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,
ZEV DAVID FRIEDMAN and JOAN BRAY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN URGING REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

INTEREST OF THE *AMICUS*[1]

Public Citizen is a non-profit advocacy organization founded in 1971 with approximately 150,000 members throughout the United States. For many years, Public Citizen has devoted substantial resources to trying to limit the influence of money on elections. To that end, it has sought to ensure that the limitations on contributions to political candidates are set at levels which do not result in the appearance that campaign contributions can purchase votes on legislation or on other official acts, while at the same time the amounts are set high enough to enable those who seek elected office to raise sufficient funds to run a competitive race.

As a result of its work in both the legislative and litigation arenas on this issue, Public Citizen has concluded that there is no single answer to the question of what is an appropriate contribution limit that would apply to all election races in all states. Thus, to the extent that this case may be seen as a vehicle to answer that question, Public Citizen has a strong interest in seeing that the Court resolves it in a way that does not create a nationwide solution that fails to take into account the circumstances, preferences, and historic election practices of each jurisdiction.

This case is also significant for Public Citizen because of the opportunity it affords the Court to provide substantial

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amicus* states that no party had any role in writing this brief and that no one other than *amicus* made a monetary contribution to its preparation or submission.

guidance to legislatures and the lower courts in dealing with campaign finance issues. While the discussion in *Buckley v. Valeo*, 424 U.S. 1 (1976), is a useful starting point that sets the outer parameters for the debate, the lower courts and the legislatures need further guidance on how to deal with a number of issues that are raised in this case. If only the fate of the Missouri statute were at issue, Public Citizen would leave its defense to the parties, whose briefs clearly show that the court of appeals overstepped its proper role when it held the limits to be unconstitutional. But because the Court's decision is likely to have an impact far beyond the four corners of the Missouri statute, Public Citizen is filing this brief (with the consents of the parties) to set forth its views on how the issue should be approached in this and in future cases.

In analyzing the constitutional issue presented, this brief will discuss a number of policy options (such as automatic cost of living increases for contribution limits, or different limits within a jurisdiction for the same race, based on different conditions). Our discussion of constitutionally permissible alternatives should not be seen as a policy recommendation by Public Citizen that they be adopted, any more than the absence of any discussion of a public funding option, like that recently adopted by the States of Maine, Massachusetts, and Arizona, and used in Presidential elections, should be construed to mean that Public Citizen has abandoned its long-time support of that means of eliminating the appearance of corruption and assuring adequate funding of elections. The only questions presented here are the constitutionality of certain options chosen by Missouri, not their wisdom, which is for the legislative branch of government to decide.

SUMMARY OF ARGUMENT

Although this is a First Amendment challenge, this Court made it clear in *Buckley* that the Constitution does not forbid the government from setting reasonable limits on the size of contributions to candidates for elected office. *Buckley* also made it clear that the Court will not substitute its judgment for that of the elected legislature. Thus, while this Court did not eliminate all judicial review of contribution limitations, nothing in *Buckley* or any other opinion of this Court changes the basic rule that laws passed by democratically-elected legislatures are presumed constitutionally valid, and that the burden is on those challenging a law to establish their invalidity. Indeed, if contribution limits are alleged to limit the ability of candidates to raise the money needed to run for office, challengers should face a particularly uphill battle to convince a court that the legislators who write those laws have created limitations that hinder their own efforts at re-election, which is, in essence, what respondents allege.

Other aspects of the decision below demonstrate that the court of appeals improperly substituted its judgment for that of the Missouri legislature. Nothing in the First Amendment requires that a state set contribution levels with mathematical precision, nor that one jurisdiction slavishly follow what another has done. Thus, an amount that may be perfectly acceptable for one race, in one locale, may suggest to citizens in another state that a contribution of that size is the equivalent of buying the candidate's vote. Similarly, the amount needed to run for Governor in New York is almost certainly irrelevant to the determination of what funds are needed for a state assembly race in North Dakota, and vice-versa. The job of the legislature is to achieve a proper balance between banning contributions that give rise to the appearance of corruption, while not setting

contribution limits so low that candidates for elected office -- particularly challengers -- are unable to raise enough money to have a realistic chance to prevail. It is not the job of the courts to pass on those balances *de novo*.

