No. 98 - 963

IN THE

Supreme Court of the United States

October Term, 1998

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

Petitioners,

v.

SHRINK MISSOURI GOV'T PAC, ZEV DAVID FREDMAN, AND JOAN BRAY,

Respondents.

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

BRIEF OF SENATOR MITCH MCCONNELL, MISSOURI REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, AND NATIONAL REPUBLICAN SENATORIAL COMMITTEE, AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

All *amici curiae* represented in this brief have acquired considerable practical experience over the last twenty-five years complying with federal and state contribution limits.[1] The Missouri limit at issue here, currently $1075, threatens free speech and associational rights in the same manner as those other limits.

Amicus Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky, and is also Chairman of the *amicus* National Republican Senatorial Committee ("NRSC"). Senator McConnell has been and will be subject to federal contribution limits, and has gained a reputation as the Senate's foremost advocate of First Amendment protection for political speech.

Amicus Missouri Republican Party is a state political party committee responsible for the day-to-day affairs of the Republican party in Missouri. It is subject to contribution limits for parties specified in Mo. Senate Bill No. 650 (1994) (codified at Mo. Ann. Stat. § 130.032 (West 1999)) and obtained a ruling that those limits violate the First Amendment. *Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161 (E.D. Mo. 1999). The Missouri Republican Party works with candidates who are subject to the limit at issue in this case.

Amicus Republican National Committee ("RNC") is an unincorporated association created by the Rules of the Republican Party adopted on August 12, 1996, by the Republican National Convention in San Diego, California. *Amicus* NRSC is also an unincorporated association comprising the Republican members of the United States Senate. The RNC and NRSC are national political party committees registered with the Federal Election Commission ("FEC"). Each is subject to and complies with

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

applicable contribution limits imposed by the federal and state governments, and works closely with candidates who are subject to such limits.

SUMMARY OF THE ARGUMENT

I. Twenty-five years of experience with contribution limits have shown that limits have a "severe adverse effect" on the ability of candidates to fund their campaigns. Even regulation advocates contend that contribution limits have failed to ameliorate the problems they were intended to solve. Accordingly, the time has come for this Court to revisit whether contribution limits are consistent with the First Amendment.

II. Even if this Court declines to hold contribution limits per se offensive to the First Amendment, it should continue to apply "strict scrutiny" to such limits to assure that post hoc justifications are not used to mask illegitimate motives.

III. Respondents submitted unrebutted evidence to show that the $1075 contribution limit interfered with their speech and associational rights. In contrast, the State failed to produce probative, much less compelling, evidence that the limit was adopted in response to actual or apparent corruption. In any event, an unfounded public perception of corruption would be an insufficient basis for sustaining an infringement of First Amendment rights. Finally, evidence outside the record rebuts any compelling need for the Missouri contribution limit.

ARGUMENT

I. THE COURT SHOULD REEXAMINE WHETHER THE FIRST AMENDMENT TREATS CONTRIBUTIONS DIFFERENTLY THAN EXPENDITURES.

In the twenty-three years since this Court decided *Buckley v. Valeo*, 424 U.S. 1 (1976), a dozen Supreme Court cases and scores of state and lower federal court cases have applied the four basic propositions underlying the decision: Political speech costs money, restrictions on political fundraising and spending infringe fundamental First Amendment freedoms, such restrictions will be upheld only if narrowly tailored to serve a compelling government interest, and the only government interests sufficiently compelling

to support such restrictions are the prevention of actual or apparent quid pro quo corruption. *Id.* at 14-15, 26. These propositions have weathered the test of time.

In particular, *Buckley* struck down the expenditure limits in the Federal Election Campaign Act, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended at 2 U.S.C. §§ 431-455 (1994)) ("FECA"), on the grounds that they "impose direct and substantial restraints on the quantity of political speech," 424 U.S. at 39, and that the asserted governmental interests were insufficient "to justify the restriction." *Id.* at 55.

In contrast, the Court upheld contribution limits. Although recognizing that contribution limits infringe the contributor's speech and associational freedoms and that larger contributions might express a greater "intensity" of support than smaller ones, the Court found that the contributor's "general expression of support for the candidate and his views . . . does not increase perceptibly with the size of his contribution." *Id.* at 21. From the perspective of candidates, it found "no indication . . . that the contribution limitations imposed by the Act would have any dramatic adverse effect" on campaign funding. *Id.* at 21. Referring to "abuses uncovered after the 1972 elections," *id.* at 27 n.28, the Court concluded that the asserted compelling government interest of limiting "the actuality and appearance of corruption resulting from large individual financial contributions" justified the restriction on speech posed by the limits. *Id.* at 26.[2]

Following *Buckley* and its progeny, courts have uniformly struck down restrictions on political expenditures. Courts and commentators have, however, criticized *Buckley*'s seemingly inconsistent approval of contribution limits. *Amici* respectfully submit that the time has come for the Court to reexamine whether a constitutionally sufficient distinction can and should exist between contributions and expenditures.

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[2] The Court also upheld the Act's disclosure requirements as "the least restrictive means of curbing the evils of campaign ignorance and corruption . . . ." *Id.* at 68.

A. *Buckley*'s Validation of Contribution Limits Created a Classic Regulatory Trap.

Campaign finance regulation has fallen prey to "the classical regulatory approach to a regulatory problem: the agency [seeks] to cure a problem caused by regulation by introducing still more comprehensive regulation." Breyer, *Regulation and Its Reform* 218 (1982). Confronted with evidence that a regulatory regime is creating perverse and unintended consequences, the regulator compounds past mistakes by adding more layers of regulation. New regulations in turn create new problems, leading to still more regulations, and so on in a vicious circle.

Campaign finance has proven especially susceptible to this regulatory trap. Faced with rapidly rising campaign costs and the falling real value of contribution limits, candidates and political parties increasingly face a choice between curtailing campaign speech or diverting time from discussion of issues to fundraising. In turn, the accelerating "money chase" prompts calls from regulation activists for more campaign finance regulation. As one group of *amici* supporting Petitioners puts it, "the campaign regulations upheld in *Buckley* are insufficient to stem the public's declining loss of faith in the democratic process." Br. for *Amici Curiae* Sen. John F. Reed *et al.*, in Supp. of Pet'rs ("Reed Br.") at 23. Some campaign reform advocates have even sought to weaken the First Amendment itself to allow greater regulation of political speech.[3]

Amici McConnell *et al.* strongly oppose any dilution of the Free Speech Clause. Regulation of political speech should be minimal, and, we respectfully submit, the courts must vigilantly

[3] *See, e.g.*, Bradley, Editorial, *Congress Won't Act, Will You?*, N.Y. Times, Nov. 11, 1996, at A15 (arguing *Buckley* "must be directly confronted, by amending the Constitution to make it clear that money does not equal free speech"); *Hearing on Campaign Finance Reform Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Gene Karpinski, Executive Director, U.S. Public Interest Research Group) (advocating constitutional amendment allowing Congress and the states "to set limits on contributions and expenditures").

resist the regulatory trap. If even regulation advocates believe contribution limits are ineffective and counterproductive, then the time has come to reconsider the constitutionality of such limits.

