No. 98-963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. NIXON, *et al.*,

Petitioners,

—v.—

SHRINK MISSOURI GOVERNMENT PAC, *et al.*,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF EASTERN MISSOURI, AND THE ACLU OF KANSAS AND WESTERN MISSOURI, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to protecting the First Amendment rights of all persons, regardless of their partisan political interests or affiliations. The ACLU of Eastern Missouri, and the ACLU of Kansas and Western Missouri, are local affiliates of the national organization.

For the past twenty-five years, the ACLU has been deeply involved in the debate over government regulation of campaign speech. Indeed, the ACLU was centrally involved in the very first cases brought under the Federal Election Campaign Act, 2 U.S.C. §431 *et seq.* (FECA). *See United States v. National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *American Civil Liberties Union v. Jennings*, 366 F.Supp. 1041 (D.D.C. 1973)(three-judge court), *vacated as moot sub nom. Staats v. American Civil Liberties Union*, 422 U.S. 1030 (1975). Those two cases helped fashion various doctrines to limit the impermissible reaches of FECA.

The New York Civil Liberties Union, another local affiliate of the ACLU, was one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976)(*per curiam*). And, since *Buckley*, the ACLU has participated in numerous political speech cases decided by this Court, both as direct counsel and as *amicus curiae*. *See, e.g., FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *McIntyre v. Ohio Elections*

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Committee, 514 U.S. 334 (1995); *Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604 (1996).

STATEMENT OF THE CASE

This case challenges a set of contribution limits adopted by the Missouri legislature in July 1994.[2] As originally enacted, Senate Bill 650 (SB 650) prohibited any person, which was defined for these purposes to include a political action committee, from contributing more than $1,000 to a candidate for statewide office, $500 to a candidate for state senate, and $250 to a candidate for state representative. Because the statute also included a periodic adjustment for inflation, these numbers had risen by the time of the lawsuit to $1075, $525, and $275 per candidate per election.[3]

In March 1998, the Shrink Missouri Government PAC, a registered political action committee, and Zev David Fredman, a prospective candidate for the Republican nomination for Auditor, a statewide elective office, filed suit. The committee claimed that SB 650 prevented it from making contributions larger than the specified amounts to state and local candidates whose views it shared and whose candidacies it

[2] The challenged limits went into effect in December 1995 after the Eighth Circuit struck down an even more stringent set of limits that had been adopted by the Missouri voters through the ballot initiative process. *Carver v. Nixon,* 72 F.3d 633 (8th Cir. 1995), *cert. denied,* 518 U.S. 1033 (1996).

[3] SB 650 also contained "voluntary" expenditure limits. Candidates who accepted spending limits set by the State were entitled to receive contributions from political parties, PACs, corporations and unions; candidates who did not accept the state's spending limits were restricted to seeking support from individuals only. Recognizing the coercive nature of this so-called "voluntary" scheme, the Eighth Circuit struck down the spending limits in *Shrink Missouri Government PAC v. Maupin,* 71 F.3d 1422 (8th Cir. 1995), *cert. denied,* 518 U.S. 1083 (1996).

wished to enable and support. (J.A. 17). From his perspective as a candidate, Fredman alleged that SB 650 prevented him from raising the money necessary to compete in the Republican primary scheduled for August 1998. As someone who had never run for statewide office before, and who needed to continue to work during the campaign, Fredman asserted that he had neither the time nor the political connections to raise funds in small amounts from large numbers of people who had never heard of him. Accordingly, he claimed, his ability to get his message to the electorate depended on his ability to ask those who did know and support him for contributions in excess of the statutory ceiling. (J.A. 13-14).[4]

The district court granted the state's motion for summary judgment and upheld the constitutionality of Missouri's contribution limits. 5 F.Supp.2d 734 (E.D.Mo. 1998). Because Missouri does not record legislative history, the Court placed great weight on an affidavit submitted by a cosponsor of the bill who asserted, in conclusory fashion, that the appropriate legislative committee "had heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence." *Id.* at 758. Based almost exclusively on this *post hoc* representation,[5] the district court held that the State had carried its burden of establishing "real harm." The court supported its conclusion by noting that the legislature is "uniquely qualified" to assess the risk of corruption and

[4] Although Fredman lost the Republican primary for State Auditor, he received more than 40,000 votes, which represented 20% of the total ballots cast.

[5] The Court also referred to two publicized instances in which contributions in excess of $20,000 -- and thus far above the contribution limits set by SB 650 -- had apparently been followed by government action favorable to the contributors. *Id.*

by further noting that "a perception of influence peddling is 'real harm' regardless of whether such peddling is actually afoot." *Id.*[6]

On appeal, the Eighth Circuit reversed by a 2-1 vote. 161 F.3d 519 (1998). Writing for the majority, Chief Judge Bowman held that Missouri's contribution limits failed to survive the strict scrutiny that this Court's decisions required.

> We will not infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago. The State therefore must prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.