On the appearance of corruption side of the ledger, courts should be extremely reluctant to substitute their views for those of the legislature. Not only is a judgment on that issue a peculiarly local matter, but questions relating to the appearance of corruption are not capable of judicial verification by the use of any kinds of data, whether local, regional, or national. Furthermore, it is singularly inappropriate for life-tenured federal judges to second-guess the elected representatives of a state on how large a contribution to a candidate for office must be to suggest to the people of that state that the candidate is being bought, or at least rented until the next election. Furthermore, if legislators vote for a contribution ceiling on the grounds that allowing larger donations would raise the appearance of corruption, they are unlikely to set that limit so low as to call into question their own prior or future practices of accepting similar amounts.

The other part of the balance does not focus on the interest of the person who seeks to make larger contributions, but on the ability of the candidate to raise sufficient funds to compete. As this Court recognized in *Buckley*, the First Amendment interest in writing a check to a candidate is a lesser one than in spending that same amount of money in making a public statement of support for that same candidate. 424 U.S. at 21. Moreover, if a donor has given the maximum allowed by law, she or he can still support that candidate by making unlimited independent expenditures, by donating time and energy as a volunteer, and by contributing to political committees and parties who may also support that candidate.

Thus, while would-be donors may have standing to challenge contribution limits, the Court should be loathe to accept their claims that the recipients of their greater largesse are being severely handicapped by the lower limits, unless there is a candidate making a credible challenge, backed by evidence and not merely conclusory assertions, that the limits interfere with that candidate's ability to run for office.

We do not suggest that the First Amendment would be satisfied if the courts simply rubber-stamp whatever limits legislatures enact. Rather, our position is that a plaintiff must initially show that contribution limitations create a substantial burden on the ability to run a competitive race. But even then, if the legislature carefully considers relevant factors, such as those outlined below, the courts should not overturn a judgment as to the proper level for political contributions except in the most extraordinary circumstances, such as where the legislature blatantly disregarded clearly relevant evidence in a manner that leads the court to conclude that the First Amendment had been effectively written out of the legislative calculus.

ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court upheld the government's right to impose limits on contributions to candidates for elected office on the ground that there was a significant interest in preventing the appearance of corruption, as well as actual corruption. At the same time, it ruled that the First Amendment prevented the government from limiting the total amount of money that candidates for office could spend, either from their own funds or from funds lawfully raised from others. In rejecting the argument that the expenditure ceiling was needed to prevent the appearance of corruption, the Court assigned that role to contribution limitations. *Id.* at 55. This

case raises the question of the degree to which federal courts will scrutinize legislatively-enacted contribution limits and the factors to which the legislature and the courts should look when enacting or reviewing those limits.[2]

We begin with an obvious, but necessary point. Drawing numerical lines is not an ordinary activity in areas in which the First Amendment provides the jurisprudence, and therefore there is little authority on how a legislature should set precise contribution limits, and less guidance on how the courts should review what the legislature has done. But certain elements cannot be disputed: legislative line-drawing is inevitable; other lines, close to the one chosen, would also be defensible; and reasonable legislatures will arrive at different conclusions based on the same or similar facts. As this Court observed in upholding a statute allowing a municipality to charge up to $300 for the expenses of policing a parade, over an objection that only a flat fee is permitted by the First Amendment, "we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought." *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941).

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[2] Missouri's limits were enacted by its legislature, although it had prior limits that were enacted through an initiative. Because of the differences between the processes by which initiatives and ordinary legislation become law, this brief will address only the latter, and we urge that the Court expressly limit its opinion to the judicial review of legislatively-enacted contribution limits, although the factors that go into setting limits in both contexts are the same.