B. The *Buckley* Distinction Between Contributions and Expenditures Is Illogical.

From the time *Buckley* was decided, members of this Court have questioned the distinction between contributions and expenditures. *See, e.g., Buckley*, 424 U.S. at 244 (Burger, C.J., concurring and dissenting) ("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 290 (Blackmun, J., concurring and dissenting). For instance, as Justice Thomas recently observed, the suggestion that "a contribution signals only general support for the candidate but indicates nothing about the reasons for that support" is immaterial. *Colorado Republican Fed. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 639 (1996) (Thomas, J., concurring in the judgment and dissenting in part). A campaign poster that reads "We support candidate Smith" is as deserving of protection as one that reads "We support candidate Smith because we like his position on agriculture subsidies." *Id.* at 639-40.

Further, federal law often treats contributions and expenditures as equivalent. "Coordinated expenditures," defined as "expenditures made . . . in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate," may be deemed "in-kind contribution[s]" under federal law. 2 U.S.C. § 441a(a)(7)(B)(i) (1994). *See Colorado Republican*, 518 U.S. at 611 (Breyer, J., for plurality). FECA creates an exception from the expenditure *and contribution* limits for coordinated expenditures made by a party on behalf of its general election candidates. 2 U.S.C. § 441a(d)(1) (1994). These "in-kind contributions" are usually *actual speech* in the form of print or broadcast advertisements, not *money* to be used by the candidate. *See Buckley*, 424 U.S. at 21. Thus, the distinction between contributions and expenditures is illogical and ultimately unworkable.

C. Experience Shows That Contribution Limits Have a "Dramatic Adverse Impact" on Political Speech.

In *Buckley*, the Court lacked evidence that the contribution limits at issue "would have any dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21. Based on their twenty-five years of experience with FECA's contribution limits, *amici* respectfully submit that such limits do, indeed, have a dramatic adverse effect on political speech. Revisiting the question is, therefore, appropriate. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 855 (1992) (Court inquires "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification").

First, the Court has made clear in other contexts that the First Amendment does not provide less protection as the "intensity" of the speaker's expression increases. *See Buckley*, 424 U.S. at 21. For example, burning an American flag receives the same absolute protection as temporarily taping a peace symbol over the flag; both are expressive conduct, but of varying intensities. *Compare Texas v. Johnson*, 491 U.S. 397, 406-07 (1989) (reversing conviction for burning a flag) *with Spence v. State of Wash.*, 418 U.S. 405, 414-16 (1974) (reversing conviction for taping a peace symbol to a flag). It is no more appropriate to hold that the expression of support inherent in a $1075 contribution is protected while the greater intensity of support reflected in a $5000 contribution is not.

Second, contribution limits have spawned a variety of consequences. Individuals and groups constrained by such limits now provide financial support indirectly by, for instance, eschewing regulated "express advocacy" and instead funding unregulated "issue advocacy." The *Buckley* Court fully anticipated the "ingenuity and resourcefulness of persons and groups" who would "devis[e] expenditures that skirted the restrictions on express advocacy of election or defeat but nevertheless benefit[ed] the candidate's campaign." 424 U.S. at 45. *See also Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981) (issue advocacy by political committee is protected from regulation); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (same for issue advocacy by corporation). Thus, "soft money," decried

by regulation advocates, is often the fully anticipated consequence of the contribution limits upheld in *Buckley*.[4] Yet, regulation advocates deem *Buckley* a "straightjacket," and now seek to regulate even protected issue speech. *See, e.g.*, Reed Br. at 3.

Another result of contribution limits may be dissemination of less accurate information about candidates' positions to the voters, since candidates are able to depict their own views more accurately than supporters who are forced to act independently. Sen. Hrg. 106-19, at 65 (Lott Stmt.). Yet another consequence is that the public receives less information, since special interest groups often do not disclose the amount and sources of funding for issue advocacy. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-57 (1995).

Third, contribution limits hamper candidates' ability to campaign. Consistent with Mr. Fredman's affidavit, Joint Appendix ("JA") 21-23, recent anecdotal evidence shows that the federal contribution limit is hampering candidate fundraising, and is deterring qualified candidates from seeking election or reelection. Former Senator Dan Coats recently testified that the "chore of raising money under the current [$1000 federal] contribution limits" was "one of the most important reasons" he decided not to run for reelection in 1998. Sen. Hrg. 106-19, at 20 (Coats Stmt.). Senator John Kerry announced in February 1999 that he would not run for president in 2000, citing the difficulty of raising adequate funds. *Id.* at 88. Senator Frank Lautenberg cited the pressure of and time consumed by fundraising as the reasons he chose not to run for a fourth term in 2000. *Id.* Senators Simon and DeConcini also stated that the fundraising burden was pivotal in their decisions not to seek reelection. *Id.* Senators Bumpers, Ford, and Glenn all chose not to run for fourth terms, citing

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[4] *See Campaign Contribution Limits: Hearing Before the Comm. on Rules and Admin.* ("Sen. Hrg. 106-19"), 106th Cong. 65 (1999) (statement of John Lott, Professor, Univ. of Chicago School of Law); *see also id.* at 24-25 (statement of Dan Coats, former U.S. Senator) ("With nowhere else to go, these potential hard money contributors have turned their money into soft dollars that finance issue advertisements.").

fundraising concerns. Eagleton, *Why Class of '74 Exits the Senate*, St. Louis Post-Dispatch, Nov. 16, 1997, at B3.

In an article advocating campaign expenditure limits, Professor Vincent Blasi explained that this "money chase" is a direct consequence of political contribution limits:

> The recent increase in time devoted to fund-raising did not evolve 'naturally.' Rather, it developed in response to the patchwork legislative scheme that was left standing after the selective invalidations of *Buckley v. Valeo*: no limits on overall spending, severe limits on the size of contributions, and no limits on independent expenditures for and against particular candidates. The war chest mentality was born of this regulatory residue. Had the 1974 campaign finance law at issue in *Buckley* either never been passed or been upheld in its entirety, the quest for contributions would look very different. Almost certainly, it would be far less time consuming because either candidates would not seek to raise so much money (if they couldn't spend beyond a set limit) or they could raise it much more efficiently (by means of large contributions).

Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1307-08 (1994). Professor Blasi's call for greater regulation through unconstitutional spending limits is a regulator's classic response to a regulatory failure. A more rational response, we respectfully submit, would be to accord contributions full First Amendment protection.

Fourth, contribution limits do not reduce concerns about corruption. As shown below (pp. 18-25), concerns about actual or apparent corruption associated with contributions are seriously overstated. But even if such fears were justified, contribution limits would not effectively address them. As campaigns become more expensive, candidates rely on networks of fundraisers, each of whom commits to raise $10,000, $50,000, or even $100,000 in amounts allowed by the contribution limit. These individuals are,

in turn, as much appreciated by the candidates as they would be i they had personally contributed the same amount of money.

