No. 98-963

IN THE SUPREME COURT OF THE UNITED STATES

JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri, *et al.*,
Petitioners

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREEDMAN, and JOAN BRAY,
Respondents

BRIEF OF PACIFIC LEGAL FOUNDATION AND LINCOLN CLUB OF ORANGE COUNTY AS AMICI CURIAE

Filed June 4, 1999

QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in *Buckley v. Valeo*, 424 U.S. 1 (1976), violate the First Amendment?

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INTEREST OF AMICI[1]

For 25 years Pacific Legal Foundation attorneys have been litigating in support of individual rights. To this end, Pacific Legal Foundation attorneys have been before this Court for the purpose of representing individuals whose First Amendment rights had been violated. *See Keller v. State Bar,* 496 U.S. 1 (1990). Pacific Legal Foundation has also participated as a friend of the court in many other First Amendment cases this Court has heard in the past decade. *See Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998); *Glickman v. Wileman Brothers & Elliott, Inc.,* 521 U.S. 457 (1996); *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995); and *U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995).

The Lincoln Club of Orange County is a community-based membership organization with a political action committee (Club), formed for the purpose of making contributions to California state and local candidates. Currently, the Club has over 300 individual members. Because many California municipalities and, at various times, California law, have imposed contribution limits which thereby infringe upon the associational rights of the Club and its members, the Club has a direct interest in the law governing contribution limits.

Pursuant to Supreme Court Rule 37, written permission from all parties for Pacific Legal Foundation to file this brief has been lodged with the Clerk of this Court.

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae Pacific Legal Foundation and the Lincoln Club of Orange County affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

STATEMENT OF THE CASE

Zev David Fredman was a candidate for the office of Missouri state auditor in the 1998 Republican primary. To this end, he formed a candidate committee ("Fredman for Auditor"), filed the requisite candidate papers, and paid a filing fee.

As part of his initial campaign strategy, Fredman desired to raise large sums of funds from various donors and possibly from Republican Party leaders. The purpose of Fredman's strategy was to obtain seed money in order to allow him to compete effectively in the Republican primary. His ability to attract other contributions--and thereby become a competitive candidate--was a function of his ability to raise early seed money. This was particularly important for Fredman because he was not a professional politician. As a first-time candidate for statewide political office, he did not have either a vast network of political contacts or a well-established base of contributors. As a private businessman who had to continue to manage his business while mounting a statewide campaign, Fredman did not have the time or resources to raise the seed money necessary for his campaign by asking a large number of contributors for small contributions. Instead, Fredman needed to depend on a small number of large contributions.

Missouri law prohibited Fredman from raising more than $1,075 per donor for the primary election. Mo. Ann. Stat. section 130.032(1)(6). Missouri law further provided that contributors and candidates who violated Missouri's contribution limits would be subject to criminal sanctions. Mo. Ann. Stat. section 130.081.

Shrink Missouri Government (SMG) PAC is a political action committee, duly organized under the laws of Missouri. During the 1994, 1996, and 1998 election cycles, it made contributions to candidates for Missouri elective office, and

continues in operation for the purpose of making similar contributions in the future. Because SMG believed that Fredman's candidacy for state auditor promoted the political viewpoints and goals of the PAC and its contributors, SMG contributed $1,025 to the "Fredman for Auditor" committee on June 23, 1997, and an additional $50 on February 25, 1998. By this latter date, SMG had therefore provided the maximum contribution to the "Fredman for Auditor" campaign for the primary election. SMG would have contributed more than $1,075 to the "Fredman for Auditor" committee for the primary election, but was prohibited from doing so by Missouri law.

Because Missouri's contribution limits severely burdened SMG's ability to promote its political viewpoints and to express support for candidates through campaign contributions, and because Missouri's contribution limits precluded the ability of Fredman to raise early seed money and thereby prevented him from mounting a competitive campaign, SMG and Fredman filed an action under 42 U.S.C. section 1983 in the United States District Court for the Eastern District of Missouri. SMG and Fredman sought declaratory and injunctive relief against the provisions of Missouri's campaign laws that limited contributions to candidates for office. On May 12, 1998, the Honorable Catherine D. Perry, United States District Judge, entered a final judgment holding that the contribution limits did not violate the First Amendment. SMG and Fredman appealed this judgment to the Eighth Circuit Court of Appeals. On November 30, 1998, the United States Court of Appeals for the Eighth Circuit found that Missouri's contribution limits violated the First Amendment of the United States Constitution. *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998).

SUMMARY OF ARGUMENT

In the seminal case of *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court explained that "contribution and expenditure limitations operate in an area of the *most fundamental* First Amendment activities." *Id.* at 14 (emphasis added). Stating that

both expenditure and contribution restrictions implicate political speech and association, this Court in *Buckley* further noted that "contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties." *Id.* at 18.

This Court's established First Amendment jurisprudence makes clear that state election laws which "directly regulate[] core political speech" or which "impose[] 'severe burdens'" on speech or association are always subject to strict scrutiny. *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636, 642 n.12, 648 (1999) (Thomas, J., concurring in the judgment). As this Court has held that contribution limits restrict "fundamental" First Amendment activities (*Buckley*, 424 U.S. at 14), the court below properly applied strict scrutiny with respect to Missouri's campaign contribution limits.