On the other hand, the First Amendment does not allow either legislatures or the courts to disregard the impact of contribution limits simply because there may be an appearance of corruption that is sought to be eliminated. However, because the process of line-drawing is essentially one of predictive judgment, if a legislature properly considers relevant factors, the courts should give those judgments great, although not total, deference when specific limits are challenged as being too low. Indeed, even in a case in which this Court applied an intermediate level of scrutiny, it accorded legislative, predictive judgments, such as those involved in this case, substantial deference, because Congress was better equipped to make those judgments, it has the relevant expertise, and "out of respect for its authority to exercise the legislative power." *Turner Broadcasting System, Inc. v. Federal Communications Comm'n*, 520 U.S. 180, 195-96 (1997).

Stated another way, if the legislature follows a reasonable process, the limits chosen are reasonable, and the basis for setting those limits is reasonably clear, the First Amendment does not permit the courts to review those conclusions *de novo*, let alone to substitute their judgments for those of the elected legislature. As this Court's decisions make clear, there is no constitutional mandate for a legislature to engage in "fine tuning," and the courts have "no scalpel to probe, whether, say, a $2,000 ceiling might serve as well as $1,000." *Buckley*, *supra*, 424 U.S. at 30 (internal quotations omitted). "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*

Under *Buckley*, there are two basic questions in setting a proper contribution limitation: what amount would be seen to raise an appearance of corruption, and will that amount so restrict the ability of candidates (or at least a major subset of

candidates) to raise sufficient funds to run a competitive race? But in answering those questions, nothing in *Buckley* changed the basic constitutional norm that legislative enactments are presumed valid, and that the burden is on the challenger to prove that the law violates the Constitution, even in a First Amendment case. With that in mind, we deal with these two questions in turn and then discuss the ultimate balancing process by the legislature and the review of that balance by the courts.

A. The Appearance of Corruption

This Court has made clear that the government is not limited to outlawing actual bribery, and thus the appearance that a candidate's vote can be purchased by large contributions will suffice. *Buckley*, *supra*, 424 U.S. at 27. There is, of course, no universally accepted "corruption meter" that somehow measures the popular reaction to different contribution limits and finds precisely where the appearance of impropriety hits an unacceptable level. This is true within small communities, and it is even more true the wider the audience that is being asked. Nonetheless, there are some factors to which a legislature might properly look in arriving at its judgment about appropriate contribution limits.

For example, if a typical contest for state assembly costs $25,000, while a race for the senate seat that covers three times as many constituents costs $100,000, it would be entirely permissible for a legislature to conclude that a smaller donation for the assembly race would be more likely to "buy influence" than the same donation in a senate race. Thus, the legislature could conclude that the appearance of corruption should be weighted differently for different races (as Missouri has done). However, because of the necessity to assure that campaigns are

adequately funded, including the ability of candidates for particular offices to raise money for their races, a state is not compelled by the First Amendment to set different limits for different races, let alone to set them so that there is a direct mathematical correlation between the amount of money spent in each race and the contribution limits for that race.

Similarly, a legislature could properly take into account traditional levels of donations in a given location. For example, if races had historically been run in which almost no one gave more than $100, a limit at that level in that locale might well be seen as an appropriate point at which the appearance of corruption might arise, but wholly inappropriate in places with very different traditions. The same kind of approach might justify lower limits in determining what constitutes an appearance of corruption in rural communities, where there is relatively little disposable income, in contrast with New York City or Hollywood, although the Constitution does not mandate such a differential. And surely a legislature could take into account the fact that 95% or even 99% of the voters would lack the capacity to make a contribution of more than $1000 in deciding whether larger gifts than that would raise the specter of influence buying. Given the subjective nature of the "finding" that a certain contribution amount raises an appearance of impropriety, the courts should be extremely reluctant to second-guess this aspect of fixing the contribution level. In our view, to the extent that judicial scrutiny of contribution limits is appropriate at all, it should be directed to the other element of the balance -- whether the limit unduly interferes with the ability of candidates to run for office.