Finally, empirical studies show that contribution limit *reduce* the competitiveness of political races by disproportionatel harming challengers. Sen. Hrg. 106-19, at 67 (Lott Stmt.). Pas investments by incumbents in advertising create "brand nam recognition" that challengers lack.[5] The challenger's disadvantag is compounded by the perquisites of incumbency, which includ media coverage of officeholders, the franking privilege, and well organized networks of volunteers that typically attach t officeholders. *Id.* at 66-67. A recent study cited by *amic* supporting Petitioners concluded that challengers face "formidabl obstacles" in the political arena and that, while incumben spending "clearly affects" election outcomes, "the most importan consideration is whether a challenger can raise enough money t finance a viable campaign."[6]

The record developed before the Senate Rules Committe in March 1999 confirms this point. In the 1998 general electio for Virginia's 8th District seat in Congress, Demaris Miller faced three-term incumbent with over $700,000 in the bank, most o which had been carried over from previous elections. Sen. Hrg 106-19, at 33-34 (statement of Demaris H. Miller, candidate fo Congress in 1998). The contribution limits forced her to tur away a number of large checks; she then lacked funding t purchase *any* advertising on broadcast television. *Id.* at 29, 3 When voters came to the polls in November, many asked "[w]h is this Miller ***fellow*** and what does ***he*** stand for?" *Id.* at 2 (emphasis added). In short, Mrs. Miller had been unable t

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[5] *See* Lott, *The Effect of Nontransferable Property Rights on the Efficiency Political Markets*, 32 J. Pub. Econ. 231 (1987); *see also* Lott, *Explainin Challengers' Campaign Expenditures: The Importance of Sunk Nontransferabl Brand Name*, 17 Pub. Fin. Q. 108 (1989).

[6] Committee for Econ. Dev., *Investing in the People's Business: A Busines Proposal for Campaign Finance Reform* 17 (1999), cited in Br. of *Amici Curia* Paul Allen Beck *et al.* ("Beck Br.") at 21; Br. of *Amicus Curiae* Public Citize ("Public Citizen Br.") at 13.

convey even basic information about herself – such as her gender – to the electorate.

II. CONTRIBUTION LIMITS MUST BE SUBJECTED TO STRICT SCRUTINY.

Even if the distinction between contribution limits and expenditure limits is allowed to stand, contribution limits must be subject to strict scrutiny. Implicitly recognizing that the Missouri contribution limit will fail if subjected to strict scrutiny, Petitioners and *amici* supporting them argue that contribution limits are subject to "intermediate" rather than "strict" scrutiny. *See, e.g.*, Petitioners' Br. ("Pet. Br.") at 13-23. One *amicus* concedes that "intermediate scrutiny" would require "*line-drawing of a kind not often permitted in First Amendment jurisprudence.*" Public Citizen Br. at 21 (emphasis added). In fact, since *Buckley* this Court has never used a standard less rigorous than strict scrutiny when reviewing a campaign finance regulation.

A. In *Buckley* and in Subsequent Decisions, the Court Has Applied Strict Scrutiny to Contribution Limits.

Buckley emphasized that both "contribution and expenditure limitations operate in an area of *the most fundamental* First Amendment activities." *Buckley*, 424 U.S. at 14 (emphasis added). Accordingly, the *Buckley* Court applied strict scrutiny in all aspects of its review of FECA. This was clearly true for expenditure limits, which "place[d] substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." *Id.* at 58-59. Even when reviewing disclosure requirements, which "appear to be the least restrictive means of curbing the evils" in the campaign finance system, the Court applied "exacting scrutiny." *Id.* at 68, 64. *See also Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 647 (1999).

Buckley also recognized that contribution limits "would have a severe impact" on the *candidate's* speech "if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. *Buckley* held that contribution limits also restrict the *contributor's* rights of speech and association, and that such an

interference "may be sustained if the State demonstrates a sufficiently *important interest* and employs *means closely drawn* to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (emphasis added).[7] The *Buckley* Court upheld the contribution limits only after applying "*the rigorous standard of review* established by our prior decisions." *Id.* at 29 (emphasis added).

The Court's subsequent campaign finance decisions have *always* applied strict scrutiny.[8] Likewise, numerous recent lower federal and state court decisions assessing the constitutionality of contribution limits have recognized that contribution limits are subject to strict scrutiny.[9]

B. For Important Policy Reasons, Strict Scrutiny Is Appropriate When Reviewing Contribution Limits.

Even if the Court were inclined to reconsider the level of scrutiny used for contribution limits, it should, we respectfully submit, continue to apply strict scrutiny. *First*, and most

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[7] Each of the decisions cited by *Buckley* for this proposition struck down a state statute using what is now considered strict scrutiny. *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) ("interest of the state must be compelling'"); *NAACP v. Button*, 371 U.S. 415, 433, 438 (1963) (requiring "narrow specificity" and "compelling state interest"); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) ("comprehensive interference with associational freedoms goes far beyond what might be justified" by the state's interest).

[8] *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990) ("narrowly tailored to serve a compelling state interest"); *Federal Election Comm'n v. National Conservative Political Action Comm. ("NCPAC")*, 470 U.S. 480, 496-97 (1985) ("full First Amendment protection"); *Citizens Against Rent Control*, 454 U.S. at 294 ("exacting judicial review"); *Bellotti*, 435 U.S. at 786 ("exacting scrutiny").

[9] *See, e.g., North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (striking contribution limit); *Russell v. Burris*, 146 F.3d 563, 572 (8th Cir.) (same), *cert. denied*, 119 S. Ct. 510 (1998); *Carver v. Nixon*, 72 F.3d 633, 636 (8th Cir. 1995) (same), *cert. denied*, 578 U.S. 1033 (1996); *Arkansas Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 553 (W.D. Ark. 1998) (same), *cert. denied*, 119 S. Ct. 1041 (1999); *see also State v. Alaska Civil Liberties Union*, 1999 WL 219443, at *32 (Alaska 1999) (sustaining contribution limit).

important, strict scrutiny assures that the limits were enacted to serve a valid government purpose. Mechanical post hoc recitations of an acceptable justification cannot immunize legislation from effective judicial review. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) (striking ordinance designed to reach religious animal sacrifices performed by a particular church); *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936) (striking tax designed to punish newspapers opposing Huey Long).