The state's contention that substantial "deference" should be given to legislatively imposed contribution limits is, in reality, a *subterfuge* utilized to mask the flawed premise underlying campaign contribution limits. The flawed premise is that rather than serving as *limitation* on legislative power, the First Amendment--according to campaign contribution limit proponents--embodies a *normative policy end* towards which society should strive. This normative policy end is a "level playing field" where all citizens have a *government compelled* "equal opportunity" for self-expression.

Not only has this Court *categorically rejected* the notion that the exercise of free speech by some may be limited for the purpose of amplifying the speech of others, but also, the state's argument fails to recognize the potential--in the context of campaign finance reform--for "legislators to set the rules of the electoral game so as to keep themselves in power and keep potential challengers out of it." *Colorado Republican Federal*

Campaign Committee v. Federal Election Commission, 116 S. Ct. 2309, 2329 n.9 (1996) (Thomas, J., concurring in part and dissenting in part).

Moreover, in order to survive strict scrutiny, a statute regulating fundamental rights must be narrowly tailored to serve a compelling governmental interest. In the context of campaign finance, the only governmental interest that this Court has accepted as "compelling" is the prevention of actual and apparent corruption. *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985). This Court has defined corruption narrowly, to include *only a financial quid pro quo. Id.* at 497.

To this end, nearly a quarter century has passed since this Court decided *Buckley* and much has changed since that time with respect to the regulation of election-related activities. More specifically, the rigorous enforcement of bribery statutes and the adoption and enforcement of comprehensive disclosure schemes by all 50 states--coupled with the intense scrutiny by the press with respect to the financing of elections--illustrates that the "blunderbuss approach" of contribution limits "cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part). Experiences from Missouri, California, and other jurisdictions indicate that less restrictive means are available to prevent actual and apparent corruption.

ARGUMENT

I

THE COURT BELOW APPLIED THE PROPER STANDARD OF REVIEW

A. This Court Has Made Clear That the "Now-Settled Approach" with Respect to State Regulations Imposing Severe Burdens on Speech Is That Such Regulations Must Be Narrowly Tailored to Serve a Compelling State Interest

In the seminal case of *Buckley v. Valeo*, 424 U.S. 1, this Court explained:

> Contribution and expenditure limitations operate in an area of the *most fundamental First Amendment activities*. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. *The First Amendment affords the broadest protection to such political expression* in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Id. at 14 (citation omitted, emphasis added). The *Buckley* Court made clear that both expenditure *and contribution restrictions* implicate political speech and association, stating that

> contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties.

Id. at 18.

Notwithstanding this Court's recognition that *both* expenditure *and contribution limits* implicate "fundamental First Amendment activities" (*id.* at 14), it has not gone "unnoticed"

that this Court has seemed more "forgiving" in the level of scrutiny applied in its review of contribution limits. *Colorado Republican*, 116 S. Ct. at 2329 n.7; *See also California Medical Association v. Federal Election Commission*, 453 U.S. 182, 196 (1981) (contributions are "not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection"); *National Conservative Political Action Committee*, 470 U.S. at 501; *Vannatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998) (applying a "rigorous" level of scrutiny with respect to contribution limitations).

In contrast, this Court has clearly and unequivocally applied strict scrutiny to expenditure limits, finding that such limits are subject to nearly a per se rule of unconstitutionality as there exists no compelling governmental reason to impose direct limitations on such political speech. *See Buckley*, 424 U.S. at 44-59; *Colorado Republican*, 116 S. Ct. at 2312 (opinion of Breyer, J.);. *National Conservative Political Action Committee*, 470 U.S. at 496-97; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 297-98 (1981).

This perceived distinction between the level of deference provided to campaign contributions as opposed to campaign expenditures has its roots in this Court's statement in *Buckley* that contribution limits "entail[] only a marginal restriction upon the contributor's ability to engage in free communication" because "the transformation of contributions into political debate involves speech by someone other than the contributor." *Buckley*, 424 U.S. at 20-21. In contrast, expenditure limits, the *Buckley* Court stated, "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19.

It was this distinction this Court utilized in *California Medical Association* to uphold the Federal Election Campaign Act (FECA) contribution limits on the amount a trade association was permitted to give to a multicandidate political action committee. In so holding, the *California Medical Asso-*

ciation Court noted that contributions to a political committee constituted "speech by proxy" and therefore limits on such activity were subject to less intense judicial scrutiny. *California Medical Association*, 453 U.S. at 196.

Although Amici do not intend to simply dismiss this apparent distinction as set forth above, Amici respectfully submit that subjecting campaign contribution limits to anything other than "strict scrutiny" defies logic and directly contravenes this Court's First Amendment jurisprudence.

