had been uncovered in federal campaign financing in 1972. *See* 424 U.S. at 27 n. 28. But we are unwilling to extrapolate from those examples that in Missouri

[3] The court of appeals had previously granted respondents' motion to enjoin the enforcement of the contribution limits pending disposition of their appeal. Pet. App. 20a-23a.

> at this time there is corruption or a perception of corruption from "large" campaign contributions, without some evidence that such problems really exist. * * * We will not infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago. The State therefore must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.

Id. at 6a. The court of appeals held that petitioners had failed to carry that burden, and on that basis it held the challenged contribution limits unconstitutional. *Id.* at 6a-7a.[4]

Judge Bowman further concluded that the contribution limits enacted by the Missouri legislature would be unconstitutional even if petitioners could show a compelling interest in limiting campaign contributions.

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[4] Petitioners offered into evidence, *inter alia*, the Affidavit of Senator Wayne Goode, who was the co-chairman of the Interim Joint Committee on Campaign Finance Reform at the time that Senate Bill 650 was enacted. Pet. App. 6a-7a; see J.A. 46-47. Senator Goode stated his belief that "contributions over [the statutory] limits have the appearance of buying votes as well as the real potential to buy votes. The greater the contribution, the greater potential there is for the appearance of and the actual buying of votes. It was the consensus of the Committee, and I concurred, that the limits we set forth in the bill balanced the need to run an effective campaign with the appearance of buying votes." J.A. 47. The court of appeals dismissed Goode's affidavit as "conclusory and self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee." Pet. App. 7a.

Pet. App. 7a-9a.[5] Judge Bowman found "as a matter of law that the limits at issue here are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." *Id.* at 7a-8a. He stated that:

> [a]fter inflation, limits of $1,075, $525, and $275 cannot compare with the $1,000 limit approved in *Buckley* twenty-two years ago. * * * In today's dollars, the [Senate Bill 650] limits appear likely to "have a severe impact on political dialogue" by preventing many candidates for public office "from amassing the resources necessary for effective advocacy."

Id. at 8a (quoting *Buckley*, 424 U.S. at 21).

Judge John R. Gibson dissented. Pet. App. 10a-19a. The dissenting judge found "no difference in kind" between Missouri's $1075 contribution limit for statewide races and the $1000 limit upheld by this Court in *Buckley*. *Id.* at 11a. Judge Gibson observed that "[i]f *Buckley*'s holding must wax and wane with inflation, * * * then the very statute that *Buckley* upheld would now be unconstitutional." *Id.* at 13a. He noted as well that "the campaign expenditures in Missouri's statewide elections have risen markedly since Senate Bill 650's enactment, and there is no basis for rejecting the district court's conclusion that candidates for office remain able to amass impressive campaign war chests."

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[5] Neither of the other two members of the panel joined in that part of Judge Bowman's opinion. Judge Ross filed a concurring opinion stating that he agreed with Part III A of the majority opinion, which held that petitioners had failed to satisfy their evidentiary burden, but that he did not join in Part III B. See Pet. App. 9a-10a (Ross, J., concurring). Judge John R. Gibson dissented. *Id.* at 10a-19a.

Ibid. (internal quotation marks omitted). Judge Gibson also concluded that the evidence introduced by petitioners was fully sufficient to support the particular contribution limits contained in Senate Bill 650. *Id.* at 14a-18a. He stated that those limitations "became law only after careful and informed deliberation by the legislature," and that "[t]he Court should not so lightly cast aside the legislature's findings in favor of its own." *Id.* at 16a.[6]

SUMMARY OF ARGUMENT

A. This case is controlled by the Court's analysis of campaign contribution limits in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The Court in *Buckley* sustained a $1000 contribution limit applicable to elections for federal office. The Court explained that the contribution limit left open ample alternative means by which would-be donors could engage in political speech and association. It held that the public and governmental interest in preventing the fact and appearance of electoral corruption provided a constitutionally sufficient justification for the $1000 cap. While recognizing the possibility that contribution limits might under some circumstances prevent candidates from acquiring sufficient resources to engage in effective political speech, the Court found no reason to believe that the $1000 limit contained in the federal law would have that effect. The *Buckley* Court's holding and analysis of contribution limits apply

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[6] Although the full range of the Senate Bill 650 contribution limits was at issue in the courts below, the question presented in the petition for a writ of certiorari is limited to "Missouri's campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in" *Buckley*. Pet i. Thus, only the $1075 limit applicable to candidates for statewide public office is at issue in this Court.

with full force to Missouri's $1075 limit on contributions to candidates for statewide public office.

