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 FOR
THE FIRST AMENDMENT PROJECT OF
THE AMERICANS BACK IN CHARGE FOUNDATION
AND REPRESENTATIVES JOHN T. DOOLITTLE AND TOM DELAY
AS *AMICI CURIAE* SUPPORTING RESPONDENTS

Filed June 7, 1999

This is a replacement cover page for the above referenced brief filed at the U.S. Supreme Court. Original cover could not be legibly photocopied

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INTEREST OF *AMICI*[1]

Americans Back in Charge Foundation is a nonprofit educational foundation established in 1991 dedicated to empowering citizens in the political process. The First Amendment Project educates the public, the media, and elected officials by presenting testimony, publishing articles, and filing *amicus curiae* briefs (as appropriate) in litigation involving campaign finance proposals, the regulation of political speech by government, and the impact of such restrictions on First Amendment freedoms.

Representatives John T. Doolittle (R-CA 4) and Tom DeLay (R-TX 22) are the principal sponsors of H.R. 1922, The Citizen Legislature and Political Freedom Act, that will encourage political speech by eliminating the limits and restrictions currently in place and requiring full and prompt electronic disclosure of contributions and expenditures.

The *amici* are dedicated to the principle of full disclosure of campaign contributions and expenditures as an alternative to government restraint and regulation of political speech. The *amici* believe that there are massive efforts underway in this nation that would sacrifice the First Amendment to ill-conceived and misguided campaign finance "reform" proposals through increased regulation by government of the citizens' rights to political speech and expression.

The *amici* believe that the instant litigation will have great bearing on the ability of the American people to exercise important First Amendment freedoms in the political arena. The First Amendment Project and Representatives Doolittle and DeLay submit this *amici curiae* brief to aid the Court's consideration of the fundamental principles at issue here.

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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, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than the *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Missouri law limiting campaign contributions violates the First Amendment, and the Eighth Circuit's decision invalidating the law should be upheld. Because the statute at issue implicates and violates the First Amendment, the Court should not defer to the State of Missouri's legislative enactment in this regard.

Buckley v. Valeo established that campaign contributions and expenditures implicate the First Amendment protections of free speech and political expression. The Court has consistently held that state laws that implicate First Amendment principles are subject to strict scrutiny by the Court. The State of Missouri has not met its constitutionally mandated burden to demonstrate that its legislative decision is based on factual findings that establish a compelling interest in the State's infringement of the First Amendment rights of its citizens. There is no factual record demonstrating that actual or apparent corruption either exists or is cured by the arbitrary contribution limit enacted by the legislature, the test established by the Court in *Buckley*.

Instead, Petitioners have offered mere conjecture and speculation about the existence of a reputed problem not articulated in *Buckley*: a poll-driven 'public concern' about generic and undefined corruption in the electoral system. Such amorphous disquiet does not justify the imposition of arbitrary political contribution limits by the Missouri legislature.

Further, the State of Missouri is entitled to no deference, having crafted a legislative solution that evidences no amelioration of the reputed problem ("public concern about money in the political process") and which is not narrowly tailored to overcome First Amendment objections. Petitioners cite to no evidence that the solution (state limits on contributions) have or will ameliorate the purported problem. In fact, Petitioners' *amici curiae* argue vigorously for increasing restrictions and regulation of political speech because, presumably, the existing limits are not enough. Their animus to First Amendment protections of political speech are philosophical – and point toward total elimination of all campaign contributions to any candidate(s) by any person(s). That is precisely the scheme rejected by the Court in *Buckley* on First Amendment grounds.

This case affords the Court the opportunity to review the development of the law and society in this arena since the Court's

decision in 1976, forcing the State of Missouri to seek other remedies to solve its purported problem. For instance, the development of computer technology provides the opportunity for instantaneous disclosure of all campaign contributions and expenditures to all candidates via the Internet, a capability that did not exist twenty years ago. That and other remedies are more narrowly tailored to address Petitioners' stated concerns without violating the First Amendment.

Finally, Petitioners posit the existence of some "common sense" exception to First Amendment protections. There is no such exception. Subjecting the Missouri contribution limit to the strict scrutiny of the Court under customary First Amendment jurisprudence requires the Court to uphold the decision of the Eighth Circuit, invalidating the Missouri statute.