Despite stirring rhetoric about the "appearance of corruption," contribution limits are often enacted for improper reasons. The Brennan Center for Justice, an ardent advocate of campaign finance regulation that represents Intervenor Joan Bray here, recently published a primer for such regulation at the state level. It concedes:

> Goals that galvanize reformers and voters may not necessarily be the purposes accepted by the Supreme Court. *Focus groups tend to report high positive responses to statutes aimed at 'leveling the playing field,' while Buckley rejected in no uncertain terms Congress's effort to limit spending by monied interests to enhance the relative voice of others.* . . . To promote survival of bills or initiatives, *market research may therefore have to take a back seat to the law, when drafters formulate legislative purposes.*[10]

The Court has unequivocally rejected "leveling the playing field" and "reducing political spending" as permissible justifications for campaign finance regulations, writing that such

[10] Brennan Center for Justice, *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws* II-4 (Goldberg ed., 1998) (emphasis added). *See also* Center for Responsive Politics, *Reform: Principles, Problems and Proposals* (visited June 2, 1999) <www.opensecrets.org/pubs/reform/reform1.htm> ("anti-democratic" to permit private money to finance elections); Raskin & Bonifax, *The Wealth Primary: Campaign Fundraising and the Constitution* (visited June 2, 1999) <www.opensecrets.org/pubs/law_wp/wealth06.htm> (same).

concerns are "wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48-49; *see also Bellotti*, 435 U.S. at 790-91. Since regulation advocates often recite "the appearance of corruption" to mask these illegitimate goals, strict scrutiny of contribution limits by the courts is vital to assure that such limits are not adopted for illegitimate reasons. Thus, a federal court used strict scrutiny in striking down Missouri's campaign finance referendum, finding "no evidence in the record identifying . . . the reasons for the particular dollar limits." *Carver*, 72 F.3d at 644. *See also Russell v. Burris*, 978 F. Supp. 1211, 1227-28 (E.D. Ark. 1997) (literature supporting amendment to Arkansas contribution limits urged adoption "to level the playing field"), *aff'd in part, rev'd in part*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998).

Second, legislatively enacted contribution limits should be subjected to strict scrutiny because they tend to favor incumbents over challengers (see pp. 9-10 above) and are therefore especially likely to reflect incumbent "self-dealing." Contribution limits thus raise "the special spectre of governmental efforts to promote the interests of existing legislators. Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks." Sunstein, *Political Equality and Unintended Consequences*, 94 Colum. L. Rev. 1390, 1400 (1994); *see also* Tushnet, *Fear of Voting: Differential Standards of Judicial Review of Direct Legislation*, 1996 Ann. Surv. Am. L. 373, 386 ("[L]egislatures do not fail to adopt campaign finance legislation. Instead, they adopt incumbent-favoring campaign finance legislation."). Legislators are able to enact such legislation while *appearing* to respond to the preferences of voters who favor "campaign finance reform." Thus, the pro-incumbent effect of contribution limits may not be readily apparent to voters. The entrenchment problem is still more pronounced when legislative inaction allows escalating campaign costs to erode real contribution limits over time.

Third, even if contributions are indirect or "'symbolic'" speech, Pet. Br. at 15, strict scrutiny is appropriate. Decisions of this Court make clear that symbolic political speech receives *full* First Amendment protection. In *Texas v. Johnson*, for instance, the Court reversed a conviction under Texas' flag desecration statute, noting the "expressive overtly political nature" of the defendant's burning of the American flag and applying "'the most

exacting scrutiny.'" 491 U.S. at 406, 412.[11] First Amendment interests in contributions are especially pronounced because both the contributor and the recipient have speech and associational interests at stake.

III. THE STATE'S FACTUAL SHOWING IS INSUFFICIENT TO SUSTAIN THE LIMIT.

A. Summary Judgment Requires an Absence of Disputed Material Facts.

To obtain summary judgment, the moving party must prove the absence of a genuine dispute about material facts and must prove its entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The district court in this case entered summary judgment for Petitioners. As required, the Eighth Circuit conducted "an independent examination of the record as a whole, without deference to the trial court." *Hurley v. Irish-American Gay, Lesbian and Bisexual Groups of Boston, Inc.*, 515 U.S. 557, 567 (1995). The Eighth Circuit agreed with the district court that the material facts were undisputed, but disagreed with the application of the law to those facts and reversed and remanded the case to the district court with instructions to enter summary judgment, instead, for Respondents. *Amici* submit that the Eighth Circuit's decision for Respondents was correct as a matter of law.

B. Respondents Proved That the Missouri Contribution Limit Constrains Political Speech.

Respondents presented undisputed evidence that the Missouri contribution limit had a significant adverse effect on Mr. Fredman's campaign for State Auditor. Mr. Fredman was a first-time candidate for statewide office and lacked his opponents'

[11] *See also United States v. Eichman*, 496 U.S. 310 (1990) (applying "exacting scrutiny" to strike down Flag Protection Act); *Spence v. State of Wash.*, 418 U.S. 405 (1974) (taping of peace symbol to flag to protest invasion of Cambodia and killings at Kent State); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) (students wearing armbands to protest American military involvement in Vietnam).

"vast network of political contacts" and "well established base of contributors." Fredman Aff. ¶ 9, JA 23. Nor was he able to raise the "seed money" necessary to gain visibility early in the campaign. *Id.* The Shrink Missouri Government PAC was ready, willing, and able to contribute to Mr. Fredman in excess of the contribution limit. ShrinkPAC Aff. ¶ 7, JA 28. The contribution limits prevented Mr. Fredman from marshalling sufficient assets to conduct a meaningful campaign. Fredman Aff. ¶ 4, JA 22.

Petitioners cannot rebut these facts by merely invoking the Court's approval of a $1000 limit twenty-three years ago in *Buckley*. To begin with, it costs a great deal more to raise money in small than in large amounts. A single visit or telephone call to obtain a $10,000 donation must be replaced by at least ten visits or phone calls. The costs of postage, printing, donor lists, and fundraising personnel have risen to the point where one-half or even more of the amount raised may be consumed in fundraising costs. *See* p.28 below. Thus, the "net" amount available for speech may be a fraction of the gross amount raised.

The value of these net proceeds has also seriously eroded. The $1000 contribution limit passed by Congress in 1974 is now worth only $302; an equivalent amount in today's purchasing power would be $3306.[12] In some sectors of the economy, prices have increased even more rapidly. For example, in 1975, a reserved seat at the World Series cost $10; in 1998, it cost $100.[13] A new Ford Mustang cost $2700 but today costs $24,000.[14] *See*

[12] *See* Sen. Hrg. 106-19, at 14 (Coats Stmt.) (citing Consumer Price Index in 1974 and 1998).

[13] *Compare If You Wonder What Next Year's Prices Will Be Like*, U.S. News & World Rep., Oct. 11, 1976, at 57, *with Cops Watching For Series Scalpers*, AP Online, Oct. 16, 1998, *available in* LEXIS, News Library, Cumws File.

[14] *Compare* McConnell, *The Money Gag: Efforts to Limit Campaign Spending Are Back, with Less Justification Than Ever*, Nat'l Rev., June 30, 1997, at 36, *with* Kiplinger's Personal Finance Magazine, *1999 Price Watch: What Three New Convertibles Will Cost* (visited June 2, 1999) <www.kiplinger.com/magazine/archives/1998/November/ycnov985.htm>.

generally Engle *et al.*, *Buckley Over Time: A New Problem with Old Contribution Limits*, 24 J. Legis. 207 (1998).