Id. at 522. The majority then found that Missouri had "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB 650 imposes on campaign contributions." *Id.* In addition, Chief Judge Bowman concluded that SB 650 failed the "narrow tailoring" requirement of strict scrutiny because, by today's standards, its limits are so small that "they run afoul of the Constitution by unnecessarily restricting protected First Amendment freedoms." *Id.*[7]

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[6] On July 23, 1998, a panel of the Eighth Circuit granted an injunction pending appeal, thus staying the enforcement of the contribution limits on behalf of all candidates and contributors. 151 F. 3d 763. As a result, Shrink Missouri Government PAC was able to make an additional modest contribution to candidate Fredman for use in the August 4th Republican primary. (J.A. 51).

[7] Judge Ross did not join this portion of Chief Judge Bowman's opinion.

SUMMARY OF ARGUMENT

The narrow question before the Court is whether Missouri's contribution limits can be upheld under *Buckley*. For the reasons persuasively set forth in the Eighth Circuit's opinion, we believe the answer to that question is no. More fundamentally, however, this case offers the Court an opportunity to reexamine its approach to contribution limits in the light of a quarter century of factual evidence not available to the Court in 1976. *Buckley* proceeded on the assumption that contribution limits provide a meaningful check on the corrupting influence of money in the electoral system. Twenty-three years later, there is more money in politics than ever before. The First Amendment bargain that *Buckley* struck in upholding contribution limits simply has not paid off. We respectfully submit that it is time to consider a different approach that is both more consistent with First Amendment values and has a greater chance of achieving its stated goals.

1. In striking down Missouri's contribution limits, the Eighth Circuit relied on three well-established First Amendment principles, two of which are derived from *Buckley* itself. First, political contributions, as well as political expenditures, are core constitutional activities affecting freedom of expression and freedom of association. 424 U.S. at 14. Second, contribution limits, as well as expenditure limits, are therefore subject to "the closest scrutiny." *Id.* at 25. Third, whenever the government attempts to regulate speech, it "must demonstrate that the 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 (1995).

Missouri has utterly failed to make that showing in this case. Instead, the state's defense of its limits begins and ends with the talismanic reference to corruption and the ap-

pearance of corruption. If that is all that *Buckley* requires, the opinion could have been much shorter than it was, including its section on contribution limits. This Court, however, has never permitted First Amendment rights to be overridden so casually. To the contrary, the Court has repeatedly recognized that heightened scrutiny is defined by its insistence that the government do more than "posit the existence of the disease to be cured." *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 664 (1994). Accordingly, the debate over whether contribution limits are subject to strict scrutiny or intermediate scrutiny is almost beside the point. On this barren record, petitioners can prevail only if contribution limits are not subject to any First Amendment scrutiny at all. As the Eighth Circuit properly recognized, that is clearly not the holding of *Buckley.*

2. On the other hand, *Buckley* plainly does hold that contribution limits can be sustained, on a proper record, because of the state's interest in curbing corruption or the appearance of corruption. Experience has proved otherwise. Political spending has not decreased because of contribution limits, it has merely been diverted into other channels -- primarily PACs, soft money, and issue advocacy -- most of which are beyond regulatory control under this Court's First Amendment precedents. As a result, the rationale that *Buckley* relied on to uphold contribution limits in 1976 is no longer persuasive twenty-three years later. Instead, we have been left with a regulatory scheme that has not leveled the playing field between challengers and incumbents, has not halted the spiraling cost of political campaigns, has not restrained the political spending of wealthy contributors, and has not reduced the access of wealthy contributors to candidates and elected officials. What the current system has accomplished, perversely, is to force all candidates to spend more time fundraising than ever before, and to diminish the ability of insurgent candidates to bring their messages to the

electorate. Such a misguided scheme might be merely regrettable if we were not dealing with First Amendment rights. Because we are dealing with First Amendment rights, such an imprecise fit between means and ends is clearly unconstitutional.

The answer does not lie in more limits, more loopholes, and more public cynicism. Rather, it lies in a serious system of public financing coupled with technologically facilitated disclosure of private contributions and faith in the ability of voters to judge where their own best interests lie. By focusing our efforts in this direction, we are far more likely to accomplish meaningful reform and far less likely to run afoul of the First Amendment.

ARGUMENT

I. MISSOURI'S RESTRICTIVE LIMITS ON POLITICAL CAMPAIGN CONTRIBUTIONS CANNOT BE SUSTAINED UNDER *BUCKLEY*

The First Amendment issues in this case are starkly posed. The only record evidence offered by the state to support its contribution limits was a litigation affidavit prepared by one of the bill's co-sponsors who asserted that, before enacting the law, Missouri's legislature had "heard testimony and discussed" the need to balance the risk of corruption (both real and perceived) against the right to support the candidate of one's choice. The state and its supporting *amici* argue that this should be enough because nothing more can ever be shown. There are two serious flaws with that argument, however. It is not true that nothing more can ever be shown. In *Buckley,* the Court pointed to "deeply disturbing examples surfacing after the 1972 election demonstrat[ing] that the problem [of corruption] is not an illusory one." 424 U.S. at 27 (footnote omitted). Here, by contrast, there is nothing in the record to suggest that campaign con-

tributions posed a serious problem of corruption in Missouri either before the imposition of limits in 1994 or after those limits were stayed by the Eighth Circuit in July 1998. Furthermore, if nothing more can be shown, the answer in our constitutional regime ought not to be the suppression of speech.