The court of appeals sought to distinguish *Buckley* on the ground that the Missouri legislature—unlike the Congress that enacted the federal limit—had failed to document the existence of actual problems caused by large campaign contributions. The court of appeals substantially understated the strength of the evidence suggesting a link between large contributions to Missouri candidates and real or apparent political corruption. Its more fundamental error, however, was in reading *Buckley* to require empirical proof of the nexus between large campaign contributions and political corruption. Although the *Buckley* Court noted in passing that abuses had occurred during the 1972 campaign, its primary focus was on the reasonableness of Congress's view that large contributions to political candidates are *inherently* likely to cause actual or apparent corruption of the electoral process.

One judge on the court of appeals concluded that, as a result of increases in the cost of living during the years between 1976 and 1998, Missouri's $1075 contribution limit is different in kind from the $1000 limit approved by this Court in *Buckley*. As *Buckley* makes clear, however, a reviewing court owes substantial deference to legislative judgments regarding the point at which a contribution limit should be set. The available evidence provides no support for the proposition that Missouri's $1075 contribution limit differs in kind from the limit previously approved by this Court. To the contrary, the evidence indicates that only a small percentage of Missouri contributors are affected by that limit, and that campaign expenditures in the State have increased significantly since the contribution limit was enacted.

B. The only basis on which to sustain the court of appeals' ruling would be to overrule *Buckley*'s analysis of contribution limits. No intervening development of fact or law supports such a departure from principles of stare decisis with respect to that issue.

Neither respondents nor the court of appeals has identified any colorable basis for concluding that large campaign contributions have ceased to pose a significant risk of real or apparent electoral corruption. Congress has retained the $1000 limit on contributions to federal candidates, and the vast majority of States have imposed similar restrictions. That legislative activity belies any suggestion that the *Buckley* rule concerning campaign contributions has become archaic or outmoded.

The *Buckley* Court's treatment of contribution limits is fully consistent with the subsequent development of the Court's First Amendment jurisprudence. This Court has repeatedly cited that aspect of *Buckley* with apparent approval, and it has accepted the propriety of reasonable contribution limits as the starting point for constitutional analysis of other forms of campaign-finance regulation. The Court has recognized more generally that the right to associate for political purposes is not absolute, and that incidental impairments of that right may often be justified by the State's interest in preserving the integrity and efficiency of its electoral processes. Finally, the Court has made clear that the Constitution permits the government to regulate the manner in which candidates for public office conduct their electoral campaigns. Thus, while Missouri's $1075 contribution limit undoubtedly entails some restriction on the contributor's expressive and associational activities, and on the candidate's ability to amass the full amount of funds that he might otherwise

acquire, this Court's decisions make clear that the limit is not thereby rendered unconstitutional.

ARGUMENT

THE MISSOURI LAW AT ISSUE IN THIS CASE, WHICH PROVIDES THAT NO PERSON MAY CONTRIBUTE MORE THAN $1075 PER ELECTION TO ANY CANDIDATE FOR STATEWIDE PUBLIC OFFICE, IS CONSISTENT WITH THE FIRST AMENDMENT.

A. The Court Of Appeals' Decision Conflicts With *Buckley* v. *Valeo*, In Which This Court Rejected A First Amendment Challenge To A $1000 Limit On Contributions To Candidates For Federal Office

1. This case is controlled by the Court's analysis of campaign contribution limits in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). *Buckley* involved a challenge to various provisions of the Federal Election Campaign Act of 1971 (FECA), as amended. One of those provisions established as a general rule that "no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1,000." 18 U.S.C. 608(b)(1) (Supp. IV 1974) (quoted in *Buckley*, 424 U.S. at 189).[7] The Court in *Buckley* upheld the $1000 ceiling on contributions to candidates, explaining that the public and governmental interest in preventing actual or apparent corruption of the electoral process justified the relatively minor burden on

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[7] The current version of former Section 608(b)(1) states:

> (1) No person shall make contributions—
>
> (A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000

2 U.S.C. 441a(a)(1).

expressive and associational activities that the contribution limit entails. 424 U.S. at 26-29.