1. Political Contributions and Expenditures Are Indistinguishable

The distinction between expenditure and contribution limits has "no constitutional significance." *National Conservative Political Action Committee*, 470 U.S. at 518 (Marshall, J., dissenting). "[P]eople--candidates and contributors--spend money on political activity because they wish to communicate ideas, and their constitutional interest in doing so is precisely the same whether they or someone else utter the words." *Buckley*, 424 U.S. at 244 (Burger, C.J., concurring in part and dissenting in part). Moreover, contributions to a political campaign is exactly the type of "group association" this Court has long-recognized as being accorded the most "exacting" protection by the First Amendment. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Citizens Against Rent Control*, 454 U.S. at 294. The ability to freely communicate ideas and participate in group association by making campaign contributions is central to our form of representative democracy. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have 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."). The exercise of such free speech rights allows citizens to communicate a message of support directly to their candidate and at the same time allows the candidate and his or her backers

to further garnish electoral support. *See* Lillian BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1054 (1985). Indeed, as this Court has noted:

> [T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; *in the political process it can focus on a candidate* or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.

Citizens Against Rent Control, 454 U.S. at 294 (emphasis added); see also *United States Jaycees*, 468 U.S. at 622 ("An individual's freedom to . . . petition the government for the redress of grievances could not be vigorously protected from interference from the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

It is perhaps with these thoughts in mind that three members of the *Buckley* Court found the distinction between contributions and expenditures untenable at the time (*see Buckley*, 424 U.S. at 241, 244 (Burger, C.J., concurring in part and dissenting in part) ("The Court's attempt to distinguish the communication inherent in political contributions from the speech aspects of political expenditures simply 'will not wash.'"); *id.* at 261 (White, J., concurring in part and dissenting in part) ("[I]t is difficult to see the difference between the two situations."); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part) ("I am not persuaded that the Court makes . . . a principled

distinction between contribution limitations, on the one hand, and the expenditure limitations on the other . . . ."), and two other members have subsequently disavowed it. *See National Conservative Political Action Committee*, 470 U.S. at 518-19 (Marshall, J., dissenting) ("I now believe the distinction has no constitutional significance."); *Colorado Republican*, 116 S. Ct. at 2325 and n.4 (Thomas, J., concurring in part and dissenting in part) ("In my view, the distinction [between contributions and expenditures] lacks constitutional significance, and I would not adhere to it.").

Amici therefore find it compelling that in the course of the 23 years since this Court decided *Buckley* substantial precedent has evolved supporting the conclusion that "contributions and expenditures are two sides of the same First Amendment coin." 424 U.S. at 241 (Burger, C.J., concurring in part and dissenting in part)[2]. *Amici therefore submit that contribution limits of the*

[2] As a practical matter, the reason contribution and expenditure limits involve "two sides of the same First Amendment coin" (*id.*) is because both campaign contributions and expenditures are utilized for the *exact same purpose*; namely, conveying a political message in the "marketplace" of "ideas." *Citizens Against Rent Control*, 454 U.S. at 295. This is illustrated by reference to a recent example from a statewide campaign in California--which currently does *not* impose contribution limits on state candidates. The 1998 Democratic gubernatorial primary pitted Al Checchi, a multimillionaire businessman whose personal campaign expenditures could not have been constitutionally limited, against Gray Davis, a candidate without such resources. *See Justices May Revive Cap on Contributions*, L.A. Times, Dec. 9, 1998. As the attached California campaign disclosure forms illustrate (*see* Appendix B), funds raised by both the Checchi and Davis committees (whether in the form of personal expenditures by Checchi or contributions from supporters received by Davis) are used *for the exact same purpose*; paying political professionals and other vendors to disseminate the political committees' message. Moreover, had California law imposed campaign contribution limits on statewide candidates such as Davis at that time, that would have (continued...)

type at issue in this case should undoubtedly be subject to strict scrutiny.

2. Subjecting Contribution Limits to Anything Other Than Strict Scrutiny Would Directly Contravene This Court's Established First Amendment Jurisprudence

This Court has long recognized that state election laws "directly regulat[ing] core political speech" or which "impose 'severe burdens'" on speech or association are always subject to strict scrutiny. *Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. at 649 (Thomas, J., concurring in judgment).

For example, just recently in *American Constitutional Law Foundation* this Court applied strict scrutiny in reviewing certain Colorado statutes regulating the initiative and referendum process. *American Constitutional Law Foundation*, 119 S. Ct. at 642 n.12. Other precedents from this Court where strict scrutiny has been applied with respect to state laws which regulate core political speech or impose severe burdens on such speech are abundant. *See Burson v. Freeman*, 504 U.S. 191,

[2](...continued)
undoubtedly vitiated the associational rights of Davis backers. Their collective voice would have been subject to a limit (as Davis could have only raised funds in small incremental amounts), whereas the collective voice of Checchi's supporters would have been comparatively amplified as he could spend *unlimited amounts of his own money in furtherance of his candidacy*. *See Citizens Against Rent Control*, 454 U.S. at 296 ("To place a . . . limit . . . on individuals wishing to band together to advance their views . . . is clearly a restraint on the right of association."); *See also National Conservative Political Action Committee*, 470 U.S. at 495 ("To say that [collective action by] pooling . . . resources . . . is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.").

