No. 98-963

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

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

BRIEF OF NATIONAL RIGHT TO LIFE PAC STATE FUND, NATIONAL RIFLE ASSOCIATION POLITICAL VICTORY FUND and STATE EMPLOYEE RIGHTS CAMPAIGN COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAND SUGGESTING AFFIRMANCE

Filed June 7, 1999

QUESTION PRESENTED

Whether low limits on contributions to candidates (such as Missouri's $1,075 per election limit on contributions to candidates for statewide offices) are unconstitutional because they are not narrowly tailored to avoid infringing the free association rights of the majority of donors whose contributions do not implicate the governmental interests in stemming corruption or its appearance.

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INTEREST OF THE AMICI CURIAE

Amici curiae, which are donors in political campaigns at the federal, state and local levels, submit this brief in order to emphasize the interest of campaign contributors in exercising their First Amendment right to free association.[1]

Amicus National Right to Life Political Action Committee State Fund (NRLPACSF) is a political action committee, connected with National Right to Life Committee, Inc., which makes contributions to campaigns in various states throughout the country. In addition to contributions, it engages in other kinds of political activity such as independent expenditures. Direct contributions to candidates, however, constitute an important part of NRLPACSF's political activity. NRLPACSF attempts to affect public policy by making contributions to candidates who share its views on pro-life issues in the hope that such candidates will be elected and institute pro-life policies in government. NRLPACSF does not make its contributions in an attempt to influence specific legislative votes. It contributes only to candidates who share its commitment to the pro-life position on issues. NRLPACSF determines whether candidates agree with its positions by means of questionnaires (reproduced in the Appendix hereto at 1), through personal contacts with candidates and through various other means. In the past, NRLPACSF has contributed to certain candidates the maximum amount allowable under applicable law. In the last three election

[1] Consents from the parties to filing this brief have been filed with the Clerk of this Court. *Amici* support the position of the respondents Shrink Missouri Government PAC and Zev David Fredman. Counsel for a party did not author this brief in whole or in part. The James Madison Center for Free Speech made a monetary contribution to the preparation and submission of this brief. No other person or entity, except for the *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation and submission of this brief.

cycles combined, NRLPACSF contributed to eleven candidates a total of $55,800.

Amicus National Rifle Association-Political Victory Fund (NRA-PVF) is a separate segregated fund of the National Rifle Association (NRA). The NRA-PVF is registered with the Federal Election Commission and with numerous state political/election agencies and makes contributions to candidates for federal, state, and local office throughout the United States. These contributions are a crucial part of NRA's political activities. The NRA-PVF also makes independent expenditures in support of and in opposition to candidates. In deciding to whom contributions are made, the NRA-PVF looks to a candidate's record and expressed positions on firearms issues. For all candidates, the NRA-PVF generally sends a questionnaire on firearms issues, reviews campaign statements, and interviews the candidate and other persons knowledgeable about the candidate. For incumbents or others who have held office, the NRA-PVF considers how he or she has voted on bills and amendments, what bills or amendments he or she has introduced, and statements he or she has made during debates. The NRA-PVF contributes only to candidates who share NRA's views on firearms issues so that such candidates will be elected and support NRA's positions on those issues. The NRA-PVF does not contribute to candidates who have not demonstrated support of NRA's views on firearms issues. The NRA has frequently contributed the maximum allowed by applicable law to candidates who were particularly strong supporters and would have made larger contributions but for the law. In the last three election cycles, the NRA-PVF has contributed approximately $4,922,475 to 869 candidates.

Amicus State Employee Rights Campaign Committee (SERCC) is a political action committee sponsored by The National Right to Work Committee (NRTWC), a non-stock corporation which is tax-exempt under 26 U.S.C. § 501(c)(4). In addition to its home state of Virginia, in the

last few election cycles, SERCC has contributed to candidates in sixteen other states. SERCC generally limits its activities to contributing to candidates for political office or to other political action committees. SERCC contributes to candidates who share the views of SERCC and NRTWC on Right to Work issues in the hope that such candidates will be elected and will institute or defend pro-Right to Work policies in government.

SERCC does not make any attempt to influence specific legislative votes. Instead, by contributing, SERCC helps elect candidates who already support Right to Work principles. SERCC does not contribute to candidates who have not demonstrated a commitment to the pro-Right to Work position on issues.