In an attempt to camouflage their absence of proof, petitioners attack the strict scrutiny standard adopted by the Eighth Circuit as inconsistent with *Buckley*. In fact, the Eighth Circuit's insistence on *some* evidence to support the contribution limits in this case is far more faithful to *Buckley* than petitioners' alternative. Specifically, the diluted standard of review that petitioners advocate is not intermediate scrutiny as that term is generally understood in First Amendment jurisprudence. Rather, what petitioners seek is near total deference to unsupported legislative judgments regarding the appearance of corruption despite this Court's unequivocal recognition in *Buckley* that "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 14.

To be sure, *Buckley* is not always entirely clear on the standard of review that the Court is applying. It is noteworthy, however, that the critical section on contribution limits begins by quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958), for the proposition that government "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Buckley*, 424 U.S. at 25. The Court then goes on to say that infringements on that right must be "closely drawn" to advance "a sufficiently important interest." *Id.* In the abstract, one could perhaps argue that the reference to "a sufficiently important interest" rather than "a compelling interest" was meant to signal something other than traditional strict scrutiny. But that argument has far less force in the context of the *Buckley* opinion itself, where the Court concludes its discussion of contri-

bution limits with an explicit reference to the "rigorous standard of review established by our prior decisions." *Id.* at 29. Moreover, the very same paragraph that contains the reference to "a sufficiently important interest" ends by citing three classic strict scrutiny cases. *Id.* at 25, citing *Cousins v. Wigoda*, 419 U.S. 477, 488 (1975); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

Read in its entirety, the *Buckley* opinion clearly proceeds on the assumption that important First Amendment values are imperiled by contribution limits as well as expenditure limits. Both activities, the Court explained, go to the core of the First Amendment: "It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." 424 U. S. at 15, quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

More generally, the Court has consistently given close scrutiny to all laws, whether they impact political speech and activities or other important realms of communication, where government seeks to impose financial penalties or restraints on the ability of speakers to fund their speech. *See, e.g., Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981)(striking down limits on contributions to referenda campaigns); *Meyer v. Grant*, 486 U.S. 414 (1988) (striking down a ban on paying canvassers to solicit signatures for a ballot initiative); *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. __, 119 S.Ct. 636 (1999)(striking down a law requiring paid canvassers to identify themselves); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991) (striking down a law barring payment to convicted felons who write about their crimes); *United States v. National Treasury Employees Union*, 513 U.S. 454 (striking down a ban on honoraria for federal employees even when they

write on subjects unrelated to their jobs); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988)(striking down a law designed to limit charitable solicitations by organizations with high overhead or soliciting expenses); *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)(same).

In all of these cases, this Court recognized that burdens on the funding of political or other ideas must be closely scrutinized because of the restraints they impose on the communication of those ideas themselves. Of course, burdens on the funding of political campaign speech are no exception to this rule. Indeed, they are the most insistent occasion for application of the rule because participants in the political process are engaging in speech at the core of the First Amendment's concern and at the precise moment when the public is paying attention. This is particularly so when government is insisting that such core speech must be restrained because of the less than tangible harms it supposedly entails.

The Court's most recent campaign finance decision turned on precisely this principle. Thus, in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, the Court refused to *assume* that independent spending by a political party in support of its candidate was inherently corrupting. Instead, the Court held:

> [The fact of independence] prevents us from assuming, absent convincing evidence to the contrary, that a limitation on political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system. The Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994).

518 U.S. at 617-18.[8]

It is significant that the Court rested this principle on *Turner*, which was not a strict scrutiny case. Even when applying intermediate scrutiny, the Court has required more supporting proof than the government offers here. At best, the government's approach represents a variation on rational basis review, *see Heller v. Doe*, 509 U.S. 312 (1993), that the Court has never applied to the First Amendment.

The Court made a similar point, again citing *Turner*, when it held that the federal government's concern about the appearance of corruption was insufficient to bar the vast majority of federal employees from receiving honoraria from writing or speaking on subjects unrelated to their employment. "[W]hen the Government defends a regulation of speech . . . it must do more," the Court wrote, "than simply 'posit the existence of the disease sought to be cured.' 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. at 475.

Petitioners do not and cannot contend that the conclusory affidavit of a self-interested legislator is adequate to meet this First Amendment standard.[9] Instead, petitioners argue

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[8] To be sure, the plurality opinion in *Colorado Republican* was considering a ban on independent expenditures, not a limit on campaign contributions, and the plurality opinion did remark on the "fundamental constitutional difference" between independent expenditures and contributions to candidates for their speech. 518 U.S. at 614. We will address the continued validity of that constitutional divide in Point II, *infra*.

[9] Aside from the interest every legislative body has in seeing its enact-
(continued...)

that Missouri's contribution limits do not trigger this First Amendment standard because they have only a marginal impact on First Amendment rights. This argument rests on two premises, both of which purport to derive from *Buckley* but neither of which can in fact withstand scrutiny.