198 (1992) (applying strict scrutiny in determining whether to uphold a state law prohibiting the solicitation of voters and the distribution of campaign literature within 100 feet of the entrance of a polling place); *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982) (strict scrutiny applied to state regulations of candidate promises); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (strict scrutiny applied to a state law prohibiting corporate contributions to ballot measures); *Citizens Against Rent Control*, 454 U.S. at 294 (applying strict scrutiny to a municipal ordinance limiting contributions to ballot measure committees); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) (applying strict scrutiny to a state statute preventing anonymous campaign literature). Indeed, even where a state law does not directly regulate core political speech, this Court has applied strict scrutiny. *See Meyer v. Grant*, 486 U.S. 414, 421 (1988) (applying strict scrutiny to a state statute making it a felony to pay initiative petition circulators).

As this Court has previously noted, campaign contribution limits operate in "an area of the most fundamental First Amendment activities" (*Buckley*, 424 U.S. at 14) as they "impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties." *Id.* at 18. Consequently, regulations imposing expenditure or contribution limits have *always been subject to strict scrutiny*--notwithstanding the wordsmithing and machinations present in certain passages in *California Medical Association*. Indeed, as this Court recently noted:

> In these cases [citing *Buckley*, *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), *National Conservative Political Action Committee*, and *California Medical Association*], the Court essentially weighed the First Amendment interest in permitting candidates (*and their supporters*) to spend money to advance their political views, against a "*compelling*" governmental interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption.

Colorado Republican, 116 S. Ct. at 2313 (emphasis added). Thus, since *Buckley*, this Court has always required that contribution limits be subject to "exacting judicial review" (*Citizens Against Rent Control*, 454 U.S. at 294) and such "exacting" review has always been *equated with strict scrutiny*. *McIntyre*, 514 U.S. at 346 n.10. It therefore appears clear that the "now-settled approach" with respect to "state regulations 'imposing "severe burdens" on speech'" is that such regulations must "be narrowly tailored to serve a compelling state interest." *American Constitutional Law Foundation*, 119 S. Ct. at 642 n.12; *see also id.* at 649 (Thomas, J., concurring in the judgment) ("When a State's rule imposes severe burdens on speech or association, it must be narrowly tailored to serve a compelling interest; lesser burdens trigger less exacting review . . . .").

Therefore, as this Court has previously held that contribution limits restrict "fundamental" First Amendment activities (*Buckley*, 424 U.S. at 14), and that state regulations imposing such contribution limits are subject to "exacting judicial review" (*Citizens Against Rent Control*, 454 U.S. at 294), the court below properly applied strict scrutiny with respect to Missouri's campaign contribution limits.

B. The Purpose of Applying Strict Scrutiny Is Not to Truncate Legislative Prerogatives but Rather to "Jealously Guard" Against Usurpations of Fundamental Rights

Contrary to the assertions of the state and its amici, the opinion of the court below does not abrogate the ability of state legislatures to regulate state electoral activity. To the contrary, the purpose of applying strict scrutiny is not to truncate legislative prerogatives, but, rather, to jealously guard against

usurpations of fundamental rights. Indeed, as this Court well knows:

> In the usual case . . . [t]o survive judicial scrutiny a statutory enactment need only have a reasonable relationship to the promotion of an objective which the Constitution does not independently forbid, *unless the legislation trenches on fundamental constitutional rights.*
>
> But *where the challenged legislation implicates fundamental constitutional guarantees*, a far more demanding scrutiny is required. For example . . . the presumption of constitutionality is lessened when the Court reviews legislation endangering fundamental constitutional rights, *such as freedom of speech* . . . . Legislation touching substantially on these areas comes [before a court] bearing a heavy burden *which its proponents must carry.*

Nixon v. Administrator of General Services, 433 U.S. 425, 506 (1977) (Burger, C.J., dissenting) (emphasis added). Accordingly, "because of the significant impact on First Amendment rights" (*id.* at 532) and perhaps with the above thoughts in mind, this Court has always required state election laws regulating political speech to undergo "exacting" or "strict scrutiny." *Id.*; *see also Citizens Against Rent Control*, 454 U.S. at 294.

Petitioners' contention--that substantial "deference" should be given to legislatively imposed contribution limits--is, in reality, a *subterfuge* utilized to mask the flawed premise underlying campaign contribution limits such as those at issue here. The flawed premise is that rather than serving as a *limitation* on legislative power, the First Amendment--according to campaign contribution limit proponents-- embodies a *normative policy end* towards which society should strive. This normative policy end is a "level playing field" where all citizens have a

government compelled "equal" opportunity for self-expression. This normative policy end underlying contribution limits of the type at issue here is fatally flawed for two reasons.

First, this Court has *categorically rejected* the notion that the exercise of free speech by some may be limited for the purpose of amplifying the speech of others:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is *wholly foreign to the First Amendment*, which was designed "to secure the 'widest possible dissemination of information from diverse and antagonistic sources,"' and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.*

Citizens Against Rent Control, 454 U.S. at 295-96 (citations omitted; emphasis added).