Political campaigns are one such sector. Witnesses before the Senate Rules Committee in March 1999, including John Lott, Professor of Law and Economics at the University of Chicago, and Karen Sheridan, Executive Vice President of one of the oldest and largest media management companies in the Midwest, testified that the costs of campaigning have increased since 1976 much faster than inflation. *See also* Sabato, *Real and Imagined Corruption in Campaign Financing, in Elections American Style* 155, 158 (Reichley ed., 1987). Moreover, the voting population has increased 42 percent since 1974, so there are more voters to reach. Sen. Hrg. 106-19, at 15 (Coats Stmt.). If adjusted for the Consumer Price Index *and* growth of voting-age population, the $1000 limit would have grown to approximately $4600. *Id.* at 87.[15]

The television production costs for political advertising have grown more rapidly than the price index. To compete for viewer attention with increasingly "glitzy" commercial advertisements, political advertisements have become more sophisticated and thus more expensive to produce. *Id.* at 15 (Coats Stmt.). The average cost to produce a 30-second spot was $4000 to $8000 in 1975, but $22,000 to $28,000 in 1999. *Id.* at 52 (Sheridan Stmt.). Moreover, candidates must now design and produce multiple advertisements to appeal to separate voting groups. *Id.* at 53.

Likewise, the cost on a per-viewer basis to air a political advertisement is much higher now than in 1976. The average number of television channels received per household rose from 7.1 in the 1970s to 50.8 in 1999. *Id.* at 56-57 (Sheridan Stmt.). The resulting viewer fragmentation has significantly increased the cost of reaching the same number of voters. The average cost per minute to reach 1000 viewers during prime time has risen from

[15] Whenever Congress imposed spending limits, it required adjustment for *both* inflation and voting-age population. *See* 2 U.S.C. § 441a(d)(2), (3) (1994) (coordinated expenditure limits for parties based on voting-age population); *id.* § 441a(c) (1994) (also adjusting coordinated expenditure limits for inflation).

$3.65 in 1975 to $15.50 in 1999. *Id.* The average cost per minute to reach 1000 viewers during the local late news rose from $2.50 in 1975 to $12.85 in 1998. *Id. See also id.* at 81 (Ex. 1 to Coats Stmt.) (chart showing increased cost to reach 1000 households from 1974 to 1997). The number of television households rose from 69.6 million in 1975 to 99.4 million in 1999; the number of adults in those households increased from 140.7 million in 1975 to 195 million in 1999; and the number of weekly viewing hours in each household rose from 43.7 in 1974 to 50.4 in 1997. *Id.* at 56-57 (Sheridan Stmt.). Getting a political message heard is an ever more expensive challenge.

As the real value of $1000 has declined, the potential for corruption posed by contributions greater than $1000 has virtually vanished. In the 1980 race for Missouri's United States Senate seat, the Democratic candidate spent almost $1.4 million, compared to almost $1.2 million by the Republican candidate. *Id.* at 83 (Ex. 2 to Coats Stmt.). A $1000 contribution *then* constituted .07 percent of the Democrat's funding, and .08 percent of the Republican's. Three elections later in 1998, the Democratic candidate for the very same Senate seat spent just under $2.7 million, and the successful incumbent Republican spent $6.2 million, of which a $1000 contribution constituted just .03 percent and 0.016 percent of their funding. *Id.* at 85 (Ex. 3). It is difficult to see how a contribution ten or even fifty times higher could have a reasonable prospect of corrupting these candidates.

Similarly, the record in this case indicates that a $1000 contribution to the 1996 Democratic gubernatorial candidate constituted only .04 percent of his funding, and .15 percent for the Republican; .1 percent for the Democratic candidate for Secretary of State, and .15 percent for the Republican; .3 percent for the Democratic candidate for State Treasurer, 2.5 percent for the Republican; .17 percent for Petitioner Nixon in his successful campaign for Attorney General, and .6 percent for his Republican opponent. Ex. A to Aff. of Joseph E. Carroll, JA 58.

In short, both the real value and any salutary effect of the contribution limit sustained in *Buckley* has so eroded that *Buckley* can no longer be credibly cited as support for a $1000 limit.

C. The Record Evidence Submitted by the State Was Insufficient To Justify Any Infringement of Speech.

The only compelling interests that have been identified by this Court as adequate to support a contribution limit are the prevention of *actual* or *apparent* quid pro quo corruption. *NCPAC*, 470 U.S. at 496-97. The State proved neither.

1. There Is No Claim of Actual Corruption.

Petitioners do not claim the existence of actual quid pro quo corruption in Missouri. *See* Pet. Br. at 35 ("[T]he contribution limits were enacted to address a public *perception* that legislative votes or executive actions were being purchased with campaign contributions.") (emphasis added). Nor could they. Like the federal government, Missouri has criminalized bribery of elected officials as well as other similar devices.[16]

Twenty-five years of sophisticated economic, public policy, and social science literature shows *overwhelmingly* that legislative voting is driven by personal ideology, constituent desires, and party loyalty, *not* political contributions.[17] As Professor Sorauf wrote in 1988 after canvassing the extant empirical literature, "there simply are no data in the systematic studies that would support the popular assertions about the

[16] *Compare United States v. Sun-Diamond Growers of Cal.*, 119 S. Ct. 1402, 1408-09 (1999) *with, e.g.*, Mo. Const. Art. VII, § 1 (impeachment of elected executive officials and judges for corruption); Mo. Ann. Stat. § 56.350 (West 1999) (fee for signing pardon deemed bribery); § 104.500 (compensation to influence trustee or employee of a state employee retirement system deemed bribery); § 217.120 (gifts from prisoners to corrections officers deemed bribery); § 576.010 (bribery of a public servant). Anecdotal, hearsay reports of quid pro quo corruption are either equivocal or prosecutable under other statutes. *See, e.g.*, Br. *Amicus Curiae* of the Secretaries of State of Ark. *et al.* ("Secretaries' Br.") at 5 n.5.

[17] *See* Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 679 (1997); Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L. J. 45, 58-59 (1997); Moussalli, *Campaign Finance Reform: The Case for Deregulation* (Madison Paper No. 5, 1990); Sorauf, *Money in American Elections* 307-17 (1988); Sabato, *supra*, at 160.

'buying' of Congress or about any other massive influence of money on the legislative process."[18]

2. An "Appearance of Corruption" Cannot Justify Restrictions on Core Speech.

The "appearance of corruption," standing alone, is far too vague a standard upon which to uphold a restriction on core political speech. A similar standard, the "appearance of impropriety," embodied in Canon 9 of the 1969 ABA Code of Professional Responsibility, was repudiated in the 1983 ABA Model Rules of Professional Conduct. While in effect, it was widely criticized as being "too vague a phrase to be useful," ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975), "simply too dangerous and vague," Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 265 (1980), and "unpredictab[le]," Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 261 (3d ed. 1992).[19]

The inherent vagueness of the appearance of impropriety standard arose in part because it was never clear from whose perspective the appearance should be judged. Some courts chose the vantage point of the "the public," others chose "all reasonable

[18] Sorauf, *supra*, at 312. *See, e.g.*, Sen. Hrg. 106-19, at 66-67 (Lott Stmt.); Bronars & Lott, *Do Campaign Donations Alter How A Politician Votes? Or, Do Donors Support Candidates Who Value the Same Things That They Do?*, 40 J.L. & Econ. 317 (1997); Wright, *Contributions, Lobbying, and Committee Voting in the U.S. House of Representatives*, 84 Am. Pol. Sci. Rev. 417 (1990); Forman, *PAC Contributions and Effective Corporate Tax Rates: An Empirical Study*, 5 Akron Tax J. 65 (1988); Lott, *Political Cheating*, 52 Pub. Choice 169 (1987); Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 Am. Pol. Sci. Rev. 400 (1985); Chappell, *Campaign Contributions and Congressional Voting: A Simultaneous Probit-Tobit Model*, 64 Rev. Econ. & Stats. 77 (1982); Welch, *Campaign Contributions and Legislative Voting: Milk Money and Dairy Price Supports*, 55 W. Pol. Q. 478 (1982).