ARGUMENT

I. THE COURT NEED NOT DEFER TO THE MISSOURI STATE LEGISLATURE WHEN, AS HERE, THE STATUTE VIOLATES THE FIRST AMENDMENT.

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend I. The Fourteenth Amendment makes the First Amendment applicable to the states. *See McIntyre v. Ohio Election Commission*, 514 U.S. 334, 336 n.1 (1995). By imposing unreasonably low limits on campaign contributions, the Missouri legislature has abridged constitutionally protected speech and trampled on "the proposition that freedom of expression upon public questions is secured by the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Therefore, the Court must consider this case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *Id.* at 270.

A. Because the Missouri Contribution Limitation Implicates the First Amendment, Strict Scrutiny of the Statute's Constitutionality is Required.

The Supreme Court recognized in *Buckley v. Valeo*, 424 U.S. 1 (1976), that the expenditure of funds by political candidates and the making of campaign contributions to political candidates are both protected speech. *See id.* at 14. While Petitioners seek to narrow the Court's holdings in its campaign finance jurisprudence, the Court should simply look to its own unambiguous language in *Buckley*: "[T]he Act's contribution and expenditure limitations *both implicate fundamental first amendment interests*." *Id.* at 23 (emphasis added). It is true that expenditure limits, in the Court's view, do "impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Id.* However, "it does not follow . . . that political contributions are not entitled to full First Amendment protection." *California Medical Ass'n v. FEC*, 453 U.S. 182, 202 (1981) (Blackmun, J., concurring). To the

contrary, "*Buckley* states that contributions and expenditure limits *both* implicate fundamental First Amendment interests." *Id.*

It is well established that a law's implication of the First Amendment triggers strict scrutiny. As the Court has stated, "[e]specially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling.'" *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)). Furthermore, the law can only survive if it is narrowly tailored to serve that interest "without unnecessarily interfering with First Amendment freedoms." *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). *See also Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990). The Missouri law fails the strict scrutiny test on both counts. *See* Parts I.B and II.B *infra*.

This Court's precedents leave no doubt that strict scrutiny is the standard that must be applied to the Missouri law. The application of strict scrutiny as the standard for reviewing contribution limits began with *Buckley*, and the Court has never wavered from it. As the Eighth Circuit observed, "The Court has not ruled that anything other than strict scrutiny applies. When the Court in *Buckley* analyzed the contribution limits, it articulated and applied strict scrutiny." *Carver v. Nixon*, 72 F.3d 633, 637 (8th Cir. 1995), *cert. denied* 518 U.S. 1033 (1996) (striking down as violative of the First Amendment a Missouri law similar to that in the instant case). *Buckley*'s progeny supports that analysis. As explained in *California Medical Association*:

> [C]ontribution limitations can be upheld only if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgements of associational freedoms.

453 U.S. at 202 (Blackmun, J., concurring). In its decision in the instant case, the Court would be wise to adopt the views of Justices O'Connor and Blackmun that "[t]he contribution limitations at issue here encroach directly on political expression and association. Thus, [the law] cannot survive constitutional challenge unless it survives strict scrutiny." *Citizens Against Rent*

Control v. Berkeley, 454 U.S. 290, 302 (1981) (Blackmun and O'Connor, J.J., concurring).

B. The Court Need Not Defer to Legislative Decisions Based Upon Conjecture or Speculation When No Objective Factual Findings Are Contained in the Record Sufficient to Compel the State's Infringement of First Amendment Rights.

As justification for the statute, Petitioners advance only theoretical fears harbored by some unknown number of unidentified citizens that campaign contributions above an arbitrary level create an appearance of corruption. *See* Brief of Petitioner at 2 ("There is a real fear, perhaps stronger today than at any time in recent memory, that money is harmfully distorting the nation's political process."); *id.* at 30 ("Like all citizens of the United States, Missouri citizens are members of the public to whom a 'regime of large individual contributions' appears corrupt, and whose confidence in representative government is consequently eroded."). The Court need not defer to a legislature's enactment based on mere abstractions, particularly when First Amendment rights are at stake and strict scrutiny has been triggered.