B. The Degree of Interference With Fundraising.

In assessing this aspect of the problem, there are two

groups of persons whose interests might be relevant -- donors and candidates -- but only the latter are of significant constitutional concern. To be sure, donors are affected since they cannot give as much as they would like to the candidate of their choice, although they can give as much as anyone else, and hence they cannot be criticized for showing too little support for the candidate. Moreover, they are also permitted (within the limits of the law) to make contributions to political committees and parties that are likely to support that candidate. Finally, they can continue to exercise their First Amendment rights by making *unlimited* independent expenditures on behalf of that candidate. For those reasons, and because, as *Buckley* correctly recognized, the additional speech value in making larger donations is rather attenuated, 424 U.S. at 21, the focus of the First Amendment concern is not with the donor, but with the candidate, for whom the question is: will the limits on per person donations make it very difficult, if not impossible, to raise the money needed to run a competitive race?

This case involves a challenge by a single candidate for State Auditor and by a political committee that wished to contribute more than the law allows to that candidate for that office. While we believe that persons who claim that they would make larger contributions if the law allowed (as perhaps they did before the limit was lowered) have Article III standing to test the constitutionality of contribution limits, the focus must be on the candidate and on the race for a particular office. Thus, in this case, the proper inquiry is whether the existing limits unduly impede one running for the office of State Auditor and not for some other office (such as Governor) for which the limit is the same, nor for other offices that have different contribution limits.

Not only does the law of standing require that the focus of the challenge be so limited, *Lewis v. Casey*, 518 U.S. 343, 357-60 (1996), but the evidence of inability to run for a specific office relates to that office, and a candidate is obviously in the best position to offer specific proof of the barriers that the statute creates. Here respondent Friedman's principal "evidence" is his bare bones assertion that the contribution limits "prevent me from marshaling sufficient assets to conduct a meaningful statewide campaign for the office of Missouri State Auditor and from expressing my political opinions to the Missouri electorate, and they severely burden political dialogue on the issues raised in the campaign for Missouri State Auditor." JA 10, ¶4.[3] Those are the conclusions that might support a finding of unconstitutionality, but they are surely not evidence from which a court might properly reach that result. Accordingly, there is no factual basis for the claims as to the State Auditor's race, which is the only office for which there is a candidate and for which there is a person who seeks to

[3] Nothing is added by a statement of the amount that one candidate spent running for State Auditor in 1994, or by respondent's claim that he does "not have time to raise the seed money necessary for my statewide campaign by asking a large number of small contributors for small contributions [but] must, instead, depend on contributions of more than $1075 made by plaintiff PAC and others." JA 11, ¶¶ 8 & 9. Similar conclusory statements by respondent PAC (JA 14, ¶¶ 8 & 9) do not fill the evidentiary void. Indeed, Mr. Friedman raised a total of only $4750 (JA 54, ¶ 5), suggesting that the $1075 contribution limit was not a real factor in his fundraising problems.

contribute more for that office than the law currently allows.[4]

Assuming that there is a proper challenge to a limit applicable to a particular office, there are no definitive answers to the question of how much money is enough. But unlike the inquiry on the appearance of corruption, data may provide more help in answering this question. Thus, in most jurisdictions -- even those with only disclosure requirements -- there will be information as to the amounts spent in campaigns and the amounts given by the largest contributors. With that information, legislators would be in a position to calculate how many people, and how many dollars, might be affected by setting the contribution level at a given amount. Of course, the legislature need not assume that every dollar of prior contributions that exceeds a particular level will automatically be lost forever. Smaller donors may increase their gifts, and new donors may be cultivated. At some point, the amount of time and money needed to recapture lost revenue may be so great as to foreclose the realistic possibility of making up the difference, but that is likely (but not certain) to apply to all candidates, in which case there will still be competition.