After considering the practical effect of the $1000 contribution limit, and the alternative means of political expression that remained available, the Court determined that the contribution limits effected "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20-21. The Court explained:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 21 (footnote omitted).

The Court recognized that "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. It found "no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations," noting that "approximately 5.1% of the $73,483,613 raised by the 1,161 candidates for Congress in 1974 was obtained in amounts in excess of $1,000." *Id.* at 21 & n.23. The Court stated that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 21-22 (footnote omitted).

The Court recognized that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association." 424 U.S. at 24-25. It stated that "governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25 (internal quotation marks omitted). The Court observed, however, that "[n]either the right to associate nor the right to participate in political activities is absolute," and that "[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 abridgment of associational freedoms." *Ibid.* (internal quotation marks omitted).

The Court held that "the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—[provides] a constitutionally sufficient justification for the $1,000 contribution limitation." 424 U.S. at 26. The Court explained:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions. * * * Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Id. at 26-27 (footnote, ellipsis, and internal quotation marks omitted).

The Court concluded that "[t]he Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions * * * while leaving persons free to engage in independent political express-

ion, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources." 424 U.S. at 28. It rejected an argument that the $1000 contribution limit was set "unrealistically low," explaining that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30 (internal quotation marks omitted). The Court noted that "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Ibid.*

2. Despite the *Buckley* Court's approval of FECA's $1000 limit on federal campaign contributions, the court of appeals in the instant case invalidated Missouri's $1075 limit on contributions to candidates for statewide office. The court of appeals held that *Buckley* was not controlling because petitioners had failed to prove the existence of Missouri-specific problems resulting from large campaign contributions. Judge Bowman concluded in addition that the effects of inflation had rendered Missouri's $1075 contribution limit "different in kind" from the $1000 limit upheld in *Buckley*. Neither of those theories withstands scrutiny.

a. The court of appeals stated that "[i]n reaching its conclusions concerning the constitutionality of federal campaign contribution restrictions, the *Buckley* Court noted the perfidy that had been uncovered in federal campaign financing in 1972." Pet. App. 6a (citing *Buckley*, 424 U.S. at 27 n.28). The court was "unwilling to extrapolate from those examples that in Missouri at this time there is corruption or a perception of corruption from 'large' campaign contributions, without some evidence that such problems really exist." *Ibid.*

The court of appeals therefore required petitioners to "prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions," *ibid.*, and it concluded (*id.* at 6a-7a) that petitioners had failed to carry that evidentiary burden. That analysis is flawed in two distinct respects.

To begin with, the court of appeals substantially understated the strength of the evidence suggesting a link between large contributions to Missouri candidates and real or apparent political corruption. As the district court recognized, large contributions to candidates for at least two statewide offices in Missouri were publicly reported near the time of Senate Bill 650's enactment, leading to concern about possible corruption. Pet. App. 31a n.6; see also *Carver* v. *Nixon*, 72 F.3d 633, 642 (8th Cir. 1995), cert. denied, 518 U.S. 1033 (1996). Shortly before the Senate Bill 650 limitations were to take effect, voters in Missouri overwhelmingly approved a ballot initiative that would have imposed substantially lower contribution limits, suggesting a significant perception of corruption within the electorate. Pet. App. 32a n.7. In addition, state Senator Wayne Goode, who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time that Senate Bill 650 was enacted, signed a sworn affidavit expressing his belief that contributions in excess of the statutory limits "have the appearance of buying votes as well as the real potential to buy votes." J.A. 47; Pet. App. 31a.[8]

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[8] The court of appeals characterized the affidavit as "self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee." Pet. App. 7a. As Judge Gibson explained, however, the court of appeals im-

The more fundamental flaw in the court of appeals' approach, however, lies in its mistaken view that *Buckley* required empirical proof of the nexus between large campaign contributions and corruption of the political process. The *Buckley* Court's passing reference (424 U.S. at 27) to "the deeply disturbing examples [of corrupt practices] surfacing after the 1972 election" was scarcely central to the Court's constitutional analysis. The Court in *Buckley* focused not on isolated examples of proven misconduct, but on the manifest reasonableness of Congress's determination that large campaign contributions are *inherently* likely to cause widespread actual or apparent corruption of the electoral process.[9]

Thus, the *Buckley* Court explained that the appearance of corruption "stem[s] from public awareness

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properly "rule[d] upon the credibility of a witness on a summary judgment motion" and "gratuitously impugn[ed] the senator's description of the evidence before the Committee, the conclusions drawn by the Committee, and his fellow legislators' first-hand knowledge of what it costs to wage a campaign and the dangers presented by contributions above the limits enacted." *Id.* at 15a n.6 (John R. Gibson, J., dissenting).