Strict scrutiny requires that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms," and an interest is not compelling merely because the State says it is. *NAACP v. Button*, 371 U.S. 415, 438 (1963). Whether or not the interest Missouri claims it is advancing is compelling is ultimately a subject for the Court, not the Missouri legislature, to decide. *See Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). In fact,

> in cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.

Gentile v. State Bar of Nevada, 501 U.S. 1030, 1038 (1991) (internal quotations omitted). Clearly, Missouri's request for deference cannot be honored by this Court when evaluating if the State's campaign contributions limitations violate the Constitution.

Petitioners claim that Missouri's laws restricting political speech by limiting campaign contributions are justified by the State's compelling interest in ameliorating corruption or the appearance of corruption. *See, e.g.*, Brief of Petitioners at 29 (arguing that the "State's interest in attacking the appearance of corruption is so compelling" that the Court need not "look beyond the Act's primary purpose . . . in order to find a constitutionally sufficient justification" for contribution limitations.) These claims are supported neither in the legislative record that served as the basis for adoption of the statute nor by any evidence in these proceedings. Petitioners have offered no evidence that contributions in excess of its limits cause or have caused corruption of any specific official or group of officials. The Missouri legislature made no findings that an $1,100 contribution would corrupt a candidate for governor of Missouri while a $1,050 contribution would not. Instead, Missouri approaches the concept of "corruption" with precisely the kind of vagueness the Court has previously held intolerable. *See, e.g., FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497-98 (1985) ("*NCPAC*") ("But precisely what the 'corruption' [the government sought to prevent by limiting PAC expenditures] may consist of we are never told with assurance.").

Indeed, even if the Court were inclined to give deference to the legislature, there are no factual findings in this record to which it could defer. The Federal Election Commission's most recent attempt to get a court to defer to its assertion that the "corruption or appearance of corruption" rationale was adequate to justify limiting contributions to candidates by political parties was similarly deficient. *See FEC v. Colorado Republican Fed. Central Comm.*, No. 89 N 1159, 1999 WL 86840 (D. Colo. Feb. 18, 1999) ("*Colorado Republican II*"). Examining the FEC's attempt to persuade the court that Congress's alleged rationale for restricting speech by political parties was compelling and entitled to deference, Judge Nottingham observed:

> The FEC makes numerous factual assertions, for example, based on reports in newspaper articles.

> Except as otherwise noted, the discussion which follows simply ignores the mass of irrelevant and/or inadmissible evidence in the record.

Id. at *3. Judge Nottingham went on to explain why all of the "hundreds" of examples of "proof" of corruption cited by the government in *Colorado Republican II* are inadequate to justify the State's interest. Here, Petitioners have offered far less justification than did the FEC in *Colorado Republican II*. Reliance on newspaper articles, public opinion polls, and other hearsay evidence is a frequent technique of those, like Petitioners, who favor restricting political speech. *See* Brief of Petitioners at 35 (urging reliance on "newspaper articles and editorials" that provide "additional evidence that the public perceives the political process as corrupted by influence buying"). Such evidence proves nothing for strict scrutiny purposes.

With no facts on which it can rely, Petitioners are left with arbitrary labels and speculative predictions. Petitioners want the court to recognize donations over $1,075 as corrupting simply because the legislature has arbitrarily labeled them as corrupting. Petitioners and supporting *amici* predict that large contributions will infect Missouri politics if left unchecked and speculate that the State's restrictive remedy will restore public confidence. This is inadequate to justify meaningful deference. The Court "cannot allow the Government's suggested labels to control [its] First Amendment analysis." *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 627 (1996) (Kennedy, J., concurring).

Petitioners argue that the "[l]egislature must be able to attack anticipated harms, not just past or current ills." (Brief of Petitioners at 32.) However, because Missouri is defending "a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured." *Id.* at 618 (plurality opinion) (quoting *Turner Broadcasting Systems v. FCC*, 512 U.S. 662, 664 (1994)). Rather, Missouri must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). *See also NCPAC*, 470 U.S. at 499 ("A tendency to demonstrate distrust of PACs is not sufficient."). As Justice Brandeis reminded

us, the Court cannot defer to mere speculation about serious harms. Fear of harm alone cannot justify suppression of political speech. After all, "[m]en feared witches and burnt women. . . . To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced." *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring). Missouri offers no such reasonable grounds but relies instead on fear alone. Corruption and its appearance are Missouri's witches, and to vanquish them, the legislature would burn the First Amendment. The Court need not defer to that choice.