1. Petitioners claim that the Missouri statute must be constitutional because it adopts the same $1,000 limit on contributions that *Buckley* upheld. This claim is true only in the most superficial sense. It does not take sophisticated economic analysis to know that $1,000 is not worth today what it was worth in 1976. Translated into *Buckley* currency, Missouri's contribution limit for statewide elections is approximately $350. Petitioners dismiss the significance of this disparity but it has important real world consequences. Under Missouri's limits, it now takes three contributors to provide the political resources to a candidate that a single contributor could provide in 1976. In addition, those resources do not go as far as they did 23 years ago. In *Buckley,* the Court noted that a full page advertisement in a major metropolitan daily cost slightly less than $7,000, *id.* at 19 n.19; the same advertisement today would cost almost $32,000 in *The Washington Post*, and almost $24,000 in *The St. Louis Post-Dispatch.* In 1976, a candidate needed seven contributors to buy a full page advertisement; today, the candidate needs three or four times that number. Moreover, this difference accurately reflects the increased time, energy and resources that now consume political candidates in the task of raising money.

Just as $1,000 buys less speech than it did in 1976, it also buys less influence, let alone corruption or the appearance of corruption. It is difficult to conceive that the *Buckley* Court would have characterized a $350 contribution for statewide office as "large." *Id.* at 28. Thus do "distinctions in degree become . . . differences in kind." *Id.* at 30.[10] Moreover, Missouri's $1,000 limit applies to PACs as well as individuals. By contrast, the federal limits upheld in *Buckley* placed a $5,000 cap on PAC contributions. *Id.* at 35. Even ignoring the decline in purchasing power between 1976 and 1999, therefore, Missouri has lowered the limit on PAC contributions by 80%. On this barren record, such a drastic reduction can be upheld only by ignoring the principle, so plainly acknowledged in *Buckley,* that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Id.* at 15, quoting *NAACP v. Alabama*, 357 U.S. at 460.

2. Petitioners point to statistics indicating that more money was raised and spent for statewide races in 1996 (with limits) than in 1992 (without limits), and then draw from these statistics the conclusion that SB 650 has not prevented Missouri candidates "from amassing the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. The conceptual problem with this argument is that it presumes that the state rather than the candidate knows how much money is necessary for "effective advocacy," thus reintroducing through the backdoor the same discredited notion that this Court rejected in *Buckley* when it struck down expenditure limits.[11]

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[9] (...continued)
ments upheld, post-*Buckley* experience has shown that contribution limits help to reinforce the already substantial advantages of incumbency. *See* pp.18-19, *infra.*

[10] For this reason alone, FECA's contribution limits also merit reexamination even under the existing constitutional framework established by *Buckley.* Simply adjusting FECA for inflation since 1976 would raise the individual contribution limit to $2,870 and the PAC contribution limit to $14,350.

[11] As the Court observed in *Buckley*: "In the free society ordained by (continued...)

The more specific problem with petitioners' reliance on average candidate expenditures is that it ignores the unrebutted affidavit testimony of respondent Fredman detailing how Missouri's contribution limits in fact affected his ability to amass the resources that he, not the state, considered necessary to mount an effective campaign. (J.A. 59-62). In *Buckley,* this Court acknowledged that the prospect that contribution limits would work to the disadvantage of minority candidates was a "troubling" one, but found that the record in *Buckley* "provides no basis for concluding that [FECA] invidiously disadvantages such candidates." *Id.* at 33. Here, Fredman's affidavit supplies that missing link.[12] At the very least, it was enough to defeat the state's motion for summary judgment. *See Hunt v. Cromartie*, __ U.S. __, 67 U.S.L.W. 4306 (May 17, 1999). As this Court noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 894 (1992): "Legislation is measured [by] its impact on those it affects." Indeed, the history of the First Amendment would look very different if we measured the validity of legislative restrictions solely by their impact on citizens whose speech fits comfortably within the political mainstream. *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 641-42 (1943).[13]

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[11] (...continued)
our Constitution it is not the government but the people -- individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign." 424 U.S. at 57 (footnote omitted).

[12] *See also National Black Police Association v. District of Columbia Board of Elections and Ethics*, 924 F.Supp. 270, 274-75 (D.D.C. 1996); *California ProLife PAC v. Scully*, 989 F.Supp. 1282, 1299 (N.D.Cal. 1998).

[13] Some of the most transforming political campaigns in modern Ameri- (continued...)

In short, the Eighth Circuit properly struck down Missouri's contribution limits under *Buckley* because those limits: (a) were set so low that they burdened the ability of respondent Fredman, and similarly situated candidates, to get their message to the voters; (b) were imposed without any evidence that such burdens were needed to alleviate a specific, documented harm; and (c) were not carefully limited to the sort of "large" contributions that might arguably pose a problem of actual or apparent corruption.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RECONSIDER THE *BUCKLEY* COURT'S APPROACH TO CONTRIBUTION LIMITS

Whatever the validity of *Buckley's* original distinction between contributions and expenditures, the legal and factual landscape has fundamentally changed in the intervening two decades. The result is a campaign finance system that is so riddled with exceptions that it is no longer plausible to claim that surviving contribution limits materially advance a "sufficiently important interest" to justify their intrusion on First Amendment rights. 424 U.S. at 25. Moreover, because what are often mischaracterized as "loopholes" in the campaign finance law are more properly understood as constitutionally compelled safe harbors for core political speech, as this Court has repeatedly recognized, the ability of contribution limits to accomplish their asserted goal is only likely to diminish with the passage of time.[14]

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[13] (...continued)
can history were initially funded through the support of several large contributors. *See* Ralph K. Winter, "The History and Theory of *Buckley v. Valeo,* 6 J.L. & Pol'y 93, 108 (1997)(citing examples).