[9] The State's interest in preventing electoral corruption encompasses all situations in which large campaign contributions could influence (or might plausibly be suspected of influencing) official actions taken by the recipients. The State need not limit its efforts to the sort of specific *quid pro quo* arrangements that violate bribery laws or similar criminal prohibitions. Compare *McCormick* v. *United States*, 500 U.S. 257, 273 (1991) (campaign contributions violate the Hobbs Anti-Racketeering Act, 18 U.S.C. 1951 *et seq.*, "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act") with *Buckley*, 424 U.S. at 27-28 ("laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action").

of the opportunities for abuse inherent in a regime of large individual financial contributions." 424 U.S. at 27. It found that "Congress was surely entitled to conclude * * * that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 28. See also *id.* at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated."). The court of appeals therefore erred in requiring petitioners to make a formal evidentiary record establishing, on a Missouri-specific basis, that campaign contributions in excess of the statutory limits would likely result in actual or apparent electoral corruption.

b. Judge Bowman also concluded that petitioners could not prevail in this case even if they had established a danger of real or apparent corruption because "the [contribution] limits at issue here are so small that they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." Pet. App. 8a. He explained that "[a]fter inflation, limits of $1,075, $525, and $275 cannot compare with the $1,000 limit approved in *Buckley* twenty-two years ago." *Ibid.* (footnote omitted). That analysis (which would logically imply that the $1000 federal contribution limit upheld in *Buckley* has since become invalid) is fundamentally flawed.

The Court in *Buckley* showed substantial deference not only to Congress's determination that unlimited campaign contributions threaten democratic values, but also to Congress's judgment regarding the choice of an appropriate dollar limit. The Court explained that:

> [w]hile the contribution limitation provisions might well have been structured to take account of the graduated expenditure limitations for congressional and Presidential campaigns, Congress' failure to engage in such fine tuning does not invalidate the legislation. As the Court of Appeals observed, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000."

424 U.S. at 30 (footnote omitted). That passage makes clear that the Constitution specifies no precise mathematical formula for calculating permissible contribution limits. Congress has significant latitude to determine the appropriate line of demarcation between lawful and unlawful contributions, and it may seek to enhance consistency and ease of administration by adopting a single limit applicable to all federal elections.[10]

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[10] The prospect of inflation was hardly unforeseeable at the time that *Buckley* was decided, but the Court did not suggest that Congress's failure to include a cost-of-living adjustment cast doubt on the continuing legitimacy of the FECA contribution limit. The Court specifically held that Congress could permissibly enact a single limit applicable to all federal offices, even though the costs of campaigning for congressional and Presidential elections vary substantially. See 424 U.S. at 30 & n.32. Indeed, because the cost of living varies significantly from one part of this country to another, a constitutional requirement that contribution limits must bear some precise mathematical relation to the consumer price index would preclude the enactment of *any* uniform federal limit, even with respect to a given elective office.

Although the purchasing power of $1000 has declined considerably since *Buckley* was decided, the expressive significance of a $1000 campaign contribution remains essentially the same. As the *Buckley* Court recognized, "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his

The *Buckley* Court indicated that "distinctions in degree" between various contribution limits might take on constitutional significance "when they can be said to amount to differences in kind." 424 U.S. at 30. There is no basis, however, for Judge Bowman's conclusion (Pet. App. 9a) that Missouri's $1075 limit on contributions to candidates for statewide office is different in kind from the $1000 limit approved in *Buckley*. Data for the 1994 election for state auditor and the 1992 election for secretary of state indicate that less than 3% of contributions exceeded an aggregate of $2000 for the election cycle. See *id.* at 39a; compare *Buckley*, 424 U.S. at 21 n.23 (noting that approximately 5.1% of contributions to candidates for Congress in 1974 exceeded $1,000). Nor have respondents attempted to prove that the limits contained in Senate Bill 650 have "prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. To the contrary, "campaign expenditures in Missouri's statewide elections have risen markedly since Senate Bill 650's enactment." Pet. App. 13a (John R. Gibson, J., dissenting). Thus, as the district court concluded, "[d]espite Missouri's contribution limits, candidates for political office in the state are still able to amass impressive campaign war chests." *Id.* at 37a; see J.A. 24-30.