SERCC determines whether prospective candidate donees agree with the Right to Work position on issues by researching candidate positions, using the results of candidate surveys conducted by NRTWC and various Right to Work organizations (samples reproduced in the Appendix hereto at 22), and by consulting other sources of information on candidate positions, such as voting records and public statements or positions of the candidates.

In the 1994 through 1998 election cycles, SERCC contributed a total of $68,401.78 to 106 state races. At times, SERCC contributed the maximum amount allowed under applicable law for contributions to candidates. For example, in the 1996 primaries, SERCC contributed the miserly maximum of $100 each to twelve candidates for the Montana Senate and House of Representatives, and in the 1996 general elections, SERCC contributed another miserly maximum of $100 each to four candidates for the Montana Senate and House of Representatives. In the 1998 primaries, SERCC again ran up against these miserly limits, being allowed to contribute only $100 each to two candidates for the Montana legislature. SERCC would have contributed more than $100 each to these Montana candidates, if it had not been prevented from doing so by Montana law.

SUMMARY OF THE ARGUMENT

Free association between contributors and candidates is a uniquely American institution and the primary method by which candidate speech is financed in this country. Every campaign spawns countless informal associations between and among contributors and candidates. Such associations are protected by the First Amendment because they exist to serve the interest in free and robust political speech which is the *sine qua non* of representative government. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (*Sullivan*). For the freedom to speak depends upon the freedom to join with others in speaking.

Because of the instrumental value of "expressive association" to our democracy, and because contributions constitute an exercise of expressive association, this Court judges contribution ceilings under strict scrutiny. *Buckley v. Valeo,* 424 U.S.1, 25 (1976) (per curiam) (Buckley); *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 294 (1981) (*Berkeley*). The proponent of contribution limits must demonstrate that such limits are justified by a "compelling interest" and that they are "narrowly tailored" so as not to infringe on speech and association which "does not pose the danger that has prompted regulation." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (*Roberts*); *Federal Election Commission v. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 265 (1986) (*MCFL*). This Court has only recognized one "compelling interest" as a justification for campaign finance restrictions: the interest in stemming "corruption" or the "appearance of corruption." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (*NCPAC*). Moreover, the Court has defined "corruption" narrowly to encompass only those situations in which money is offered in exchange for political favors. *Id.* at 497. The term "appearance of corruption" is a term of similarly precise denotation which encompasses only a reasonable belief that

political favors are being exchanged for money. Therefore, as proponents of contribution limits, petitioners must demonstrate that corruption (in the precise sense of *quid pro quos*) exists or that the electorate has a reasonable perception of *quid pro quo* corruption.

They can do neither. For empirical studies demonstrate that there is no causal connection between campaign contributions and legislative behavior. This is because the great majority of campaign donors are like the *amici:* they give to campaigns in order to elect like-minded office-holders, not to seek corrupt privilege. Even those few contributors who may seek "access" to legislators are not engaging in corruption because access to elected representatives is a necessary result of all sorts of ordinary political activity. To justify contribution limits on the basis that "access equals corruption" would effectively justify the outlawing of myriad types of perfectly innocent political activity.

Low contribution limits restrict a great deal of non-corrupt political association (that is, contributions which are above the legal limit but not intended to induce political favoritism). Such limits are not narrowly tailored to serve the compelling interest in stemming corruption or its appearance. Therefore, contributors like *amici* are severely burdened by low contribution limits. The court below was thus correct in holding the limits unconstitutional and this Court should do so as well.

ARGUMENT

I. FREE ASSOCIATION FOR EXPRESSIVE PURPOSES IS A FUNDAMENTAL RIGHT PROTECTED BY THE FIRST AMENDMENT.

A. Contributions to candidates are an exercise of the right to free association and are essential to the American system of private campaign finance.

America is the only "country on the face of the earth where the citizens enjoy unlimited freedom of association for political purposes." 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 123 (Phillips Bradley ed., Henry Reeve trans., Vintage Books 1945) (1840). "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Berkeley*, 454 U.S. at 294. Americans give to political campaigns as "part of a powerful and respected tradition of voluntarism." FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 35 (1992). "[G]iving [to political campaigns] has become expected, perhaps even habitual for millions of Americans." *Id.* at 35. It is the "quintessential political activity for our era." *Id.* at 38. The people's exercise of free association in the form of campaign contributions to candidates is the primary mechanism by which American campaigns are funded both at the federal and state levels. Although presidential candidates receive public funding for the general election,[2] and although a few states have public financing systems, U.S. Congressional races, presidential primaries, and most state election campaigns are privately financed with voluntary