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[4] Paragraph 5 of the Friedman affidavit suggests that the case may be moot because the 1998 election was "a special opportunity" since the incumbent was not seeking re-election. JA 10. However, because the record is not clear on mootness, and because the court of appeals decided the case after the primary was held in which Mr. Friedman garnered only 20% of the vote (JA 55, ¶ 11), this Court should reach the merits and, if a remand is required, have the district court pass on mootness as the initial issue. *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993).

Nor must a legislature use higher individual contribution limitations to assure that all the candidates in a given race are able to raise equal amounts of money. In the first place, no matter what level is set, some candidates will always raise more money than others -- generally the incumbent, but not always; there are simply too many factors that go into a successful fundraising campaign in an election race to attribute much of a role to contribution limits, at least within some fairly broad range. Second, it is essential to take into account funds that are available from political parties, as well as, in some jurisdictions, corporations, labor unions, and political committees. Third, in order for a race to be competitive, the candidates need not have identical warchests; rather, there are certain amounts that are needed to have a realistic chance, but once they are met, the money differential often is not the dispositive factor. Of course, more money is almost always a strong asset, especially to have in reserve in case it is needed at the last moment, but strict equality is not a *sine qua non* for a competitive race.

Finally, equality or even substantial superiority in fundraising does not always assure victory. Thus, according to a new study by the Research and Policy Committee of the Committee for Economic Development, a prominent organization of business leaders and educators, seven of the nine challengers who defeated House or Senate incumbents in 1998 spent *less* money than the incumbent, and a survey of 1540 House races from 1976 to 1990, "concluded that, while money is essential, challengers do not as a rule have to spend as much as incumbents to win." *Investing in the People's Business*, 17 (1999); *see also Buckley*, 424 U.S. at 32 (reporting similar conclusions from earlier races).

The Missouri law is apparently based on the premise that some races will cost more than others because it sets higher contribution limits for them. But there is no necessary mathematical correlation between the amounts spent in races for different offices and the separate contribution levels for each. Depending on other factors, a legislature could set a single contribution limit for all races -- as Congress did for federal elections -- and still not violate the First Amendment, as this Court held in *Buckley*. Thus, if the legislature concluded that, although state senate races were more costly than assembly races, the broader base of voters and/or the heightened interest in senate races, because of the smaller number of members in that body, made it possible to raise the needed funds even with the lower cap, that would be constitutionally acceptable. Missouri's law, which has different levels for different races, should pass muster.[5]

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[5] A variation on this issue relates to the constitutionality of the identical limit for races for the United States Senate where there are substantial variations in the populations of the different states. One reason for the common limit is that Senate races in the smaller states attract larger numbers of out-of-state contributors since, once elected, all Senators have the same vote. Indeed, Senators from smaller states may be less vulnerable to challengers than are those from New York or California, and hence the years in which there are competitive races in those smaller states may result in even larger out-of-state "investments" in the election. We offer this illustration to underscore the danger of using the mathematical approach followed by one of the court of appeals judges below. In addition, to decide this issue would require a full record in the district court in showing the impact on a candidate for United

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A state might find, for example, that the need to use expensive media in certain locations, but not others, resulted in a wide variance in the cost of running for the same office within the state. In that situation, the state could, but would not be required to, have different contribution limits for those places with higher costs. Any such differential would not have to be based on the exact ratio of the higher cost to the lower cost races, but need only be set at a level that the state concludes is sufficient to allow candidates to run competitive races. In addition, a state could also deal with the problem of disparate costs by setting the ceiling at some intermediate level, so long as it did not unduly hamper candidates in the more expensive races. Stated another way, the legislature is not required to set the contribution limitation at the highest level -- to eliminate any possibility that high cost races would be underfunded -- nor is it required to choose the lowest level -- to be certain that all traces of an appearance of corruption are rooted out. The touchstone is the actual impact of the limitation on the ability to run for elected office.[6]

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[5](...continued)
States Senate and the justification for the limit chosen before deciding the legality of *any* contribution limit. Moreover, since elections for members of a state's legislative body are for units with approximately equal populations, the issue for races for the United States Senate can never arise at the state level. Issues relating to unequal costs of races for similar offices within a state, caused by other factors, are discussed *infra* at 14-15.