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contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 21. Even assuming that the amount of a contribution serves to some degree to express the depth of the contributor's support, a contribution at the maximum level permitted by law should ordinarily communicate the desired message.

B. The *Buckley* Court's Treatment Of Campaign Contribution Limits Is Fully Consistent With Subsequent Developments In First Amendment Jurisprudence And Should Not Be Overruled

For the reasons set forth above, there is no principled distinction between the $1075 contribution limit at issue in this case and the $1000 FECA contribution limit upheld by this Court in *Buckley*. So long as *Buckley*'s analysis of the constitutionality of campaign contribution limits remains good law, the decision of the court of appeals should therefore be reversed. Although "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989), "even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *United States* v. *International Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996) (citations and internal quotation marks omitted).

The "special justification[s]" that support overruling of this Court's precedents are perhaps insusceptible of precise definition, but they will generally fall into one of two basic categories. First, overruling of an existing precedent may be justified where the prior decision rests on a view of the relevant facts that appears not to reflect current reality. See, *e.g.*, *Planned Parenthood* v. *Casey*, 505 U.S. 833, 855 (1992) (Court should inquire "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification"). Second, overruling may be justified if developments in related areas of the law have rendered the earlier decision a constitutional anomaly. See, *e.g.*, *ibid.* (Court in deciding whether to overrule precedent considers "whether related prin-

ciples of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine"); *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997). Neither of those "special justification[s]" applies to *Buckley*'s analysis of campaign contribution limits.[11]

1. The *Buckley* Court upheld as reasonable Congress's determination that bribery and public disclosure laws were not a sufficient response to the threat of electoral corruption, and "that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." 424 U.S. at 28; see also *id.* at 30 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated"). Neither respondents nor the court of appeals has identified any colorable basis for concluding that large campaign contributions have ceased to pose a significant risk of real

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[11] Currently pending before the Court is the petition for a writ of certiorari in No. 98-978, *Bray* v. *Shrink Missouri Government PAC, et al.*, which seeks review of the same court of appeals decision that is at issue here. Petitioners in *Bray* suggest, without significant elaboration, that this case may furnish an appropriate occasion for reexamination of other aspects of *Buckley*. See 98-978 Pet. 5. We believe that such a course of action would be unnecessary. In our view, the instant case may and should be resolved on the grounds that (a) no principled distinction exists between Missouri's $1075 limit on contributions to candidates for statewide office and the $1000 limit upheld in *Buckley*, and (b) no intervening development of law or fact suggests that *Buckley*'s analysis of campaign contribution limits should be overruled. Whether other aspects of *Buckley* warrant reexamination by this Court should await a case that involves other forms of campaign-finance regulation.

or apparent electoral corruption. Congress has retained the $1000 limit on contributions to federal candidates, and the vast majority of States have imposed similar restrictions. See Pet. App. 42a-44a. That pattern of legislative activity belies any suggestion that the factual underpinnings of the *Buckley* rule have become outmoded.

2. Intervening decisions of this Court during the past quarter-century have not rendered *Buckley*'s First Amendment analysis of campaign contribution limits a constitutional anomaly. To the contrary, the *Buckley* Court's treatment of contribution limits is fully consistent with the subsequent development of this Court's First Amendment jurisprudence.

a. The *Buckley* Court held that FECA's $1000 contribution limit does not abridge the contributor's right to freedom of speech. The Court explained that contribution limits impose "only a marginal restriction upon the contributor's ability to engage in free communication," since "[a]t most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." 424 U.S. at 20-21. It also concluded that the public interest in reducing "the actuality and appearance of corruption" furnished "a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

The Court in *Buckley* stated that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association." 424 U.S. at 24-25. It explained, however, that "neither the right to associate nor the right to participate in political activities is absolute," and that "[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 abridgment of associational freedoms." *Id.* at 25 (brackets and internal quotation marks omitted). Because the FECA contribution limit was supported by the governmental interest in reducing actual or apparent electoral corruption, see *id.* at 26, and because a variety of avenues of political association remained available, see *id.* at 28-29, the Court found no unconstitutional interference with associational freedoms.