[2] Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 (1994).

contributions.[3] Millions of individual Americans give hundreds of millions of dollars in every election cycle to fund those campaigns.[4] They give directly to candidates and also to political action committees (PACs) such as the *amici* which, in turn, donate to candidates. As this Court has recognized, these donors are paying primarily for candidate speech.[5] Thus, donations are the fuel which produces the political speech which the Court recognizes as crucial[6] to representative democracy.[7] In sum, contributions are "central" to "the American way of campaign finance." SORAUF, *supra*, at 35.

Ultimately, all private funding of campaigns originates with individual citizens. A large proportion of private funding consists of individuals' direct contributions to candidates. "Individuals are an important source of

[3] "In presidential nomination finance, the generating source of almost all money is the individual contributor." CLIFFORD W. BROWN, JR., *ET AL.*, SERIOUS MONEY 6 (1995).

[4] Because of record keeping practices, "[i]t is difficult to determine exactly how many individuals make contributions to presidential campaigns . . . ." BROWN, *supra*, note 3, at 6. "It is safe to say, however, that over a half million individuals made contributions totaling $143 million to presidential candidates during the 1988 nomination process, and more than a quarter million made contributions totaling $82 million during the 1992 process." *Id.*

[5] For "[g]iven the important role of contributions in financing political campaigns, contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates . . . from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21.

[6] In order "to be competitive" candidates for presidential nominations "must receive contributions from tens of thousands of individuals." BROWN, *supra*, note 3, at 6.

[7] "[V]irtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19. [M]oney, or having the ability to communicate, is essential to campaigning in contemporary congressional politics . . . ." Michael J. Malbin, *Congressional Campaign Finance in 1994* 1 <http://www.usc.edu/dept/CRF/NET/PAPERS/paper1.html>(visited May 18, 1999).

contributions and together give more money to candidates than all PACs combined." FILIP PALDA, HOW MUCH IS YOUR VOTE WORTH? 99 (1994). "While it is true that the percentage of congressional campaign funds contributed by PACs has increased steadily since 1972, contributions from individuals remain the single largest source of political funds . . . ." Herbert E. Alexander, *The PAC Phenomenon*, 4 <http://www.usc.edu/dept/CRF/NET/PAPERS/paper2.html> (visited May 18, 1999). Individuals "pool their contributions" in order to fund elections because few candidates have the wherewithal to fund their own campaigns. *Id.* at 1. As this Court has explained, a group speaks with a louder and more effective voice than any individual.[8]

Associations are inherent in American political campaigns: every campaign necessarily engenders many political associations. These fall into two categories. First, in every campaign there is an association between every donor and the candidate. Second, there are associations among all of the like-minded contributors to the same candidate. This Court has recognized that such associations are deserving of strong judicial protection because of the instrumental role they play in our political life. For, the First Amendment guarantees the "freedom to associate with others for the common advancement of political beliefs," a freedom which "enhance[s]" "effective advocacy" and allows "the citizenry to make informed choices among candidates for office." *Buckley*, 424 U.S. at 14-15 (citations omitted)

As this Court has recognized, political association in the form of individual contributions to candidates serves the function of providing the funds necessary to produce candidate speech. *Buckley,* 424 U.S. at 21. But contributions

[8] "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley,* 424 U.S. at 65-66 (citation omitted).

also have an important informational component, for they transmit to candidates information about constituents' interests. Therefore, "[t]o tap individual contributions politicians must pay attention to what their individual constituents want and not simply to the demands of special interest groups." PALDA, *supra*, at 99. Therefore, "[w]ell-organized interest groups are not the only constituency to which politicians must pay heed." *Id.*

Because, "[t]he press and reform advocates seldom emphasize the importance of individual contributions . . . the impression . . . is that [special interest] money dominates politics." *Id.* "This is simply not the case," although political action committees do play an extremely important role in the American system of political finance. *Id.* "PACs raise funds for their activities by seeking voluntary contributions which are pooled together into larger, more meaningful amounts and then contributed to favored candidates or political party committees." Alexander, *supra*, at 1. "Essentially, PACs are a mechanism for individuals who desire to pool their contributions to support collective political activity at a level higher than any individual could achieve acting by themselves." *Id.* Often, as with the instant *amici*, PACs are created to promote a position on a particular political issue. They "provid[e] a process to gather contributions systematically through groups of like-minded persons for whom issues are a unifying element in their political activity." *Id.*