Second, and perhaps more fundamental, the normative policy end that underlies contribution limits such as those at issue here is, in reality, a repackaged version of an argument this Court has rebuked in the past. More specifically, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court declared unconstitutional a Florida statute that provided a "right of reply" for political candidates with respect to newspapers which had attacked or otherwise editorialized in opposition to them. Defending the statute with an argument remarkably similar to the one advanced by the government and its amici in this case--that political campaign giving and by extension the election of representatives is dominated and controlled by well-endowed "special interests"--the state of Florida argued that the reply statute was necessary as "[t]he First

Amendment interest of the public being informed [was] in peril because the 'marketplace of ideas' [was] a monopoly controlled by the owners of the market." *Id.* at 251. According to the State of Florida, the First Amendment imposed a "fiduciary obligation" *on the government* "to ensure that a wide variety of views reach the public." *Id.* at 251, 248.

Rejecting this contention, this Court stated:

> [T]here is practically universal agreement that a major purpose of [the First Amendment] [is] to protect the free discussion of governmental affairs.
>
> . . . .
>
> . . . [S]ociety must take the risk that occasionally debate on vital matters will not be comprehensive and that all viewpoints may not be expressed.

Id. at 259-60 (White, J., concurring in judgment).

Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), offers further support to reject the "level playing field argument" advanced by the government and its amici. In that case, this Court held that there was no First Amendment requirement for broadcasters to sell time for editorial announcements. *Id.* at 130-32. Thus, this Court rejected attempts by the plaintiffs in that case to turn the First Amendment into a "sword" rather than a shield against government overreaching. *See also Arkansas Educational Television Commission v. Forbes*, 118 S. Ct. 1633 (1998) (rejecting third-party candidate's argument that the First Amendment gave him a right of access to participate in a candidate debate hosted by a state-owned public television broadcaster).

Far from imposing a duty on government to "level the playing field," the First Amendment serves as a *limitation* on legislative power. Standing alone, the First Amendment provides:

> Congress shall make *no law* . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. 1 (emphasis added). This limitation on legislative power is, of course, made applicable to the states through the Fourteenth Amendment. *See, e.g., Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *see also McIntyre*, 514 U.S. at 336 n.1.

But even assuming arguendo, that, as the government and its amici contend, the First Amendment can be used to "level the playing field" (*see, e.g., Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367, 375 (1969) (upholding the then-existing Federal Communication Commission's "fairness doctrine" on the ground the policy "enhanced" rather than abridged First Amendment principles),[3] this argument "fails to acknowledge . . . the potential for legislators to set the rules of the electoral game so as to keep

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[3] It is to be noted, however, that *Red Lion* relied, in part, on the finding that the ability of citizens to broadcast viewpoints was curtailed to the extent that effectively doing so relied on their obtaining access to scarce broadcast mediums such as television and radio frequencies. Amici respectfully submit that the rationale of *Red Lion* may no longer be viable to the extent that broadcast mediums are no longer scarce in this "internet" or "world wide web" age. More specifically, the development of the internet and the world wide web provide most citizens with virtually unfettered low-cost access to a means of broadcasting viewpoints. *See Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2335 and n.9 (1997) ("Any person or organization with a computer connected to the Internet can 'publish' information. Publishers include . . . advocacy groups and individuals. . . . 'Web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal "home pages," the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web.'").

themselves in power and keep potential challengers out of it." *Colorado Republican*, 116 S. Ct. at 239 and n.9 (Thomas, J., concurring in part and dissenting in part). "Indeed, history demonstrates that the most significant effect of election reform has been not to purify public service, but to protect incumbents and increase the influence of special interest groups." *Id.* Therefore, when state legislatures--such as the Missouri Legislature--seek to "*ration* political expression in the electoral process, [courts] ought not simply acquiesce in [legislatures'] judgment." *Id.* (emphasis added).

As Professor BeVier points outs:

> Courts must police inhibitions on political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out . . . .
>
> Indeed, there are reasons to believe that legislators, given free rein to inhibit political activity, might attempt to restructure the political balance of power so as principally to benefit themselves and their political allies. In fact, many political process "reforms" seem to promise tempting short-run political advantages to incumbents and their allies.

BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform, supra,* at 1075-76.

Moreover, evidence bears this point out as the advantages of holding office (such as franking privileges, media attention, etc.) certainly provide incumbent candidates with a multitude of vehicles by which to increase and maintain their name recognition and, by extension, their hold on their seats. Indeed, as one *Los Angeles Times* article pointed out for example, between January 1, 1995, through Aug. 19, 1996, the top spending 20 California Assembly Members alone spent a combined total of $1.3 million during this period on *taxpayer funded* frank mail. *See* Paul Jacobs and Virginia Ellis, *Legislators Bypass Mass*

Mailing Ban: Loopholes Used to Send 35 Million Pieces at Taxpayer Expense, L.A. Times, Aug. 27, 1996, at A1; *see also Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (stating that references to other locales is relevant in First Amendment challenges). As this article points out, this staggering amount of taxpayer funded mail sent to California voters during this period:

> . . . [D]emonstrates the inventiveness of elected officials in finding ways to use tax funds to promote themselves and maintain their grip on public office. . . .
>
> . . . [T]he mailings are used most by legislators facing a stiff challenge in their district or trying to advance to another office. . . .
>
> And direct mail to voters plays a crucial role in winning elections . . . . "Nine times out of 10, campaigns are won by the candidate who did the most mail."