Nothing in this Court's subsequent campaign-finance decisions casts doubt on the holding in *Buckley* that reasonable contribution limits do not violate contributors' First Amendment rights. To the contrary, this Court has repeatedly referred, with apparent approval, to that aspect of the *Buckley* Court's analysis. See *Colorado Republican Fed. Campaign Comm.* v. *Federal Election Comm'n*, 518 U.S. 604, 615 (1996) (opinion of Breyer, J.); *id.* at 628 (opinion of Kennedy, J.); cf. *id.* at 649 (Stevens, J., dissenting); *Federal Election Comm'n* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-260 (1986); *Federal Election Comm'n* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982); *California Med. Ass'n* v. *Federal Election Comm'n*, 453 U.S. 182, 196-197 & n.16 (1981) (plurality opinion). In some cases the Court has relied on *Buckley* in upholding legislative or regulatory measures designed to address the fact or appearance of electoral corruption. See *National Right to Work Comm.*, 459 U.S. at 208; *California Med. Ass'n*, 453 U.S. at 196-197 & n.16; *id.* at 202-203 (Blackmun, J., concurring in part and concurring in the judgment). In other decisions the Court has invalidated campaign-finance restrictions only after concluding that the measures in question trenched more deeply on First

Amendment freedoms, and/or were supported by less compelling governmental interests, than the contribution limits upheld in *Buckley*. See *Colorado Republican*, 518 U.S. at 614-616 (opinion of Breyer, J.); *id.* at 628-629 (opinion of Kennedy, J.); *Massachusetts Citizens for Life*, 479 U.S. at 259-260. Thus, subsequent decisions of this Court, rather than rendering *Buckley*'s treatment of contribution limits a constitutional outlier, have accepted the validity of contribution caps as the starting point for analysis of other forms of campaign-finance regulation.[12]

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[12] Indeed, it might well be argued that the *Buckley* Court applied an unduly stringent standard of review to the claim that FECA's contribution limits violate a contributor's right to freedom of speech. The Court had previously held that government regulation of expressive conduct "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). The Court has since reaffirmed that "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Texas* v. *Johnson*, 491 U.S. 397, 406 (1989); see also *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 566-567 (1991) (plurality opinion); *id.* at 582 (Souter, J., concurring in the judgment); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293, 298-299 & n.8 (1984). Direct contributions of money to political candidates might be regarded as a form of expressive conduct subject (under *O'Brien* analysis) to significant regulation, so long as the regulation serves to advance governmental interests unrelated to suppression of the contributor's "message."

In rejecting the application of *O'Brien* analysis to FECA's contribution and expenditure limits, the *Buckley* Court relied in part on *Bigelow* v. *Virginia*, 421 U.S. 809, 820 (1975), and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266 (1964). See 424 U.S.

b. *Buckley*'s treatment of contribution limits is consistent not only with subsequent campaign-finance decisions, but with the legal standards that apply more generally to state regulation of the electoral process. This Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984); accord, *e.g.*, *Board of Dirs. of Rotary Int'l* v. *Rotary Club*, 481 U.S. 537, 544, 548-549 (1987). The Court has also recognized, however, that "[t]he right to associate for expressive purposes is not * * * absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623 (citing, *inter alia*, *Buckley*, 424 U.S. at 25). The Court has specifically applied that principle to associational activities undertaken in connection with the electoral process. "When deciding whether a state election law violates First and Fourteenth Amendment associational rights, [the Court] weigh[s] the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider[s] the extent to which the State's concerns make the burden necessary."

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at 16-17. Those cases are not wholly apposite: they hold that written expression does not receive reduced First Amendment protection simply because its dissemination requires a payment of money, see *Sullivan*, 376 U.S. at 266; *Bigelow*, 421 U.S. at 820, but they do not hold that the payment is itself a form of pure speech entitled to the highest level of First Amendment protection.

Timmons v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotation marks omitted).

As the Court recognized in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983), every provision of a State's election law "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Id.* at 788. "Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992). Thus, while "[r]egulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest," "[l]esser burdens * * * trigger less exacting review." *Timmons*, 520 U.S. at 358; accord *Burdick*, 504 U.S. at 434. The Court has also emphasized the need for judicial deference to reasonable legislative judgments regarding the steps needed to safeguard the integrity of the electoral process, particularly when those judgments are by their nature insusceptible of definitive empirical proof or refutation. See, *e.g.*, *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 194-196 (1986); *National Right to Work Comm.*, 459 U.S. at 209-210.