C. The Application of Consistent First Amendment Principles to Missouri's Limits on Campaign-Related Speech Requires No Greater Deference than Other Types of First Amendment Expression.

Over the last half century, the Court has repeatedly protected various forms of expression against governmental restrictions. The Court made it virtually impossible for government to impose prior restraints on a free press. *See New York Times v. United States*, 403 U.S. 713 (1971). The Court recognized that the First Amendment protects wearing armbands to protest the Vietnam War. *See Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969). Wearing a jacket bearing the words "F—k the Draft" was held to be speech "entitled to constitutional protection." *Cohen v. California*, 403 U.S. 15, 21 (1971). Burning the American flag cannot be punished under the First Amendment, even when the crude expressive value of that conduct is weighed against a state interest in "preserving the flag as a symbol of nationhood and national unity." *Texas v. Johnson*, 491 U.S. 397, 410 (1989). Indecent sexual expression, including dial-a-porn services, is protected by the First Amendment. *See Sable*, 492 U.S. at 126. The Court struck down on First Amendment grounds a law prohibiting indecent sexually explicit text, pictures, and chats on the Internet even after acknowledging that the material ranged "from the modestly titillating to the hardest core." *Reno v. ACLU*, 117 S. Ct. 2329, 2336 (1997).

The Missouri law in the instant case provides the Court with an opportunity to state definitively that as surely as it protects flag

burning and dial-a-porn, the First Amendment also protects political speech. If the Court does not defer to the states in cases involving indecent clothing and Internet pornography, surely it does not owe deference to the Missouri legislature in the matter of political speech. Wearing a jacket urging readers to "F—k the Draft" cannot be entitled to more First Amendment protection than contributing money to a candidate for Missouri State Auditor. The Court should seize this moment to reaffirm its prescient declaration that "the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

II. THE STATE OF MISSOURI IS NOT ENTITLED TO DEFERENCE IN ITS CRAFTING OF A LEGISLATIVE SOLUTION THAT NEITHER EVIDENCES AMELIORATION OF A PUBLIC PROBLEM NOR IS NARROWLY CRAFTED TO COMPLY WITH THE FIRST AMENDMENT.

Even if the Court finds a compelling state interest in Missouri's contribution limits, there is no indication that the solution enacted will solve the purported problems. Nor is Missouri's statutory solution narrowly tailored as required when First Amendment principles are at stake.

A. The Court Should Not Defer to a Constitutionally Questionable Legislative Decision that Cannot Be Shown to Ameliorate the Reputed Problem.

Petitioners posit that the ill-defined problem of perceived corruption can be remedied by placing limits on campaign contributions. (Brief of Petitioner at 13.) Surely if limiting campaign contributions were an appropriate remedy for the problem Petitioners claim to exist, the public's confidence in the federal electoral system would be quite strong today. For more than twenty years, the Federal Election Campaign Act of 1974 ("FECA") has limited campaign contributions to federal candidates. *See* 2 U.S.C. § 431, *et. seq.*

1. Since Buckley there has been an explosion in the regulation of political speech.

In the twenty-three years since *Buckley* upheld parts of the FECA regulatory scheme, regulation of political campaign speech by the federal government has mushroomed. The government has punished and attempted to punish the political speech of individuals and organizations across the political spectrum. *See, e.g.*, *Colorado Republican*, 518 U.S. 604 (discussing FEC efforts to punish speech of a state political party); *Austin*, 494 U.S. at 936 (discussing FEC efforts to punish speech of a nonprofit corporation); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (discussing FEC efforts to punish speech of a congressional campaign committee); *Republican National Comm. v. FEC*, 445 U.S. 955 (1980) (discussing FEC efforts to punish speech of a national political party); *FEC v. Christian Action Network*, 110 F.3d 1049 (1997) (upholding lower court's finding that words of "express advocacy" are necessary before the FEC can regulate speech of a non-profit organization and ordering the FEC to pay costs and fees).