L. A. Times, Aug. 27, 1996.

In yet another California example, one Assembly incumbent sent out $24,000 worth of taxpayer funded mail two weeks prior to a recall election this Member faced. *See A Behind-the-Scenes Look at Orange County's Political Life: Foes Frankly Furious at Allen's Late Mailers at Taxpayers' Expense*, L.A. Times, Nov. 5, 1995.

Yet more recent evidence also underscores the fact that the ability of challengers to unseat incumbent officeholders is directly related to the amount of money they are able to raise and spend. One such study concluded as follows:

> In fourteen lower-chamber legislative elections in states between 1990 and 1994, as well as in six U.S. Congressional elections between 1986 and 1996, the amount of money raised by the challenger was

> *consistently the single most important variable associated with electoral competition.*

Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States*, at 166 (The Rockefeller Institute Press 1998). Professor Malbin's study also concluded:

> Our studies of twenty-two legislative elections confirm a conclusion long known among political scientists: The most important financial difference between competitive and uncompetitive races lies in the money raised by the challenger. There is also no question, either among political scientists or among politicians, that early money is the hardest to raise, as well as being the most important for establishing a "take-off" threshold for potentially viable campaigns to become serious.
>
> . . . [W]e know that the sources available to incumbents, and to well-established, competitive nonincumbents, will not be there to help most challengers get started.
>
> Rich candidates, of course, can always provide their own seed money.

Id. at 174.

Indeed, Professor Malbin's findings indicate that if the old adage that "money [is] the mother's milk of politics" is in fact true, courts should be vigilant in ensuring that incumbent officeholders do not "own[] the dairy." *Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33, 54 (1979) (Bird, C.J., dissenting) (striking down California Political Reform Act's ban on lobbyist contributions). *This case, of course, involves a nonincumbent first-time candidate for statewide political office.*

Accordingly, the court below properly rejected the "scintilla" of evidence produced by Missouri in defense of that state's campaign contribution scheme: namely, the "conclusory and self-serving" affidavit of an incumbent state Senator. *Shrink Missouri Government PAC v. Adams*, 161 F.3d at 522. This evidence alone simply does not satisfy the "heavy burden" (*Nixon v. Administrator of General Services*, 433 U.S. at 506) the government and its amici carry to demonstrate to a court that the recited harms of corruption or the appearance of corruption "are real . . . and that regulation [contribution limits] will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. Federal Communication Commission*, 512 U.S. 622, 664 (1994).

II

MORE NARROWLY TAILORED MEANS EXIST TO PREVENT ACTUAL AND APPARENT CORRUPTION

In order to survive strict scrutiny, a statute regulating fundamental rights must be "narrowly tailored" to serve a compelling governmental interest. *American Constitutional Law Foundation*, 119 S. Ct. at 642 n.12; *McIntyre*, 514 U.S. at 347. To this end, "government must curtail speech *only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted the regulation.*" *Massachusetts Citizens for Life*, 479 U.S. at 265 (emphasis added).

In the context of campaign finance, the only governmental interest that this Court has accepted as "compelling" is the prevention of actual or apparent corruption. *National Conservative Political Action Committee*, 470 U.S. at 496-97. Moreover, this Court has defined corruption narrowly, to include *only* a financial quid pro quo; in other words, dollars *exchanged* for political favors. *National Conservative Political Action Committee*, 470 U.S. at 497; *see by analogy, McCormick v.*

United States, 500 U.S. 257, 273 (1991) (finding campaign contributions made in exchange for an "*explicit promise*" of favorable future action as a violation of the Hobbs Act as opposed to those contributions made with *anticipation* of favorable future action) (emphasis added).[4]

Nearly a quarter century has passed since this Court decided *Buckley* and much has changed since that time with respect to the regulation of election-related activities. More specifically,

[4] In fact, the major foundation on which the government and its amici base their argument is what they characterize as the "common sense recognition" that large campaign contributions cause "harm" or "corrupt" our system of government. This Court has rejected similar attempts to make such bald, categorical assessments of corruption based solely on the existence of campaign contributions in our electoral system *without evidence of actual quid pro quo corruption*:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit . . . [crimes] when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of [the indicia of criminal intent]. . . . To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation.

McCormick, 500 U.S. at 272. Thus, the government's assertion that the mere existence of "large" campaign contributions in our electoral system is indicative of corruption is simply unsupportable.

the rigorous enforcement of bribery statutes and the adoption and enforcement of comprehensive disclosure schemes by all 50 states--coupled with the intense scrutiny by the press with respect to the financing of elections--illustrates that the "blunderbuss approach" of contribution limits "cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent." *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part).

Simply stated, and as discussed more fully below, more narrowly tailored means exist to prevent actual and apparent corruption.