[19] *See also Gregori v. Bank of America*, 254 Cal. Rptr. 853, 862 (Ct. App. 1989) ("too imprecise to furnish a reliable judicial guideline,"); Wolfram, *Modern Legal Ethics* 320 (West 1986) ("subjective"); *Adoption of Erica*, 686 N.E.2d 967, 973 (Mass. 1997) ("nebulous standard that has been rejected by most courts").

persons," and in either case "the task of guessing at what those groups might hold in their minds [was] extremely speculative." Wolfram, *supra*, at 320. In an attempt to salvage the standard, the Fifth Circuit held that "there must be at least a reasonable possibility that some specifically identifiable impropriety *did in fact occur*" because "a lawyer need not 'yield to every imagined charge of conflict of interest, regardless of the merits, so long as there is a member of the public who believes it.'" *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (emphasis added). Critics also noted that "[w]hat lay persons sometimes perceive as impropriety is frequently in the highest tradition of the bar." Kramer, *supra*, at 265.[20]

Like the "appearance of impropriety" standard, the "appearance of corruption" standard, in the absence of any claim of *actual* corruption, is too vague a foundation upon which to base a restriction on core political speech. Speech should not be regulated based on the misperceptions of the general public. *Cf. Butler v. Michigan*, 352 U.S. 380 (1957) (state may not reduce the adult population to reading only what is fit for children).

This is especially true when dealing with the First Amendment, which serves as a bulwark against majorities – even overwhelming majorities – enacting laws that suppress the speech, associational, or religious rights of individuals. As but one example, the Court deemed irrelevant a purported "'national consensus'" opposing flag desecration and twice struck down laws prohibiting the symbolic speech of flag burning. *Eichman*, 496 U.S. at 318; *Texas v. Johnson*, 491 U.S. at 420. Polls cannot override the First Amendment.[21]

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[20] A federal judge is subject to disqualification in any proceeding "in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1994). This statutory standard differs from the "appearance of impropriety" and "appearance of corruption" standards in many respects, foremost that it is an objective standard to be evaluated in each case based on known facts.

[21] The 1798 Alien and Sedition Act banned speech "insulting" to the government. It imposed fines and imprisonment on "any person [who] shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the

In any event, this Court has *never* sustained a contribution or expenditure limit solely on a showing of the "appearance of corruption." In *Buckley*, the legislative history of FECA, *see, e.g.*, S. Rep. No. 93-689 (1974), and the court record, *see* 519 F.2d 821, 835-40 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976), contained evidence relating to *actual* exchanges of money for government action. The First Amendment requires that "[w]hen the Government defends 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." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion by Kennedy, J.).[22] It "must demonstrate that the recited harms are *real*, . . . 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 (1994) (emphasis added). *See also NCPAC*, 470 U.S. at 498 (invalidating independent expenditure limit where corruption "remain[ed] a hypothetical possibility and nothing more"). Longstanding First Amendment principles would suffer if a state were allowed to suppress core political speech based on an unfounded public perception of corruption.[23]

President . . . [or] to bring them . . . into contempt or disrepute." Act of July 14, 1798, ch. 74, 1 Stat. 596. A basic premise of First Amendment jurisprudence is that the Act was unconstitutional. *See generally New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964) (discussing Alien and Sedition Act); Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 121-30 (1984).

[22] In *Colorado Republican*, six members of the Court expressly adopted for the campaign finance context Justice Kennedy's statement for the plurality in *Turner* that the government must show that speech regulations address a *real* harm. *See* 518 U.S. at 618 (O'Connor, J., Souter & Breyer, JJ.); 518 U.S. at 647 (Rehnquist, C.J., Scalia & Thomas, JJ) (concurring in the judgment and dissenting in part).

[23] *Cf. Bridges v. California*, 314 U.S. 252, 263 (1941) ("[T]he substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (The Court must determine whether or not "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils . . . .").

3. The State Failed To Prove Even "an Appearance of Corruption."

The evidence submitted by the State of Missouri to support its claim of an "appearance of corruption" is weak indeed. The record contains only two items purporting to prove an "appearance of corruption" in Missouri. The first is a three-page affidavit of Missouri Senator Wayne Goode, chairman of the Interim Joint Committee on Campaign Finance Reform. Citing no specifics, Senator Goode averred that his committee "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence." Goode Aff. ¶ 8, JA 129. Goode asserted that he "*believe[s]* that contributions over those limits have the appearance of buying votes as well as the real potential to buy votes." *Id.* ¶ 9, JA 129 (emphasis added).

The second item, a two-page affidavit by John W. Maupin, former Chairman of the Missouri Ethics Commission, states that "Missouri needed the campaign contribution limits to counter the *blatant cynicism among the populace* that the large contributions by a few contributors curried favor with Missouri elected officials." He opined that "the perception of corruption in our government has definitely improved [*sic*] as a result of the campaign contribution limits." *Id.* ¶¶ 4, 5, JA 131-32 (emphasis added).

Neither affidavit alludes to any actual incidents of political contributions appearing to buy votes, nor does either cite facts to substantiate the beliefs espoused. Neither affidavit would seem to be admissible as expert testimony. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The district court also cited newspaper articles purportedly pointing to an "appearance of corruption." Even if this hearsay were considered probative evidence sufficient for a Rule 56 ruling, examination of these articles rebuts any such inference. One article reported a $20,000 contribution to a candidate for state treasurer who, once in office, awarded the contributor a substantial portion of the State's banking business. The very same article concludes, "Central Trust Bank appears to have won the contest fair and square." Editorial, *The Central Issue is Trust*, St. Louis

Post-Dispatch, Dec. 31, 1993, at 6C. The other article reports that a candidate for state auditor received $40,000 from a brewery and $20,000 from a bank; it does not suggest that the candidate planned to take any official actions that would benefit the contributors. Mannies, *Auditor Race May Get Too Noisy to Be Ignored*, St. Louis Post-Dispatch, Sept. 11, 1994, at 4B.

Next, the State suggests that the 1994 passage of a voter referendum in Missouri limiting contributions proves a "perception" of corruption in Missouri. Pet. Br. at 4, 34. Nothing in the text of Proposition A discloses the reasons underlying it. *See Carver*, 72 F.3d at 634 n.1 (quoting Proposition A). Indeed, letters to the editor supporting Proposition A,[24] newspaper editorials supporting it,[25] statements of its sponsor,[26] and post-election analyses[27] indicate that Missouri voters were motivated to adopt Proposition A by illegitimate concerns. The Eighth Circuit properly held the Proposition offensive to the First Amendment. 72 F.3d at 645.