[14] As this Court observed when discussing an analogous problem in (continued...)

Faced with such an imprecise fit between means and ends, this Court has not hesitated to strike down a variety of regulatory schemes in other contexts as a violation of the First Amendment. For example, in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Court held that the state could not prohibit only the mass media from publishing the name of a rape victim. "Without more careful and inclusive precautions against alternative forms of dissemination," the Court wrote, "we cannot conclude that Florida's selective ban on publication by the mass media satisfactorily accomplishes its stated purpose." *Id.* at 541 (footnote omitted). *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995)("the irrationality of this unique and puzzling regulatory framework ensures" that it will fail to achieve its purported goal).

Perhaps most to the point, *Buckley* itself invalidated the limit on independent expenditures in part because "[t]he exacting interpretation of the statutory language necessary to avoid unconstitutional vagueness . . . undermines the limitation's effectiveness as a loophole-closing provision . . . ." 424 U.S. at 45. We respectfully submit that the contribution limits approved in *Buckley* suffer from precisely the same constitutional infirmity -- a fact that is apparent now even if it was not apparent then. Put another way, the limits on campaign contributions to political candidates are unconstitutional if for no other reason than experience has shown they are so plainly ineffective. And while the Constitution does not normally require the government to adopt effective policies, it does not permit the government to abridge the First Amendment in an ineffective pursuit of even valid

[14] (...continued)
Buckley, "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restrictions on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U.S. at 45.

government ends. In the case of contribution limits, both the means and the end are suspect and deserve reexamination.

Buckley identified a number of goals that Congress was seeking to achieve by creating the campaign finance regulatory system embodied in FECA. As Justice Breyer summarized it twenty years later:

> [FECA] sought both to remedy the appearance of a "corrupt" political process (one in which large contributions seem to buy legislative votes) and to level the electoral playing field by reducing campaign costs. It consequently imposed limits upon the amounts that individuals, corporations, "political committees" (such as political action committees, or PACs), and political parties could *contribute* to candidates for federal office, and it also imposed limits upon the amounts that candidates, corporations, labor unions, political committees, and political parties could *spend*, even on their own, to help a candidate win election.

Colorado Republican, 518 U.S. at 609 (plurality opinion) (emphasis in original)(citations omitted).

Whether or not those goals could have been accomplished by the comprehensive campaign finance system that Congress enacted, a very different system emerged from this Court's decision in *Buckley.* In particular, the Court declared FECA's expenditure limits unconstitutional because "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ." 424 U.S. at 48-49. Accordingly, we have organized our elections for the past two decades under a campaign finance scheme that is neither the one Congress de-

signed, nor the one that the First Amendment would inspire. From the beginning, the chances that such a patchwork quilt could achieve real reform were exceedingly slim. *See id.* at 236 ("I question whether the residue leaves a workable program")(Burger, C.J., concurring and dissenting).

A. The Unintended Consequences Of Buckley

Incumbents are doing better than ever. Approximately 40 challengers won election to Congress in 1974 when the FECA amendments were first adopted. Since then, the incumbency rate has skyrocketed to 95% and beyond. The fundraising ability of incumbents continues to far outpace the fundraising ability of challengers. And personally wealthy candidates remain free to spend as much of their own money as they choose to communicate their messages, subject only to whatever political sanctions may befall candidates perceived to be trying "to buy" the election.[15] By contrast, candidates who have neither personal wealth nor the advantage of incumbency have a more difficult time than ever before raising the funds needed to promote their

[15] In the 1998 Democratic primary for Governor of California, two candidates with personal fortunes were defeated by a third candidate, Gray Davis, who was Lieutenant Governor and is a man of modest personal means. Davis was able to reduce this disparity through effective fundraising in part because California's contribution limits had been enjoined by court order. *See* n.12, *supra.* Also, the extent to which his opponents relied on their personal wealth afforded Davis a priceless campaign slogan: "Experience Money Can't Buy." *See* E.J. Dionne, "Big Money Loses Again," The Denver Post, June 3, 1998, at B11 . Gray Davis is now the Governor of California. The anecdote teaches two vital lessons about campaign finance: First, candidates without personal wealth can at least attempt to level the playing field when they are able freely to raise contributions from others; second, the best ultimate arbiter of whether a candidate is trying "to buy" an election is the electorate.

candidacy.[16] In addition, they are forced to spend more of their time fundraising than ever before because of rising campaign costs and low contribution limits.

This unstable situation could not and did not last. Instead, FECA's contribution limits spawned a seemingly infinite variety of new campaign finance techniques, which exacerbate the problems that FECA is intended to address while circumventing the controls that FECA places on contributions to political candidates.