A. Bribery Statutes Exist and Are Utilized to Prevent Actual Corruption

Missouri has enacted a comprehensive scheme of criminal bribery statutes intended to precisely address the situation of "quid pro quo" corruption. More specifically, Missouri Code section 576.010 provides in relevant part:

> 1. A person commits the crime of bribery of a public servant if he knowingly offers, confers or agrees to confer upon any public servant any benefit, direct or indirect, in return for:
>
> (1) The recipient's official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or
>
> (2) The recipient's violation of a known legal duty as a public servant.

In addition, Missouri Code section 576.020 provides in relevant part:

> 1. A public servant commits the crime of acceding to corruption if he knowingly solicits, accepts, or agrees to accept any benefit, direct or indirect, in return for:

(1) His official vote, opinion, recommendation, judgment, decision, action or exercise of discretion as a public servant; or

(2) His violation of a known legal duty as a public servant.

Additionally, as part of the requisite oath of office for elected members of the Legislature, the Missouri Constitution requires such members to take an oath committing to honest services during their tenure and the commitment not to take any money or other gifts in exchange for the performance or nonperformance of official duties. Missouri Constitution, Article III, section 15. Far from being a relic of Missouri law, the annotations to these statutory and constitutional provisions indicate their vitality.

As these Missouri bribery laws are undoubtedly more narrowly tailored means by which to address the precise problem of corruption in public service, the contribution limits at issue in this case are overbroad as they "infringe[] on [many instances of innocent] speech that does not pose the danger that has prompted regulation." *Massachusetts Citizens for Life*, 479 U.S. at 265.

In addition, recent experiences in California also illustrate the ability of bribery laws "to punish and deter the corrupt conduct the [g]overnment seeks to prevent" through limits on campaign contributions. *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part). In the early 1980's, the United States Department of Justice began what was to be an approximate eight-year investigation into suspected corruption in the California Legislature. As explained in the *Sacramento Bee* (*It Wasn't Easy to Sting Capitol*, June 19, 1994), this investigation resulted in the convictions of four state legislators, several appointed officials and one lobbyist. Generally, these convictions were based on various federal and state statutes and legal theories such as the

Hobbs Act (19 U.S.C. § 1951), "RICO" (18 U.S.C. § 1962), "mail fraud" (18 U.S.C. § 1341), "money laundering" (18 U.S.C. § 1956), and "bribery" (California Penal Code § 86). *See also United States v. Montoya*, 945 F.2d 1068 (9th Cir. 1991); *United States v. Carpenter*, 961 F.2d 824 (9th Cir. 1992); and *United States v. Jackson*, 72 F.3d 1370 (9th Cir. 1995).

Moreover, far from being isolated to the above instances, there are many other examples of the government convicting public officials and others from multiple jurisdictions-- including Missouri--under such bribery theories. *See, e.g., United States v. Simmons*, 154 F.3d 765 (8th Cir. 1998) (Missouri political consultant); *United States v. Griffin*, 154 F.3d 762 (8th Cir. 1998) (Missouri speaker of the House); *United States v. Bereano*, 161 F.3d 2 (4th Cir. 1998) (Maryland lobbyist); *United States v. Woodard*, 149 F.3d 46 (1st Cir. 1998) (Massachusetts House member); *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996) (Massachusetts lobbyist); *McCormick v. United States*, 500 U.S. 257 (West Virginia legislator); *see also The Fresno Bee, Big Names Surface in Operation Rezone Case,* Jan. 1, 1999, concerning the recent convictions of certain California municipal officials regarding the same.[5]

These examples illustrate that bribery laws are more narrowly tailored means to prevent actual corruption. Indeed, "bribery laws are designed to punish and deter the corrupt conduct the Government seeks to prevent under [contribution limits]." "In light of [this] alternative[], wholesale limitations that cover contributions having nothing to do with bribery--but with speech central to the First Amendment--are not narrowly tailored." *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part).

[5] Although Amici are certainly not advocating the federalization of state and local bribery and ethics crimes, Amici raise these examples as evidence of the simple fact that more narrowly tailored means exist to prevent actual corruption.

B. Campaign Contribution Disclosure Provisions Exist to Prevent the Appearance of Corruption

In the 23 years since this Court decided *Buckley*, every state in the Union has adopted a comprehensive statutory scheme requiring candidates to disclose contributions and expenditures before and after elections. Most of these states require the itemization of individual donors who give over a certain threshold amount (usually between $25 and $100) and also prohibit anonymous and "laundered" contributions (i.e., contributions made through straw men). Michael Malbin and Thomas Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States, supra*, at 13-14.

Many states also impose disclosure obligations on *contributors* who contribute a cumulative threshold amount. *See Corporate Political Activities 1998: Complying with Campaign Finance, Lobbying and Ethics Laws*, Practising Law Institute Course Handbook Series, Chapters 17 and 20. Thus, in these states, contributions are "double" reported. In California for example, individuals, corporations, and other entities that contribute a cumulative total of $10,000 or more in a year to candidates, political action committees and ballot measure committees combined, must file semi-annual "Major Donor" disclosure reports. *See* FPPC Advice Letter to Randall Zakreski (08/11/93) No. I-93-296. Thus, a person who qualifies as a "Major Donor" in California discloses all of his or her contributions on his or her Major Donor Report, and such contributions are also disclosed on the recipient candidate's report. Other states having "double disclosure" laws include Hawaii, Maryland, Nebraska, Pennsylvania, Utah, Washington, and West Virginia. *See Corporate Political Activities 1998: Complying with Campaign Finance, Lobbying and Ethics Laws, supra*, Chapter 20 at 7-8.