Notwithstanding the fact that courts have been unwilling to sustain the FEC's attacks on political organizations, the FEC has reached even further to attack the printed press under the banner of fighting "corruption". In 1998, the government sought civil penalties against Forbes Inc., the publisher of *Forbes Magazine*, because the magazine published essays written by its editor, Steve Forbes, while he was running for president, even though none of the columns referenced his candidacy or any other candidacy. *See* Complaint in *FEC v. Forbes*, No. 98 Civ. 6148 (S.D.N.Y. Aug. 31, 1998) (dismissed with prejudice, February 18, 1999).

This litany of cases, which is but the tip of the iceberg, illustrates the leviathan of speech restrictions imposed by the government when it assumes the role of speech guardian.

2. Even with over-reaching speech regulation, the perception of corruption has not been remedied.

Yet, notwithstanding the explosion of regulations on political speech, those who advocated such measures in 1976 as the "cure"

for public cynicism can point to little success from the regulations. Instead, the opposite is true. The Petitioners and their *amici curiae* argue that the contribution limits in the Missouri statute are essential to "maintain the public's confidence in the integrity of our political system," because the public's confidence has been *decreasing*. (Brief for *amici curiae* Senator John F. Reed et. al. at 1.)

The members of Congress who wrote as *amici curiae* are actually working to *increase* the regulation of political speech and expression related to federal campaigns. *See* Bipartisan Campaign Reform Act of 1999, S. 26, 106th Cong. ("McCain-Feingold bill"), and Bipartisan Campaign Reform Act of 1999, H.R. 417, 106th Cong. ("Shays-Meehan bill"). *Amicus curiae* Sen. Jack Reed (D-R.I.) argued on the floor of the United States Senate in 1998 that such increased regulation is justified by the erosion of public confidence in the electoral process:

> What we are witnessing today in our electoral process encompasses this form of insidious corruption – *not specific misdemeanors, or infractions*, but a system in which the American people are losing faith and confidence, that they are seeing their system transform from one in which free elections are based on the merits of the candidate to one which they perceive is based upon simply the sheer volume of cash that flows into the system. This corrupting influence is weakening our ability to govern and the confidence of the people in our motives and indeed our actions.

CONG. REC., 105th Cong., 1st Sess., Oct. 7, 1998 (emphasis added). Rep. Christopher Shays (R-Conn.) echoed those sentiments in arguing for passage by the House of Representatives last year of his bill of doubtful constitutional validity that would restrict political speech in federal and state campaigns:

> Eighty-four percent (84%) of my constituents said they believe, and I quote, 'Our democracy is threatened by the influence of *unlimited campaign contributions* by individuals, corporations, labor unions, and other interest groups.'

CONG. REC., 105th Cong., 2d Sess., Mar. 30, 1998 (emphasis added). Thus, Petitioners have established that the regulations already in place have done nothing to ameliorate the purported problem. Amazingly, they cite the failure of the regulations as justification to ratchet up the level of restrictions to new heights. This argument is "one logical proposition detached from history [that] leads to another, until the Court produces a result that bears no resemblance to the America that we know." *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 696 (1995) (Scalia, J. dissenting).

In *Colorado Republican II*, the court required the FEC to establish by admissible evidence that "limiting party coordinated expenditures is necessary to avoid corruption or the appearance thereof." 1999 WL 86840, at *12. Here, the only evidence of the impact of regulation is that *amici curiae* members of Congress clamor for still more regulation because the existing regulations have not solved the problem.

3. *Because Petitioners cannot show that increased regulation will solve the problem, the Court must not defer to the legislature.*

The Court is reluctant to leave to a legislature the decision of whether its enactment passes constitutional muster, especially if the issue implicates a fundamental right. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc* 435 U.S. at 843. Courts reviewing legislative actions must look to see whether the conduct at issue falls within the reach of the statute in question. *See id.* at 844. "Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Id. See also Pennekamp v. Florida,* 328 U.S. 331, 335 (1946) (holding that the Court must determine if legislation violates the First Amendment, rather than leaving the determination to the legislature itself).

The Court must stop the legislative efforts to erode the First Amendment. Because Petitioners cannot demonstrate that the proposed remedies will ameliorate any perceived problem, the Court should not defer to their questionable legislative findings, less the First Amendment be smothered by the continuous expansion of regulation.