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[24] *See, e.g., Letters*, St. Louis Post-Dispatch, Nov. 5, 1994, at 15B (Proposition A would "encourage more neighbor-to-neighbor campaigns"); *Letters*, St. Louis Post-Dispatch, Oct. 16, 1994, at 2B ("If you, like 90 percent of Missourians, believe that *there is too much money in politics*, vote yes on Proposition A.") (emphasis added).

[25] *See, e.g.*, Editorial, *Four Proposals on the Missouri Ballot*, St. Louis Post-Dispatch, Oct. 20, 1994, at 6B ("Proposition A . . . is a grassroots effort to drive big money out of state politics."); *Proposition A Seeks Cap On Campaign Aid*, St. Louis Post-Dispatch, Nov. 6, 1994, at 8 ("Supporters say these changes will make the electoral process more democratic and make officeholders more accountable.").

[26] *See, e.g.*, Mannies, *Limits on Campaign Funding May Create 'Big Mess' for '96*, St. Louis Post-Dispatch, Nov. 10, 1994, at 5B ("public financing of campaigns" was ACORN's objective in proposing the measure).

[27] *See, e.g.*, Editorial, *Proposition A, Round 2*, St. Louis Post-Dispatch, Jan. 7, 1995, at 10B ("[V]oters . . . want *less spending by politicians* and much less money in political campaigns.") (emphasis added); Murphy, *Low-Key Proposition A Would Refashion Election Financing*, Kansas City Star, Oct. 27, 1994, at A1 ("more level playing field at election time.").

Even if (contrary to settled law) public opinion could support restrictions on core political speech, public opinion polls undermine the notion that the public perceives a serious threat of corruption from political contributions. A Princeton survey sponsored by the Center for Responsive Politics, a campaign reform group, and relied upon by *amici* supporting Petitioners (Secretaries' Br. at 15) is illustrative.[28] Only twelve percent of respondents answered as many as three of five rudimentary campaign finance questions correctly, and only four percent were aware that corporations are prohibited from contributing to presidential campaigns. *See Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 1999 WL 86840 (D. Colo. 1999) at *16 ("the public is unaware of the nuances of campaign financing"). With regard to the "appearance of corruption," only 17 percent believed that it "looks like" a contributor is "trying to buy special favors" if he contributes an amount below *$20,000*, and only one third of the respondents were suspicious at contribution levels below *$50,000*. In other words, only if a contribution exceeds the Missouri limit by at least *forty-fold* would it look like a quid pro quo to a majority of the public. Notably, 47 percent of all respondents favored removing *all* limits on campaign contributions, "provided that campaigns make known who donated money and how much they donated." This survey rebuts any "public perception of corruption."[29]

[28] The web site of the Center for Responsive Politics summarizes this 1997 survey. *See Money and Politics Survey* (visited May 26, 1999) <www.opensecrets.org/pubs/survey/s3.htm>. Complete poll results are available in LEXIS, News Library, Arcnws File.

[29] *See* Survey Questions 22-24, 17-18, 31(I). Polls consistently indicate that campaign finance reform is a very low priority for American voters. *See Wall St. J./NBC News Poll*, Wall St. J., Jan. 23, 1998, at A1 (more than 50 percent of respondents consider high priorities to include a balanced budget, Social Security, federal support for education, and taxes; campaign finance reform "can wait"); Rothberg, *Campaign Finance Reform Gets Yawn: An AP News Analysis*, AP Online, June 29, 1998, *available in* LEXIS, News Library, Curnws File (polling in June 1998 indicated campaign finance was a "recessed issue" and "rarely mentioned"); *see also* Smith, *A Most Uncommon Cause: Some Thoughts on Campaign Reform and a Response to Professor Paul*, 30 Conn. L. Rev. 831, 833-36 (1998) (discussing a 1996 Tarrance Group Poll and a 1996 Harwood Group Poll).

The steady decline in taxpayer participation in the "public funding" of presidential campaigns further suggests the average American is not concerned about corruption in the campaign finance system. Each year, every taxpayer is allowed to designate $3 of his tax payment, at no cost to himself, to provide public funding for presidential campaigns and national party conventions. Taxpayer participation has steadily declined from a high of 28.7 percent in 1980 to 12.2 percent in 1998. *See* Federal Election Comm'n, *Presidential Fund Income Tax Check-Off Status* (Jan. 1999); Herman, *Tax Report*, Wall St. J., Apr. 29, 1998, at A1. Participation in public funding at the state level is also declining. For example, in Idaho, participation declined from 18.3 percent (in 1980 or in the earliest year for which data is available) to 6.6 percent in 1994; in New Jersey, from 41.7 percent to 22.7 percent; and in Rhode Island, from 22.0 percent to 6.0 percent. Malbin & Gais, *The Day After Reform: Sobering Campaign Finance Lessons from the American States* 67 (1998).

4. "Access" Is Not Corruption or Even the Appearance of Corruption.

Petitioners and their *amici* advocate an even more lenient test than the appearance of corruption standard. They argue that mere "access" by contributors to officeholders, regardless of any actual effect on decision making, is sufficient to prove an "appearance of corruption." "Access" to lawmakers is itself a right protected by the First Amendment, which prohibits restrictions on the right "to petition the Government for a redress of grievances." Neither FECA nor the Missouri statute prohibits candidates and officeholders from using personal solicitation – in person, by telephone, at fundraising receptions and dinners – to raise campaign contributions, and any attempt to do so would raise grave constitutional issues.

Significantly, persons and entities seeking "access" to government officials spend far greater amounts of money on

lobbying than on campaign contributions. For just calendar year 1997, the Center for Responsive Politics reported total federal lobbying expenditures of $1.26 billion, more than was spent on *all federal electoral activity* during the *two-year* 1997-1998 election cycle.[30] The top ten donors of so-called "soft money" gave $12,002,390 to the national political parties during the 1997-1998 election cycle, whereas those same ten companies spent $104,176,042.75 on lobbying during that same period.[31] As Professor Paul Herrnson, an expert for the FEC in pending litigation, correctly notes, "[t]he lobbying efforts that groups make have a greater effect on members' voting decisions than their campaign contributions."[32]

More fundamentally, attempts to equate "access" with quid pro quo corruption trivialize the offense of bribery. In *Sun-Diamond Growers*, this Court held that, to prove a violation of the gratuity statute, the government must prove an *actual link* between a thing of value given to a federal official and a specific "official act" in return. 119 S. Ct. at 1411. The Court pointed out the "absurdities" of criminalizing "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his

[30] Center for Responsive Politics, *Influence Inc.: Summary* (visited May 27, 1999) <www.opensecrets.org/pubs/lobby98/summary.htm>; Federal Election Comm'n, *FEC Reports on Congressional Fundraising for 1997-98* (visited May 27, 1999) <www.fec.gov/press/canye98.htm>; Federal Election Comm'n, *FEC Reports on Political Party Activity for 1997-98* (visited May 27, 1999) <www.fec.gov/press/ptyye98.htm>.