In addition, many states and the Federal Election Commission publish, or are beginning to publish, campaign disclosure reports on the internet. This development will no

doubt provide for more efficient disclosure particularly to the "thousands" or "millions" of people who use the internet as an information source. *See Reno v. American Civil Liberties Union*, 117 S. Ct. at 2335. Indeed, a search on the world wide web indicates that there are hundreds of organizations on the web whose sole purpose is to publish information on campaigns and elections and many such web sites focus particularly on the financing of elections. The web sites established by the California Voter Foundation (www.calvoter.org) and the Center for Responsive Politics (www.crp.org) are just two examples.

The significance of these laws--and, just as important, the utilization of the information provided as a function of such laws--is not so much their intricacies, but rather, the fact that their existence is clear evidence that more narrowly tailored means exist to prevent the appearance of corruption rather than the "blunderbuss approach" of campaign contribution limits. *Colorado Republican*, 116 S. Ct. at 2329 (Thomas, J., concurring in part and dissenting in part). Indeed, as this Court has noted in analogous circumstances, the "less intrusive" means of preventing fraud in the charitable solicitation context are "penal laws used to punish [illicit] conduct directly" and "disclosure" laws. *Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980).

Again, examples from California illustrate this clearly. For instance, in a heavily contested 1994 California Assembly race, candidate Steve Kuykendall accepted a $125,000 contribution from Philip Morris in the last days prior to the election that was properly reported pursuant to California's campaign contribution disclosure law. Although he won the election, the public reaction to this contribution *caused him to refuse to accept any more tobacco money in subsequent campaigns*. Moreover, far from "kowtowing" to Philip Morris as the government and its amici would undoubtedly conclude, the Philip Morris contribution in all likelihood assured Assemblyman Kuykendall's

support for anti-smoking legislation. As the *Los Angeles Times* pointed out:

> And ironically, it could be the Philip Morris contribution that ensures that he backs anti-smoking legislation while in Sacramento. Otherwise, opponents could gain even more fodder for a recall.
>
> . . . .
>
> "He's not going to be dumb enough to vote tobacco."

Ted Johnson, *Kuykendall Blends Pragmatism, Ideology: Legislator Says Accepting Tobacco Firm's $125,000 Contribution Helped Him Beat Incumbent, and Vows It Won't Ease His Opposition to Smoking*, L.A. Times, Dec. 8, 1994; *see also In Legislative Races, Tobacco Is a Hotter Issue Than Ever: Several Candidates Get Burned by Foes for Taking the Industry's Donations. Some Who Accepted Gifts in the Past Are Now Shunning Them*, L.A. Times, Oct. 29, 1996.

A more recent example of disclosure adequately protecting against the appearance of corruption occurred again in California during this past 1998 gubernatorial election cycle. One highly contentious issue during that election was a ballot measure--Proposition 5--which attempted to legalize Indian gambling operations on reservations located in California. During this campaign, the California Legislative Counsel opined that accepting donations from Indian tribes may be illegal subjecting recipients to possible criminal sanctions. *See* Dan Morain and Dave Lesher, *Casino Campaign Donations Questioned: Legislature's Legal Advisor Says That Lawmakers Could Face Criminal Sanctions if They Accept Contributions from Indian Gambling Operations Deemed To Be Illegal*, L.A. Times, July 3, 1998. Shortly after the issue was reported in the press, then gubernatorial candidate Gray Davis, among others, *refused to accept any more Indian tribe campaign contributions to avoid the appearance of impropriety. See* Virginia Ellis, *Labor, Trial Lawyers Pour Millions Into Davis' Coffers Funds: A Third of*

Gubernatorial Candidate's Money Comes from Two Groups That Usually Back Democrats, L.A. Times, Oct. 21, 1998.

Given these examples of campaign finance disclosure and vigilant reporting by the press, it is simply incredulous to assert the notion that disclosure is inadequate to prevent the appearance of corruption. *Not only does disclosure allow citizens to make their own judgments about a particular candidate, but such laws also allow the press and opponents to continually monitor campaign activity and alleged correlations between contributors and actions taken in public office.* Certainly, these types of disclosure laws and vigorous reporting by the press further the "discussion of public issues and debate on the qualifications of candidates [which is] integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14; *see also Grosjean v. American Press*, 297 U.S. 233, 250 (1936) (observing that an "informed public opinion is the most potent of all restraints upon misgovernment").

Amici therefore submit that the contribution limits at issue in this case fail strict scrutiny as they are not narrowly tailored:

> If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the government interest in the small minority of contributions that are not innocent.

Colorado Republican, 116 U.S. at 2329 (Thomas, J., concurring in part and dissenting in part).

CONCLUSION

The judgment of the Eighth Circuit should therefore be affirmed.

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Respectfully submitted,

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