First, there was the widely noted and frequently bemoaned "rise of PACs."[17] Although PAC contributions to candidates are controlled by FECA, the fact that PACs can contribute five times what individuals can (under federal law, not Missouri law), and are able more easily to tap large pools of contributors, has encouraged candidate reliance on them. Independent partisan activity by PACs, which cannot be subject to legislative limits, *see FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), also became more prominent after *Buckley.* The same is true for organized labor, which spent an estimated $35 mil-

[16] In the 1996 congressional elections, incumbents who spent less than $.5 million won every time; challengers who spent less than $.5 million won only 3% of the time. Conversely, challengers who spent between $.5 million and $1 million won 40% of the time, and challengers who spent over $1 million won 80% of the time. *See* Bradley A. Smith, "The Siren's Song: Campaign Finance Regulation and the First Amendment," 6 J.L. & Pol'y 1, 29 n.150 (1997), noted in Kathleen M. Sullivan, "Political Money and Freedom of Speech: A Reply to Frank Askin," 31 U.C. Davis L.Rev. 1083, 1089, n.30 (1998).

[17] Despite frequent claims that the system is more and more inundated by PAC money, the portion of overall federal election spending that comes from PACs has remained consistent over the past five election cycles. "FEC Reports on Congressional Fundraising for 1997-98" (April 28, 1998)(available at http://www.fec.gov/press/canye98.htm).

lion in 1996 in an effort to return the House of Representatives to Democratic Party control.

Second, there has been the widely criticized "soft money" phenomenon that was so successfully used by both political parties in the last presidential election. By definition, soft money cannot be used to support an identifiable candidate, either through direct contributions or coordinated expenditures. *See Colorado Republican,* 518 U.S. at 616-17. Because it operates outside FECA's contribution limits, soft money can and has been raised by both parties in unlimited amounts and from otherwise prohibited sources (such as corporations). While the use of soft money traces its authority to certain FEC rulings and statutory provisions, the constitutional legitimacy of such fundraising and spending by political parties is firmly anchored in *Buckley's* core teaching that speech is wholly beyond the permissible scope of statutory control if it does not expressly advocate the election of political candidates, and in *Colorado Republican's* consensus that speech by political parties in support of their candidates cannot be presumed to be speech attributable to those candidates.[18]

Third, there is the increased prominence of issue advocacy in modern political life.[19] Individuals who are barred

[18] There has undeniably been a significant increase in soft money spending since *Buckley.* Even still, soft money accounted for less than 10% of political funding during the 1996 federal elections, *see* Bradley A. Smith, "Soft Money, Hard Realities: The Constitutional Prohibition on a Soft Money Ban," in "Campaign Finance Reform Symposium: The Current Debate Over Soft Money," 24 J.Legis. 179, 180 n.6 (1998), and "less than 20% of total political spending." *See* Bradley A. Smith, "Reform Bill Unconstitutional," USA Today, May 20, 1999, at 14A.

[19] This may be an unintended consequence of candidate contribution limits, but it is not an unexpected one. In arguing against the constitution-

(continued...)

from giving substantial support to the candidates of their choice by FECA's contribution limits remain constitutionally entitled to provide unlimited support to advocacy groups in the hope of creating a climate of opinion favorable to their preferred candidates.[20] Issue advocacy groups became a focal point for debate during the 1996 elections because of claims that much of their political speech was linked directly to criticism of incumbent candidates in terms that were tantamount to -- but legally not within -- the meaning of "express advocacy." This, in turn, has fueled persistent calls for new statutory controls. Proposals to limit issue advocacy, however, are constitutionally infirm for reasons this Court made clear in *Buckley*: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." 424 U.S. at 45.[21] In practical

[19] (...continued)
ality of candidate contribution limits, the challengers in *Buckley* predicted that upholding such limits would simply cause wealthy individuals to seek other funding outlets immune from controls, such as the support of issue advocacy. "Limits on individual contributions will, moreover, induce potential political contributors to donate funds instead to 'issue' groups. That in turn may create additional pressure for Congress and the courts to see that 'issue' organizations also are regulated in the way that political campaigns are -- a clearly unconstitutional approach . . . ." Appellants' Brief at 126, *Buckley v. Valeo*, No. 75-436.

[20] The one provision of FECA unanimously struck down by the lower court in *Buckley* would have regulated issue advocacy by groups across the ideological spectrum by limiting, *inter alia,* the use of legislative scorecards to monitor the position of political candidates on designated issues. *Buckley v. Valeo*, 519 F.2d. 821, 876-78 (D.C.Cir. 1975).

[21] Estimates of the actual amount of money spent on issue advocacy necessarily vary depending on how broadly one defines the term. There is disagreement, for example, on whether the term properly applies only to

(continued...)

terms, therefore, issue advocacy is unconstrained by statutory limits despite its sometimes partisan impact; on the other hand, funding that helps a candidate respond directly to such speech is subject to the strictest of controls.

Finally, contribution limits have had at least one other unintended consequence: magnifying the influence of the media and their wealthy owners. Favorable news media coverage and editorial support can make or break a candidate. It has been observed that more voters carry a newspaper's election day recommendations into the polling booth with them than carry an issue group's scorecard or a candidate's flyer or a party's slate card. Yet, the individual and corporate owners of major media outlets are wholly immune from any campaign finance controls on the use of their resources to affect electoral outcomes, while candidates who wish to reply to a media attack are limited in their ability to seek financial contributions from their supporters. The ACLU, of course, has repeatedly defended the unfettered privilege of the press to report on and comment about political candidates, *see Mills v. Alabama*, 384 U.S. 214 (1966), but there is no warrant for affording less protection to those who invoke the First Amendment to help underwrite a candidate's response to the media. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 712 (1990)(Kennedy, J., dissenting, joined by O'Connor and Scalia, JJ.)("[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities")(quoting Justice Brennan in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 784 (1985)).