Thus, subsequent decisions have reinforced the *Buckley* Court's holding that reasonable contribution limits do not violate the contributor's right to freedom of association. In particular, the Court has unequivocally rejected the proposition that every legislative restriction on associational activities—no matter how slight or attenuated the resulting burden—is to be treated as presumptively unconstitutional. Where (as here) the burden on associational freedoms is relatively

small, the countervailing public and governmental interests substantial, and the State's method of achieving its objectives reasonable, nothing in this Court's decisions subsequent to *Buckley* casts doubt on the propriety of the State's action.[13]

c. The *Buckley* Court's analysis of the interests of the *recipients* of campaign contributions is also consistent with subsequent developments in First Amendment doctrine. The Court in *Buckley* acknowledged that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." 424 U.S. at 21. The Court found "no indication, however, that the contribution limitations imposed by the Act would have any dramatic adverse effect on the funding of campaigns and political associations." *Ibid.* In upholding the FECA contribution limit on that basis, the

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[13] Indeed, under both federal and Missouri law, payments to public officials are forbidden in a variety of circumstances. See, *e.g.*, 5 U.S.C. 7353 (generally prohibiting Members of Congress and federal officers and employees from soliciting or accepting anything of value from persons in specified circumstances); 18 U.S.C. 201(c)(1)(A) and (B) (1994 & Supp. III 1997) (no person may give, and no federal official may receive, anything of value "for or because of any official act"); 18 U.S.C. 209(a) (1994 & Supp. III 1997) (prohibiting payment or receipt of "any contribution to or supplementation of salary" of any federal Executive Branch officer); Mo. Ann. Stat. § 105.456 (West Supp. 1999) (prohibiting members of Missouri general assembly and statewide elected officials in Missouri from, *inter alia*, accepting outside compensation for acting in official capacity). Although such prohibitions limit to some degree the means by which persons outside the government may associate with favored politicians or causes, it could not seriously be contended that the prohibitions are for that reason unconstitutional.

Court necessarily rejected any suggestion that a candidate's First Amendment right to engage in political speech encompasses an absolute right to accept any and every campaign contribution offered by a willing donor.

That holding is fully consistent with intervening developments in First Amendment jurisprudence. In *National Right to Work Committee*, for example, a unanimous Court rejected a First Amendment challenge to solicitation restrictions designed to effectuate a statutory ban on corporate and union contributions to candidates for federal office. See 459 U.S. at 206-211. The Court's analysis plainly presumed that the underlying ban on corporate and union contributions is valid, notwithstanding its foreseeable impact on the quantity of funds that candidates can acquire and thereafter utilize for political expression.[14] In other contexts as well, the Court has made clear that the Constitution permits the government to regulate the manner in which candidates for public office conduct their electoral campaigns. See, *e.g.*, *Timmons*, 520 U.S. at 358, 364-370 (upholding state antifusion law prohibiting candidates from appearing on ballot as candidate of more than one political party); *Clements* v. *Fashing*, 457 U.S. 957, 971-972 (1982) (rejecting challenge to "resign-to-run" provision that treated an elected state official's declaration of candidacy for another elected office as an automatic resignation from the office then held).

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[14] Federal law has long forbidden business corporations and labor unions from making contributions to candidates for federal office. See 2 U.S.C. 441b; 11 C.F.R. 114.2(a) and (b); *Massachusetts Citizens for Life*, 479 U.S. at 246; *United States* v. *International United Auto., Aircraft & Agric. Implement Workers of Am.*, 352 U.S. 567, 570-587 (1957).

Unless a particular contribution limit can be expected to "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, it is not rendered invalid simply because it has *some* discernible impact on the amount of funds a candidate is able to acquire.

In the instant case, the district court considered the available evidence and concluded that "despite Missouri's contribution limits, candidates for state elected office are still quite able to raise funds sufficient to run effective campaigns." Pet. App. 37a. Respondents have made no effort to rebut that finding. *Buckley* therefore makes clear, and subsequent decisions of this Court confirm, that respondents cannot demonstrate a First Amendment violation based on the effect of the challenged contribution limits on the recipients' ability to engage in political speech.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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