[6] For simplicity, this brief has used the costs of actually running, but there are many refinements or alternative measures that a state could properly use, but should not be required to

(continued...)

In many cases it will be argued, as it is here, that the size of voting districts and the costs of running do not remain constant over the years. To be sure, a state cannot ignore these facts as part of the mix, but that does not mean that the First Amendment requires that states automatically escalate their limits by an amount equal to the highest of (i) the increase in the CPI, (ii) the average cost of races in the state, or (iii) the percentage change in the number of voters. For example, more voters may mean higher costs, but that may also result in more people who are willing to contribute and/or make larger donations. Similarly, the costs of races may escalate not out of necessity, but because candidates are successful at raising more money. Where the state explores these factual questions, the federal courts should be extremely reluctant to overturn reasoned conclusions about any of them.

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[6](...continued)
follow. For example, using only contested races would be permissible, but not obligatory, as would eliminating from the mix those aberrant races in which one candidate's personal wealth raised the cost far beyond the typical election. States also should be able to take into account the primary selection process in a way that is appropriate for their election systems, rather than having a single mandate imposed by the federal courts. Similarly, as an alternative to historic costs, a state might base its limits on the number of citizens, registered voters, or actual voters in recent races. Stated another way, the Court should not impose a "one size fits all approach" for an issue that has strong and legitimate reasons for local variance, particularly when the ultimate questions do not admit of precise answers, no matter which approach is selected.

A state could, as Missouri has done, choose to incorporate automatic increases in contribution limits based on the cost of living or some other objective measure. Such an approach would respond to the argument that existing limits are no longer reasonable, but the failure to include an automatic adjustment of some kind is not alone grounds for striking down a contribution limit, any more than the failure to include any other specific adjustment or factor described above is always fatal; the burden remains on the challenger to prove that the limits in effect significantly impede the ability of candidates to run competitive races for that elective office. Automatic adjustments based on the CPI or other factors, such as the average cost of campaigns or increases in the voting population, are simply one among many possible means to assure that the ability to run a competitive race is not eroded by changes in circumstances. However, a legislature could quite properly reject automatic adjustments of any kind if it concluded that exceeding current levels would raise an appearance of corruption and that other means were available to assure that races were adequately funded.

Moreover, although not required to do so by the Constitution, a state might choose to review existing contribution limits from time-to-time to assure their continued validity. But regardless of what the state decided to do, even in a challenge to a contribution limit that was set many years earlier, the ultimate burden of establishing that the limits were unconstitutional would still be on the plaintiff.

A further factor that both legislatures and courts should consider is the possible disparate impact that particular limits may have on incumbents and challengers. In *Buckley*, this Court expressed concern that, since incumbents set expenditure limits, they do so at levels at which it is much more difficult for

challengers to overcome the inherent advantage of name recognition that goes with incumbency. 424 U.S. at 56-57. The same potential exists on the contribution side, although there is at least some basis for concluding that incumbents believe they are better off with higher limits because it will be easier for them to raise larger sums than it will be for their opponents. On the other hand, it can be argued that challengers need to be able to raise relatively large amounts of money quickly, and the only realistic way to do that is with a smaller number of large contributions.

We do not believe that there is an answer to this question that would apply to all races in all places, now and for the future, since, like many other aspects of this issue, we are dealing with predictive judgments that are the most difficult to "prove" if this Court were to require that. We do not, however, suggest that the possible impact of the incumbency advantage may be overlooked by either the legislature, which should include it as one factor in its deliberations, or by the courts.[7]

There is one final point that should be obvious, yet seemed to be overlooked by the court of appeals in this case. The determination of the amount reasonably needed to fund a competitive race is not a single number applicable to all races

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[7] Among the many concerns about the current system of campaign finance are the time and money spent by candidates (both incumbents and challengers) raising money, rather than discussing issues. A state may, but is not required to, take these factors into account in setting a higher rather than a lower contribution limit, on the theory that it takes less time and money to raise a given sum in larger contributions than in smaller ones.

in the United States, even those involving approximately the same number of voters. Thus, the fact that this Court approved a $1000 limit for federal races in *Buckley* does not mean that Missouri must adhere to the federal model in setting its limits. As we have tried to show, the proper contribution level is a quite individualized determination that may not even apply throughout a state, let alone across state borders or between federal and state campaigns.