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[21] (...continued)
advertisements that specifically identify a particular candidate. Of course, the ambiguity of the term poses its own First Amendment problems.

B. A Constitutional Response To The Post-*Buckley* Dilemma

As demonstrated above, two decades after *Buckley* we are once again confronted with a campaign finance world that, to borrow President Lyndon Johnson's evocative expression, is "more loophole than law." The New York Times, Oct. 3, 1972, at 44. How, then, can we continue to treat political contributions as a constitutional stepchild subject to regulations that would not be tolerated in any other First Amendment sphere involving political speech? And, how can we continue to justify a legislative scheme that is so clearly at odds with the normal First Amendment proscription against content-based regulation? As Justice Kennedy said in a related setting, a regime which relies upon and employs such distinctions embodies "the rawest form of censorship . . . ." *Austin v. Michigan Chamber of Commerce*, 494 U.S. at 700 (dissenting opinion). The answer to the first question is we cannot. The answer to the second question is we should not.

1. The Contribution/Expenditure Divide

Ever since *Buckley,* there has been a raging debate about the merits of the Court's distinction between contributions and expenditures. The logical fallacies inherent in this distinction were recently explored at length by Justice Thomas:

> Though we said in *Buckley* that controls on spending and giving "operate in an area of the most fundamental First Amendment activities," *id.* at 14, we invalidated the expenditure limits of FECA and upheld the Act's contribution limits. The justification we gave for the differing results was this: "The expenditure limitations . . . represent substantial rather than merely theoretical restraints on the quantity and

diversity of political speech," *id.* at 19, whereas "limitation[s] upon the amount that any one person or group may contribute to a candidate or political committee entail only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 20-21. This conclusion was supported mainly by two assertions about the nature of contributions: First, though contributions may result in speech, that speech is by the candidate and not by the contributor; and second, contributions express only general support for the candidate but do not communicate the reasons for that support. *Id.* at 21. Since *Buckley*, our campaign finance jurisprudence has been based in large part on this distinction between contributions and expenditures . . . .

In my view, the distinction lacks constitutional significance, and I would not adhere to it. As Chief Justice Burger put it: "[C]ontributions and expenditures are two sides of the same First Amendment coin." *Buckley v. Valeo*, 424 U.S. at 241 (concurring in part and dissenting in part). Contributions and expenditures both involve core First Amendment expression because they further the "discussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." *Id.* at 14. When an individual donates money to a candidate or to a partisan organization, he enhances the donee's ability to communicate a message and thereby adds to political debate, just as when that individual communicates the message himself. Indeed, the individual may add more to political discourse by giving rather than spending, if the donee is able to put the funds to more productive use than can the individual. The contribution of funds to a candidate or to a political group thus fosters the "free discussion of governmental affairs," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), just as an expenditure does.

Colorado Republican, 518 at 635-36 (Thomas, J., concurring and dissenting)(footnotes omitted).

To this we would add four observations: First, providing financial support for candidates or causes of one's choosing should not be dismissed as "proxy speech" because it is a critical embodiment of freedom of association, which has long been given comparable protection to freedom of speech. *See NAACP v. Alabama*, 357 U.S. 449. Second, the fact that the amount or size of a contribution is characterized as "only" an expression of the intensity of the donor's support for the candidate or cause should not be the basis for lesser protection because respecting the intensity of a message is a recognized part of the First Amendment landscape. *See Cohen v. California*, 403 U.S. 15, 26 (1971) (recognizing the importance of the emotive as well as the cognitive function of speech). Third, under traditional First Amendment principles, it is no answer to say that the impact of limits is mitigated by the contributor's ability to express his or her political preferences through other means. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939). Finally, the reallocation of a contributor's funds to other political speech is very likely to undermine its efficacy. To take one simple example, a supporter who gives $5,000 to a favored candidate may help that candidate purchase a full-page newspaper advertisement. Acting

alone, the contributor would not have the funds necessary to reach a similarly large audience.

2. An Indefensible Status Quo

Because of the disparate treatment of contributions and expenditures, we have a system of freedom of expression in the campaign finance area whose inconsistencies and incongruities undermine the goals of reduced "corruption" and expanded political participation that have been claimed as its principal justification. In First Amendment terms, we have created a political speech code under which the choice between freedom or restraint turns on the identity of the speaker, the content of the speech and, if pending proposals are enacted into law, the timing of the speech as well.[22] Funding given directly to candidates, coordinated with candidates, or expressly advocating the election or defeat of candidates, is subject to the elaborate and restrictive limits of FECA and comparable state statutory schemes. The funding of *all* other political speech that may affect the climate of opinion in which electoral outcomes are determined is left wholly unrestrained in accordance with First Amendment imperatives (as well as democratic principles).[23] The result has been a political line-drawing exercise that can best be described as arbitrary and irrational.[24] More troubling

[22] *See* H.R. 417, Section 201(b), 106th Cong., 1st Sess. (1999)(Shays-Meehan bill)(defining as "express advocacy" any paid radio or television advertisement referring to a "clearly identified candidate" within 60 days of an election).