B. The Court Cannot Defer to the Legislature When the Legislation Restricting the First Amendment Is Not Narrowly Tailored.

Missouri's law cannot survive the strict scrutiny required by *Buckley* and its progeny unless it can demonstrate that the statute is narrowly tailored to serve a compelling interest. *See Austin*, 494 U.S. at 657; Part I.A *supra*. A statute is narrowly tailored if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 486 U.S. 789, 808-10 (1984)).

1. The proposed remedy is not narrowly tailored.

Missouri must craft its law narrowly to address *only* the problem identified. When a statute implicating First Amendment rights is not narrowly tailored, the danger is that the rights implicated will be eviscerated. *See Riley v. National Fed. of the Blind of North Carolina, Inc.*, 487 U.S. 781, 794 (1988) (holding that statutes setting percentage limits on charitable fundraisers' fees were unconstitutionally vague because they gave no specific way to measure the reasonableness of the set limit, thus creating a scheme that would "necessarily chill speech in direct contravention of the First Amendment's dictates."). *See also, e.g., Boos v. Barry*, 485 U.S. 312, 325-26 (1988) (invalidating a District of Columbia law prohibiting the carrying of any sign within 500 feet of a foreign embassy if the sign would bring any type of "public disrepute" to the foreign government, because the law was not sufficiently narrowly tailored to meet the government's stated goal of protecting the dignity of foreign leaders without trampling on the public's right to free speech); *Secretary of State of Maryland v. Joseph H. Munson Co.*, Inc., 467 U.S. 947 (1984) (finding a statute that set percentage-based tests for fundraising was an unconstitutional abridgement of free speech because it was not narrowly tailored to meet the State's goal of preventing fundraising fraud); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (declaring that a local ordinance requiring charitable organizations to use 75% of all funds for charitable purposes was not narrowly tailored).

In *Simon & Schuster, Inc. v. Members of the New York State Crime Victim's Board*, 502 U.S. 105 (1991), the Court invalidated New York's "Son of Sam" law, which was enacted to keep criminals from profiting from their offense and to compensate victims of the crime. The means New York employed to accomplish these goals, however, were "overly broad." *Id.* at 119-20. The laws would have subjected Malcolm X, Henry David Thoreau, and Martin Luther King, Jr. to its requirements because all three had been convicted of violating laws. *See id.* at 121-22. The Missouri law is similarly overly broad. It imposes regulations on citizens, even those who have no history or intention of corrupting any candidates.

2. There are many narrowly-tailored methods to prevent corruption without limiting speech.

Petitioners argue that "[t]here is a real fear, perhaps stronger today than in recent memory, that money is harmfully distorting the nation's political process." (Brief for Petitioners at 2.) Yet "the proper course of action is not to limit speech by permitting unnecessary and unconstitutional limitations on the parties' and candidate's freedoms of speech and association but, rather, to engage in more speech to educate the public." *Colorado Republican II*, 1999 WL 86840, at *16 (citing *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 97 (1977); *Whitney*, 274 U.S. at 377).

Since 1976 and the Court's *Buckley* decision, technological advances have provided easier access to information that educates the public about both the sources and uses of campaign funds. The Internet, cable and satellite television, and a flood of rapidly prepared and disseminated publications provide a vast quantity of virtually instantaneous information to the electorate. Thus,

Missouri has at its disposal the ability to engage in more speech and to educate the public.

Even if Missouri is ultimately able to pinpoint the "corruption" or perceived corruption it seeks to eliminate, the State should be required to adopt other, less intrusive means of ameliorating the problem that satisfy the First Amendment's command of a narrowly-tailored statute.