This is not to say that levels used and/or approved by the courts in one state are irrelevant in another; rather, they are relevant only if conditions are similar. Thus, if legislature A determines that the election conditions in state B are generally similar, and it adopts those limits, that should give the courts some comfort. On the other hand, if legislature A concludes that, despite surface similarities with state B, the elections there are conducted in a very different way, with very different levels of funding, the failure to follow state B is not only not a danger signal, but a positive indication that state A has given the issue the kind of consideration that the courts should approve. Therefore, the fact that Missouri in 1996 chose different contributions for its three categories of elections than Congress chose for federal elections in 1974 is of no significance, absent a showing that the manner in which the two sets of elections are conducted, and the multitude of other conditions affecting the two sets of elections, reasonably approximate one another.

C. Making the Judgments

Like all challenges to legislative determinations, the burden is on the plaintiff to show that the presumption of constitutional validity is overcome, in particular by showing that the limitation being challenged imposes a severe restriction on the ability of candidates to run for office. This Court held

in *Buckley* that *some* limits on contributions are constitutional, and thus the question in each case is whether the limits before the Court are consistent with *Buckley*. That process involves judicial review of the judgments made by the legislature on two separate issues: what is the level at which concerns about the appearance of corruption arise, and what level of contributions is needed to assure that challengers and incumbents have the ability to raise the money needed to run a competitive race? The legislature might or might not have considered the factors discussed above in reaching its conclusion about the proper limits, but the "list of factors [is] meant to be helpful, not definitive." *Kuomo Tire Co. v. Carmichael*, ___ U.S. ___, No. 97-1709, Slip op. at 11, 67 USLW 4179, 4183 (March 23, 1999). In the end, no matter how carefully the legislature undertakes its task, no one should be fooled into thinking that a mathematically exact answer can ever result since so much of what is being decided are questions of predictive judgment.

Since the challenger has the burden of establishing the invalidity of the contribution limits, the court may not conduct a trial *de novo*. Rather, it should only assure itself that the legislature made a good faith effort to consider relevant factors and that it dealt with them in a non-arbitrary way. And where the legislative process includes a thorough review of the relevant factors and specific explanations for its decisions, the courts should give the ultimate judgments by elected officials a very high degree of deference. As this Court observed when faced with a similar line-drawing problem, "[a]lthough one might quibble about whether 15 feet is too great or too small a distance [from the entrance to an abortion clinic] if the goal is to ensure access, we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear." *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 381 (1997). Moreover, given all the

incentives that sitting legislators have to assure that contribution limits do not impede their own fundraising efforts, coupled with their ability to raise money because of their current positions of power, the likelihood that a law will be enacted that will hamper their ability to run an effective campaign for re-election seems quite remote.

We recognize that this statute is challenged under the First Amendment, but the context is somewhat unusual because of the necessity for line-drawing of a kind not often permitted in First Amendment jurisprudence. Thus, at some point a contribution limit "could effectively become an impermissible burden" on First Amendment rights. *Burson v. Freeman*, 504 U.S. 191, 210 (1992). However, like the 100-foot boundary upheld in *Burson*, over a claim by the lower court that 25 feet was ample, it is not the role of a court to second-guess the legislature's carefully considered judgments about the appropriate contribution limitation for a particular election race. Finally, given the growing discontent with the political processes and with the flood of special interest money inundating elections today, the courts should be particularly respectful of efforts by the States and their citizens to clean their own houses.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and judgment entered for petitioners.

Respectfully Submitted,

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