[31] According to the Center for Responsive Politics, Philip Morris, Amway, American Financial Group, MCI Worldcom, RJR Nabisco, AT&T, Loral Spacecom, Federal Express, Bell Atlantic, and Freddie Mac gave a total of $12,002,390 in "soft money" during the 1997-98 cycle. *See* Center for Responsive Politics, *Soft Money Search* (visited June 3, 1999) <www.opensecrets.org/parties/softsearch.htm>. Form LD-2s filed by those same corporations and available at the Legislative Resource Center indicate they spent $104,176,042.75 on federal or, in five cases, federal and state, lobbying during that same cycle.

[32] Herrnson, *Congressional Elections: Campaigning at Home and in Washington* 239 (2d ed. 1998). Herrnson is the FEC's expert in *Republican Nat'l Comm. v. Federal Election Comm'n*, Civ. No. 98-CV-1207 (D.D.C.).

office, on the occasion of the latter's visit to the school." *Id.* at 1407-08. Likewise, a campaign contribution in exchange for attending the candidate's fundraising dinner, although "access," is not corruption.

5. The Statute Is Not Narrowly Tailored To Address the Perceived Evil.

As shown in *Sun-Diamond Growers*, there are more narrowly tailored ways for the government to address corruption and the appearance of corruption. The "intricate web" of federal legislation and regulation, *id.* at 1408, demonstrates that government *need not* infringe First Amendment freedoms in order to address corruption or apparent corruption.

D. The Extra-Record Evidence Now Before the Court Fails To Justify the Missouri Contribution Limit.

Petitioners and *amici* supporting them have cited evidence outside the record in an attempt to show that contribution limits do not infringe speech, and that there was, in 1994, a public perception of corruption in Missouri. A remand would be required if it were necessary to weigh this evidence, but a close examination reveals that it fails to prove either proposition.

First, Petitioners argue that few people have the resources to make contributions in excess of the limit. Pet. Br. at 18-19; Public Citizen Br. at 9.[33] This, they assert, will lead people to suppose undue influence from such contributions. Apart from its lack of logic, this argument implies an effort, repudiated in *Buckley*, to equalize speech. 424 U.S. at 48-49. Moreover, the Princeton Survey found that contribution levels as high as $50,000 do not create an appearance of impropriety. *See* p.24 above.

Petitioners and *amici* trivialize the importance to candidates, especially challengers, of these "few" large donations.

[33] Petitioners rely on data about pre-enactment contributions greater than $2000. Because the law permits individuals to contribute $1000 at the primary stage and again at the general election stage, the more pertinent inquiry concerns contributions in excess of $1000.

Although a single large donation will not normally dominate a campaign's funding, in the aggregate larger donations can be critical to a candidate. The Lietzow Affidavit submitted by the State – and the public data from the Missouri Ethics Commission on which she relied – corroborates the point: Although only 2.38 percent of contributors to the 1994 State Auditor's race gave more than $2000, they contributed a total of approximately $347,598. Contributions over $1000 in that race totaled approximately $445,042 – over ***25 percent*** of the total amount raised.[34]

Second, Petitioners and *amici* point out that in four of five statewide races in Missouri, average candidate expenditures increased between 1992 (before the limit was imposed) and 1996 (after the limit was imposed). Pet. Br. at 20-21. This, they suggest, proves candidates are not hampered by the 1994 law. Critically, these figures in no way support a claim of apparent corruption; a $1000 contribution to the winning gubernatorial candidate was a mere .04 percent of his total funding; an amount 10 or even 50 times that high would not suggest corruption.

In addition, the amounts shown are "gross" amounts, before the costs of fundraising are deducted. The "net" amount available for speech in 1996 might have been lower than the amount available in 1992. For example, the NRSC's reports to the FEC for the 1997-98 election cycle show that its cost to raise money subject to the FECA was $.63 per dollar raised.[35] In addition, contribution limits require candidates to devote more effort to fundraising, and thus have a "severe impact on political dialogue." *Buckley*, 424 U.S. at 21. *See* pp. 6-10 above.

Third, Petitioners suggest that even if the contribution limit of $1000 sustained in *Buckley* has eroded over time, lower

[34] Mo. Disclosure Reports filed by Candidates for State Auditor for 1994 Election Cycle, *available from* Mo. Ethics Comm'n.

[35] "Net" federal revenue can be calculated by adding the federal share of allocable fundraising expenses (from Schedule H4) to federal fundraising expenses (on line 21b) and refunds (line 28d), subtracting the fundraising portion of offsets (line 15), and then subtracting *this total* from contributions (line 11d).

contribution limits are acceptable at the state and local level. Pet. Br. at 42 n.30. Again, this undocumented assertion does not prove actual or apparent corruption justifying a lower limit. It also invites the Court to focus on how much campaigns *should* cost, not on whether contribution limits are necessary to deter actual or apparent corruption. Further, it may be more difficult for state candidates than for federal candidates to raise money; federal candidates often raise money from sources outside their districts and are often afforded broader news coverage.

Fourth, *amici* suggest that contribution limits can be justified by a need to address voter morale. Reed Br. at 21-22. Voter turnout in presidential elections has been declining steadily since 1960, however, and the decline has continued unabated since enactment of FECA in 1974.[36] Similarly, public confidence in government has "headed rather consistently downward since 1964 – with close to 80% of the public trusting the government then, compared with about 35% today." Breyer, Address at the Tulsa County Bar Ass'n, at 3 (May 4, 1999). Federal contribution limits, enacted in 1974, have not addressed either concern.

Finally, *amici* supporting Petitioners point out that candidates now spend vast amounts of time raising money. Reed Br. at 14-16. As shown (p.8 above), the very commentator cited by *amici*, *see id.* at 15, acknowledges that the fundraising burden is a direct result of contribution limits. The solution to the "money chase" is elimination of oppressive contribution limits, not more regulation.

E. Alternatively, This Case Should Be Remanded for Development of a Complete Record.

The existing record in this case is adequate to show that the Missouri contribution limit imposes severe burdens on the First Amendment rights of candidates and contributors, and that Missouri has failed to prove a compelling interest to sustain the limit.

[36] Turnout in 1972 was 55.21%, and 1996 was 49.08%. *See* Sen. Hrg. 106-19, at 89 (Ex. 7 to Coats Stmt.)

If, however, the Court finds the record insufficient to so conclude, it should, we respectfully submit, remand the case for further fact-finding. The Court has recently done so in similar First Amendment cases. *See, e.g., Turner*, 512 U.S. at 668 (remanding for development of record on the extent to which local broadcast television was jeopardized by cable and the effects of must-carry on cable operators and programmers); *Colorado Republican*, 518 U.S. at 626 (remanding for compilation of a factual record to resolve a challenge to expenditure limits). Such a record would enable the lower courts, and if necessary this Court, to settle the question whether, today, a $1075 contribution limit violates the First Amendment.

CONCLUSION

For the reasons set forth above, *amici* Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee urge the Court to affirm the decision of the Court of Appeals, or alternatively to remand for development of a complete factual record.

Respectfully submitted,

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