"Some 3,954 PACs were registered with the Federal Election Commission at the end of 1994." *Id.* In addition, there are numerous political action committees organized in states across the country. They are responsible for a great deal of campaign speech in every election year, both in the form of independent expenditures and in the form of contributions to candidates and campaign committees. For example, "[I]n the 1993-94 election cycle, PACs of all kinds raised $391.0 million and spent $387.4 million." *Id.* They

"contributed $189.4 million to 1994 candidates for the Senate and House of Representatives." *Id.*

Like individual contributions, PAC activity combines free speech and association and is essential to our system of private campaign finance. PAC donors "are thus simultaneously exercising speech and association rights which are both protected by the First Amendment." *Id.* PACs "help facilitate fundraising for officeseekers who would find it difficult, costly and inconvenient to solicit each of the PAC's donors on an individual basis." *Id.* PACs perform an informational function over and above that performed by direct individual contributions: they "represent individuals to the politician in much the same way that department stores represent the consumer to the wholesaler." PALDA, *supra*, at 104. They allow people to express their political preferences in an effective and precise manner which may not be possible through direct campaign contributions. As Filip Palda explained,

> "[i]f . . . I oppose abortion and favor legalization of drugs, I may not find this mix of ideas in any candidate, but I can give money both to the pro-life movement and to the Libertarians in proportion to how strongly I feel on each question. In this way, my ideas get freer expression than if I gave directly to the major party candidate roughly closest to my way of thinking."

Id. Thus, political association through direct individual contributions to candidates and through the concerted activity of PACs plays a crucial role in our Nation's election campaigns. Contributions provide the wherewithal for all candidate speech in privately financed elections; they provide a means for constituents to demonstrate the depths of their feelings on issues; they facilitate the ability of voters to join their voices with others of like mind and interest; they

allow candidates more easily to solicit funds necessary for campaign speech and to gauge the mood of the electorate. "If men living in democratic countries had no right and no inclination to associate for political purposes," De Tocqueville wrote, "their independence would be in great jeopardy . . . ." 2 DE TOQUEVILLE, *supra*, at 115.

B. Because they burden the fundamental First Amendment right of free expressive association, contribution limits are analyzed under "strict" or "exacting" judicial scrutiny.

This Court has made it clear beyond peradventure that contribution limits[9] like other significant burdens[10] on the fundamental[11] First Amendment right[12] of free

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[9] In *Berkeley,* this Court applied "exacting judicial review" to an ordinance limiting contributions to committees formed to advocate positions on ballot issues. 454 U.S. at 294.

[10] "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) (*Bates).*

[11] This Court accords the highest level of judicial protection to laws which infringe fundamental rights, including the right to free association. In *Elrod v. Burns*, Justice Brennan wrote that "political belief and association constitute the core of those activities protected by the First Amendment." 427 U.S. 347, 356 (1976) (plurality opinion). "The right of association 'lies at the foundation of a free society.'" *Buckley,* 424 U.S. at 25 (citation omitted).

[12] The Court has applied strict scrutiny to laws which threaten First Amendment rights. "It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod*, 427 U.S. at 362 *citing Buckley v. Valeo*, 424 U.S. at 64-65. In *Berkeley*, this Court stated that "regulation of First Amendment rights is *always* subject to exacting review." 454 U.S. at 294 (emphasis added).

association[13] are subject to "strict" or "exacting" scrutiny. Thus, the *Buckley* Court, noting that "the primary First Amendment problem raised by the Act's contribution limitations is their restriction of one aspect of the contributor's freedom of political association," held that "[i]n view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Buckley*, 424 U.S. at 24-25, *quoting NAACP v. Alabama*, 357 U.S. at 460-61. Therefore, whether the activities at issue here they are characterized as exercises of "fundamental rights," or of "First Amendment rights," or of the "right to associate for expressive purposes,"[14] or of "protected liberties" or merely as "contributions," limits on these activities must be judged under strict scrutiny.