III. THERE IS NO "COMMON SENSE EXCEPTION" TO PROTECTION OF FIRST AMENDMENT RIGHTS.

Without concrete findings that large contributions corrupt the political process, Petitioners argue that "Missouri certainly is permitted to rely upon common sense and accepted tenets of human behavior in adopting rules governing its elections." (Brief of Petitioners at 30.) Even where the Court has agreed with the common sense rationale of a state legislature, it refuses to allow a law restricting speech to stand when there is no concrete evidentiary support that the law will advance the State's interest. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (holding the State's prohibition on liquor price advertising to be an unconstitutional restriction on free speech even though the advertising would, based on common sense, prevent price competition, raise prices, and therefore reduce alcohol consumption). Similarly, while the Texas legislature had the common sense belief that burning an American flag could potentially incite others to disturb the peace, the Court was unwilling to support such a claim in the absence of evidence in the record. *See Johnson*, 491 U.S. at 409. The Court has specifically refused to allow the legislature to justify restrictions on political speech with common sense speculation of a future harm, requiring instead that the legislature "must demonstrate that the recited harms are real, not merely conjectural." *Treasury Employees*, 513 U.S. at 475. Clearly, a legislature may not trample on First Amendment rights without evidence of a problem simply because it has the "common sense" to do so.

Similarly, Petitioners claim that the "[t]he district court's common-sense conclusion is amply supported by a record at least as telling as that relied on in *Buckley*." (Brief of Petitioners at 34.) However, in *Buckley*, the Court had before it a number of specific "deeply disturbing examples . . . demonstrat[ing] that the problem

is not an illusory one." *Buckley*, 424 U.S. at 27. Nowhere do Petitioners cite to any actual examples of corruption. Without proof that large contributions lead to corruption, the Court must not allow the Missouri legislature to use its "common sense" to trump the First Amendment.

IV. IF A LAW IS REPUGNANT TO THE CONSTITUTION THE COURT WILL NOT UPHOLD IT MERELY BECAUSE IT REFLECTS THE POPULAR WILL OF THE PEOPLE.

Petitioners submit that the Missouri statute should be upheld because the citizens "through their elected representatives and through Proposition A[2], sought to enact contribution limits." (Brief of Petitioners at 34.) In other words, Petitioners are suggesting that if a law is popular, it is inherently constitutional.

Yet, the very premise of judicial review, of the entire system of checks and balances and federalism, and the reason for enacting the Bill of Rights, is to protect the liberties of individuals against unconstitutional acts imposed by the majority. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 179 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is."); *Martin v. Hunter's Lessee*, 14 U.S. 304, 344 (1816) ("The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity.").

On a number of occasions, the Court has been willing to strike down popular laws that violate the Constitution. For example, the Court recently determined that a portion of California's attempt at welfare reform violated the Constitution, even though the great majority of citizens supported the 1996 welfare reforms that enabled California to implement the unconstitutional provisions. *See Saenz v. Roe*, No. 98-97, 1999 U.S. LEXIS 3174 (May 17,

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[2] Proposition A, approved by 74% of the voters in 1994, created even lower limits on contributions than the legislation currently under review, and was held to be unconstitutional. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

1999).[3] Additionally, the Religious Freedom and Restoration Act, a law supported by many religious groups, was found to be unconstitutional. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Finally, at a time when many Americans believed that it should be a crime to burn the American flag, the Court struck down a Texas law prohibiting flag desecration. *See Johnson*, 491 U.S. 397.

Similarly, the Court has not shied away from striking laws adopted by initiative or referendum that are unconstitutional "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control*, 454 U.S. at 295. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (overturning Colorado's Amendment 2, a law enacted by initiative which prevented localities from adopting special protections for homosexuals); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (overturning Arkansas's congressional term limits, which were enacted by initiative)[4]; *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (striking down an Oregon constitutional amendment adopted by initiative limiting judicial review of punitive damages); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (striking down a Washington statute adopted through initiative limiting the schools to which students could be assigned by a school district); *Brockett* v. *Spokane Arcades, Inc.*, *v.* 454 U.S. 1021 (1981) (summarily affirming the Ninth Circuit's decision to strike down a Washington moral nuisance law adopted by initiative as an impermissible restraint on free speech). Thus, Petitioners' contention that the Missouri law is constitutional and entitled to deference because it is a popular reflection of the will of the people, must fail.

[3] A CNN/USA Today/Gallup Poll found that 68% of the American people supported the welfare reform bill passed by Congress and signed by President Clinton in 1996. *See The Hotline* (Aug. 9, 1996).

[4] In fact, the result of *U.S Term Limits* was to invalidate similar laws adopted via initiative in 21 other states, which combined had received over twenty-five million votes. *See* CLETA MITCHELL, SETTING LIMITS at 94 (1996).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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