[23] *See* Bradley A. Smith, "Essay: Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform," 105 Yale L.J. 1049, 1061-64 (1996)(arguing that campaign funding controls undermine democratic participation and change).

[24] For example, the "Harry and Louise" ads broadcast by the insurance (continued...)

still, it has too often been used to stifle the speech of the politically powerless, notwithstanding the claim that it would help level the playing field. *See FEC v. Central Long Island Tax Reform*, 616 F.2d 45 (2d Cir. 1980).

This disparate regime of "raw censorship," which deviates so dramatically from normal First Amendment principles, plainly fails to embody the "precision of regulation" that those principles demand. Instead, in a sweepingly overinclusive way, the system enforces a prophylactic rule against "large" contributions, regardless of their potential for corruption, and despite the existence of more targeted laws requiring disclosure and prohibiting bribery or conflicts of interest. Furthermore, the current system allows the restraint of core political speech on the basis of vague concepts like "corruption" or, worse, "the appearance of corruption." *Compare United States v. Sun Diamond Growers*, __ U.S. __, 67 U.S.L.W. 4265 (May 4, 1999)(violation of federal gratuity statute requires link between gift and official act).

These consequences point up the very essence of the intractable campaign finance dilemma and the inherent instability of campaign finance controls. The more one regulates, the more one risks offending the First Amendment, as illustrated by the flawed FECA provisions struck down in *Buckley*. The less one regulates, the less effective the remaining regulations will be and the harder it therefore be-

[24] (...continued)
industry in response to President Clinton's health care proposals in 1994 may well have helped the Republicans regain control of the House of Representatives for the first time in sixty years, yet they were beyond FEC control because they did not represent either a contribution or a coordinated expenditure. Similarly, the 1995 Medicare ads broadcast by the Democratic National Committee were arguably beyond FEC control although many commentators believe they influenced the outcome of the 1996 presidential election. *See* Anthony Corrado, "Giving, Spending and 'Soft Money,'" 6 J.L. & Pol'y 45, 50-51 (1997).

comes to justify halfhearted measures like the post-*Buckley* regime. *Buckley*'s well-intentioned effort to strike the balance by splitting the difference between contributions and expenditures, and between explicitly electoral speech and all other messages that may potentially affect political outcomes by influencing the climate of opinion, simply has not achieved the equilibrium desired or withstood the test of time.

3. A Constitutionally Preferable Solution

As in *Buckley,* the Court is once again at a constitutional crossroad. There are rational solutions to the campaign finance dilemma, but they do not lie in the direction of more limits on speech and the financing that makes speech audible. Instead, they are to be found in the direction that the First Amendment, properly regarded, has always led -- the path of "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring). We respectfully submit that a program of campaign finance reform that is consistent with the First Amendment would include three essential elements.

First, we can and should require instantaneous disclosure of large contributions to political candidates and campaigns, which will facilitate timely reporting and analysis by government agencies, news media and private campaign watchdog groups.[25] The value of disclosure is too often underestimated as an informational tool enabling the public to exercise its electoral power intelligently, and also as an antidote to corruption or undue influence. In *Buckley v. American Constitutional Law Foundation*, 119 S.Ct. at 657 (citation omitted), Justice O'Connor recently noted (speaking for herself and Justice Breyer), that disclosure is an "essential cornerstone of effective campaign finance reform."[26] That is even more true today than it was a generation ago because technological advances now permit almost instantaneous filing and public dissemination.

Second, we can and should implement a serious system of public financing. As the Court commented in the portion of *Buckley v. Valeo* upholding public financing for presidential elections: "Subtitle H [the public financing provision] is a congressional effort, not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people. Thus, Subtitle H furthers, not abridges, pertinent First Amendment values." 424 U.S. at 92-93 (footnotes omitted). The ACLU shares that view, and has long supported adequate and equitable public financing of qualified candidates as the least restrictive and most effective way to bring about *real* campaign finance reform. By eliminating the need for candidates to depend entirely on private contributions, public financing represents a far more direct response to whatever problems may exist with corruption or the appearance of corruption. And, by providing critical resources to candidates who lack personal wealth, public financing is far more likely than contribution limits to expand the electoral marketplace by introducing new faces and new ideas. Contribution limits thus represent the worst of both worlds: they are simultaneously less effective and more restrictive than the public financing alternative. At least until public financing has been tried and failed, the singleminded reliance on con-

[25] The recent decision in *FEC v. Akins,* 524 U.S. 11 (1998), provides additional opportunity for citizens and groups to seek enforcement of campaign disclosure rules and regulations.

[26] *See* Kathleen M. Sullivan, "Edward J. Barrett, Jr. Lecture on Constitutional Law: Political Money and Freedom of Speech," 30 U.C. Davis L. Rev. 663, 688 (1997)(discussing value of disclosure).

tribution limits cannot be reconciled with core First Amendment principles.

Third, we can and should regard political accountability as the appropriate constitutional check on "excessive" fundraising and spending. Let candidates decide whether to make an issue out of an opponent's high budget campaign. Similarly, let the voters decide whether particular candidates are relying too heavily on large contributions. In short, let us show the courage of the framers and put our faith in the people, not the government, to distinguish between public interest and special interest and choose their elected officials accordingly.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

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Dated: June 7, 1999