II. MANY CONTRIBUTIONS DO NOT RESULT IN CORRUPTION OR ITS APPEARANCE AS PRECISELY DEFINED BY THIS COURT

A. This Court defines "corruption" very narrowly.

As explained above, strict scrutiny requires the proponent of a restriction on free association to demonstrate

[13] In *Kusper v. Pontikes*, this Court explained that "[a]s our past decisions have made clear, a significant encroachment on associational freedom cannot be justified upon a mere showing of a legitimate state interest." 414 U.S. 51, 58 (1973). Rather, a law which "burdens appellees' right to free speech *and free association* . . . can only survive constitutional scrutiny if it serves a compelling governmental interest. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 225 (1989) (emphasis added).

[14] Where free association is in the service of free speech, the Court has referred to it as "the freedom of expressive association." *Roberts*, 468 U.S. at 618. The *Roberts* Court explained that "[a]n individual's freedom to speak . . . could not be vigorously protected . . . unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Id.* at 622.

that the restriction is "narrowly tailored" to serve a "compelling interest."[15] Because the restriction at issue here is a limitation of campaign finances, the "compelling interest" must be either "corruption" or "the appearance of corruption."

As this Court stated in *NCPAC*, "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." 470 U.S. at 496-97. "Corruption" is very narrowly defined. The *Buckley* Court limited "corruption" to situations where "an unscrupulous contributor exercises *improper* influence over a candidate or officeholder." *Buckley*, 424 U.S. at 30 (emphasis added). In *NCPAC*, this Court explained that

> [c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial *quid pro quo:* dollars for political favors.

470 U.S. at 497. *NCPAC* thus demonstrates that "corruption" is to be defined very narrowly to encompass

[15] "To assess the constitutionality of a state election law, we first examine whether it burdens rights protected by the First and Fourteenth Amendments. If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu*, 489 U.S. at 222 (citations omitted). "[I]nfringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests . . . that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts*, 468 U.S. at 623.

only situations where "large" financial contributions[16] are given in exchange for official favors. Two elements must be present: something which is of value to a candidate (a large amount of cash or its equivalent given to him or his campaign) and some action on the candidate's part (office holders "giving official favors" or candidates offering "improper commitments").[17] *Id.* at 498. Thus, the definition of "corruption" is narrowly circumscribed--it is as important for what it does *not* include as for what it does. *It does not include the situation where the purported "official favor" is that a candidate maintained or changed his position on an issue.* As the *NCPAC* Court stated,

> [t]he fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by [individuals] can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.

470 U.S. at 498. Thus, "corruption," in this Court's precise usage, can never include the kind of activity engaged in by millions of individual and associational donors: contributions motivated by the desire to help a favored candidate win election which are given with no desire for political favoritism. A restriction such as the one challenged in the instant case is necessarily "*not* narrowly tailored" because it restricts a great deal of association "that does not pose the

[16] *Buckley* also emphasized that it was only "large" contributions which could raise concerns about *quid pro quos*. *See, e.g.*, 424 U.S. at 28 (contribution limit focuses on "the problem of *large* campaign contributions") (emphasis added).

[17] *Cf. United States v. Sun-Diamond Growers of California*, 1999 WL 241704 *10 (holding that "in order to establish a violation of 18 U.S.C. § 201(c)(1)(A) [the federal illegal gratuity statute] the Government must prove a link between a thing of value and a specific 'official act' for or because of which it was given").

danger that has prompted regulation." *MCFL*, 479 U.S. at 265.

B. The definition of the "appearance of corruption" is very narrow.

The respondents claim that the "government's burden of proof when it seeks to prevent the *appearance* of corruption is . . . even less demanding [than when it seeks to prove actual corruption]." Respondent Bray's *Brief* 31. However, the "appearance of corruption" rationale is far narrower than respondents would have this Court believe. Just as "corruption" is a term of limited denotation, so also is the term "appearance of corruption." Because "corruption" is a grammatical element of "appearance of corruption," it is important limitation on the meaning of that phrase. To speak about the "appearance of corruption" is thus necessarily to speak about the "appearance" of actual, narrowly defined corruption (that is, "dollars for political favors").[18]

The proponents of contribution limits contend that such limits are necessary to address the governmental interest in avoiding the "appearance of corruption." However, they never precisely define what they mean by that phrase. Is it, on the one end of the spectrum, a reasonable belief that large numbers of campaign contributions are being given in exchange for improper commitments from candidates? Or is it, on the other end of the spectrum, a subjective public cynicism about politicians as measured by the latest polling results? Certainly only a reasonable belief in the prevalence of *quid pro quo* corruption would constitute a sufficiently strong interest to justify the restraint of any First Amendment activities. In *NCPAC*, this Court recognized that the "appearance of corruption" is much more

[18] *See* James Bopp, Jr., *Constitutional Limits on Campaign Contribution Limits*, 11 Regent U. L. Rev. 235, 257 (1998) for a discussion of the limited scope of the "appearance of corruption" rationale.

than public cynicism. Discussing the government's evidence, the Court stated that

> the FEC attempted to show actual corruption or the appearance of corruption by offering evidence of high-level appointments in the Reagan administration of persons connected with the PACs and newspaper articles and polls purportedly showing a public perception of corruption. The District Court excluded most of the proffered evidence as irrelevant to the critical elements to be proved: corruption of candidates or public perception of corruption of candidates. *A tendency to demonstrate distrust of PACs is not sufficient.*

NCPAC, 470 U.S. at 499 (emphasis added). As Professor Bradley Smith opined, "it seems very dangerous to suggest that the mistaken view of some could justify restricting the First Amendment liberties of others." Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049, 1067-68 n.113 (1996). Indeed, it seems that the reformers are not only advocating that the "mistaken" view of some should lead to the deprivation of others' freedom, but that even an "unreasonable" view should result in limitations on freedom. However, at the very least, the standard upon which the deprivation of First Amendment rights depends must be that of a reasonable person.

The argument of the reformers "verges on'[corruption is] there even if we can't see it.'" *Id.* (citation omitted). To that extent, the argument is not "open to disconfirmation" and therefore contains within itself no limiting principle. *Id.* The argument cannot be disproven except by proving that subjective perceptions of corruption are wrong. That can only be done by proving the negative proposition that actual corruption does not exist. Because it

cannot be disproven, it must be assumed to be true, and therefore, can serve as the justification for even severe restrictions on freedom. This Court should, decline the invitation to construe the "appearance of corruption" so broadly as to limit severely associational freedoms.

In recent congressional testimony, Commissioner David M. Mason of the Federal Election Commission explained the irony that low contribution limits, which were intended to prevent corruption, may actually be the cause of corruption. David M. Mason, *Anonymity and the Internet: Constitutional Issues in Campaign Finance Regulation* (May 5, 1999).[19] He explained that "we should recall that the whole purpose of the $1,000 limit is to prevent corruption." *Id.* However, the Federal Election Commission's "enforcement caseload presents some evidence that this $1,000 limit may no longer advance that purpose, and *may indeed itself become a cause of corruption.*" *Id.* For the limit may be, in effect, so low "as to induce people interested in engaging in politics to participate in illegal schemes to circumvent it with no directly corrupt purpose." *Id.* Noting that the Commission has recently seen a marked rise in the number of "cases involving conduit contribution allegations," Commissioner Mason noted that,

> [i]n at least some of these cases it appears that *donors were motivated by little else than enthusiasm for a candidate*. The sums raised in some instances are only a few thousand dollars, not enough to raise serious corruption concerns, nor in many of these cases were the recipient campaigns apparently aware of any

[19] Testimony before the Subcommittee on the Constitution, Committee of the Judiciary, U.S. House of Representatives (May 5, 1999) (available at 1999 WL 16947304). In his testimony, Commissioner Mason stressed that he was speaking on his own behalf and not for the Federal Election Commission or for the other Commissioners.

> extraordinary efforts which might give rise to suspicions of favor-seeking.
>
> It appears that the $1,000 limit may have become effectively so low that is has itself become a cause of corrupt activity, except that *its circumvention may be motivated in some instances by nothing other than a pure desire to support favored campaigns*. In judicial terms, this raises the question of whether the $1,000 limit is narrowly tailored in advancing its corruption-preventing rationale.

Id. (emphasis added). As will be shown below, a great deal of candidate speech is funded through individual and group contributions which demonstrate no appearance of corruption whatsoever. Such contributions do not raise the specter of corruption because, in Commissioner Mason's words, the "donors were motivated by little else than enthusiasm for a candidate." *Id.* Since there is no "corruption" or "appearance of corruption" in such donations (because such donors are not giving "dollars for political favors") the $1,075 contribution limit forbids a great deal of speech "that does not pose the danger that has prompted regulation." *NCPAC,* 470 U.S. at 497; *MCFL,* 479 U.S. at 265.

C. There is no causal link between contributions and legislative behavior.

For several decades, there has been a well-organized movement to promote campaign finance "reform." This movement includes, among others, several of the *amici* who support the position of the petitioners in this case.[20] The

[20] For example, Common Cause and Public Citizen, groups which submitted *amicus curiae* briefs supporting the petitioners' position.

movement has consistently lobbied state and federal governments to impose ever more restrictive contribution limits. "A fundamental tenet of the reform movement is that money has corrupted the legislative process in America." Smith, *supra*, at 1067. Reformers cite a "rise in the number of PACs and the amount of money they give" to candidates and derive from these data the conclusion "that politicians are under greater influence from campaign contributions than before." PALDA, *supra*, at 95. "[B]ut in fact there is little evidence that politicians are 'selling out' more to contributors." *Id.* "[A] substantial majority of those who have studied voting patterns on a systematic basis agree that campaign contributions affect very few votes in the legislature." Smith, *supra*, at 1068. "Two decades of exhaustive academic research has found no conclusive evidence that election money buys government favors." PALDA, *supra*, at 92.

The "reformers" attempt to prove their point about corruption by "cit[ing] cases where PACs give money to those in power who share their issue positions." Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 American Journal of Political Science 2 (1989). However, "[t]he analysis in this literature is anecdotal and unsystematic or is based on correlations." *Id.* That is, "whereas the coincidence of power, votes, and money is established," the authors of these studies have failed to demonstrate "causality." *Id.* Recently, Professor John Lott testified to a congressional committee that a widely recognized problem in that literature is the question of causation: "[A]re donors simply giving money to candidates who they agree with, or are donors giving money to 'bribe' how politicians vote?" John R. Lott, Jr., *Testimony Before the U.S. Senate Committee on Rules and Administration* (March 24, 1999). To test whether donations influence voting, Lott studied how "all congressmen voted from 1975 to 1990." *Id.* He hypothesized that

> [i]f contributions cause politicians to vote differently from what they truly would like to do, politicians should behave differently when they are in their last period and no longer face the risk of losing future contributions.

Id. Professor Lott stated that "no statistically significant relationship was found between the reduction in campaign expenditures in a politician's last term and how they voted on legislation." *Id.* In fact, "politicians' voting remains extremely stable over their entire careers." *Id.* In short, reformers have not been able to demonstrate by valid empirical evidence that campaign contributions induce legislators to behave in a corrupt manner. Indeed, as Professor Lott found, the evidence which exists is directly to the contrary. For it is a "finding widely acknowledged in the scholarly community, but seldom reported in the media" that "there is little systematic evidence of a causal connection between the PAC money and congressional voting." John R. Wright, *The Statistical Relationship Between Contributions andVotes*1<http://www.usc.edu/dept/CRF/NET/PAPERS/paper8.html> (visited May 18, 1999). The inescapable conclusion is that "contributions from large PACs do not generally influence members' voting patterns on issues of interest to these groups." Grenzke, *supra*, at 1.

Statistical studies have been done in order to examine whether and to what extent PAC contributions result in

changes in the official behavior of legislators.[21] Typically, these studies have examined the question whether legislative roll call votes are influenced by contributions from PACs. They have found that, although there is a correlation between donations and legislative voting, donations do not influence roll call votes or committee behavior. Rather, the studies have found that there are many factors other than contributions which, either individually or combined, have a much greater impact on the official actions of legislators. Among these are: a candidate's personal political beliefs and ideology; candidates' political party affiliations; constituents' view and needs; the level of PAC influence in members' districts and the consequent ability to influence voters in the district; lobbying activity by the PACs; and the ability of PACs to help organize campaigns.

These studies show what the "reformers" fail to grasp: that correlation is not equivalent to causation. In other words, a statistical correlation between two events does not mean that one caused the other. While it may be true that contributions are *correlated* with pro-contributor legislative actions, it does not follow that contributions *induced* the legislators' actions. On the contrary, the most plausible explanation of the available data is that legislative actions induce contributions. "Where contributions and voting patterns intersect, they do so largely because donors contribute to those candidates who are believed to favor their

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[21] *See, e.g.*, John R. Wright, *Contributions, Lobbying and Committee Voting in the U.S. House of Representatives*, 84 American Political Science Review 417 (1990) ("lobbying, not money . . . shapes and reinforces representatives' policy decisions"); Grenzke, *supra*, at 1 ("this research finds little evidence that the contributions of 120 PACs affiliated with 10 organizations affected the voting patterns of the House members who served continuously from 1975 to 1982"); and John R. Wright, *PACs, Contributions, and Roll Calls: An Organizational Perspective*, 79 American Political Science Review 400 (1984) ("this analysis demonstrates with marked clarity the limited nature of PAC influence").

positions, not the other way around." Smith, *supra*, at 1068. As Professor John Wright has explained,

> "[w]hile it is true that contributions and voting tend to vary together . . . this co-variation does not stem from vote-selling and buying behavior on the part of PACs and legislators. Instead, the association is a benign consequence of PACs and legislators engaging in routine partisan and ideological behavior."

Wright, *Statistical Relationship, supra,* at 1. Indeed, as noted above, there are many factors other than contributions which tend to influence legislative behavior. Studies which ignore those factors "overestimate the influence of money on [legislative] votes." Grenzke, *supra*, at 2. From the politician's point of view, the most important factor concerning any legislative action is how it will affect his or her chances of election or re-election. In her study of the U.S. House of Representatives, Professor Janet Grenzke questioned PAC officials about the relationship between contributions and legislative actions. "All of the PAC officials agreed that in order to turn access into influence, the PAC must convince the House members that a particular position will improve their electoral prospects." Grenzke, *supra*, at 20. For "[m]embers' electoral prospects are improved by issue positions that generate support from district elites and voters . . . ." *Id.* Therefore, a "particular PAC's contribution is not critical because a sizable war chest and votes are forthcoming if there is general support in the district . . . ." *Id.* Thus, positions on issues are the most plausible nexus between legislative behavior and contributions. Candidates seeking electoral success must formulate issue positions which will resonate both with likely contributors and with likely voters. "Politicians attract financial support, like votes, because of views they hold.

That their contributors agree with them ought to surprise no one." ALEXANDER HEARD, THE COSTS OF DEMOCRACY 86 (1960). A politician's ultimate goal is getting votes; money is, at best, a means to that end. Therefore, a legislator is "unlikely to accept a campaign contribution, which can be used only to attempt to sway voters, in exchange for an unpopular vote, which definitely alienates voters." Smith, *supra*, at 1070.

Any influence which PAC officials may have, therefore, relates not to the contributions they make, but to their ability, if any, to influence electoral outcomes. PACs which have strong grassroots support and organization in a legislator's home district will often be more influential than a PAC which has only money. As an official of a labor PAC told Professor Grenzke: "'labor's work in campaigns is much more important than our direct financial contributions.'" Grenzke, *supra*, at 9. To the extent that there may appear to be a correlation between the size of contributions and PAC influence, it is because the "relative size of a contribution is often representative of the magnitude of other kinds of support a candidate receives from other parts of the organization [e.g., the local organization in the members' district]." *Id.* at 12. As Grenzke concluded

> [w]hen positive relationships do emerge, it is because the contributions are consistent with and may be considered a measure of the more important endorsement and campaign activities of the organization, not because PAC contributions influence a pattern of voting by members.

Id. However, even considering the full panoply of support which a PAC may give to a candidate, the "legislative influence of an even entire campaign package may be limited." *Id.* "The misconceptions about the role of contributions in politics come from a lack of proper attention

to the many channels through which people can influence government." PALDA, *supra*, at 95. This inattention "has led reformers to infer too much from the rising trend in contributions." *Id.* The "evidence simply does not show a meaningful, causal relationship between campaign contributions and legislative voting patterns." Smith, *supra*, at 1071.

D. Donors give to political campaigns from motives which do not implicate a concern about corruption or the appearance of corruption: in order to support candidates who already share their views and who have a chance of winning the election, not to buy favors from legislators.

Individuals and groups give to political campaigns for various reasons. Some give in response to the tradition of "good, old-fashioned American voluntarism." SORAUF, *supra*, at 35. Others give to campaigns primarily because they are solicited by friends and associates. However, the greatest number of donors give for public-spirited motives such as attempting to influence policy. "Concern for 'government policy' motivates contributing just as it motivates voting." HEARD, *supra*, at 73. "This concern looms as more important than the desire for some sort of special personal privilege." *Id.* In short, "people give money in order to influence policy and out of a sense of political duty." PALDA, *supra*, at 98.

Most donors "contribute in hopes of influencing the outcomes of elections." Grenzke, *supra*, at 19. They wish to influence public policy by aiding in the election of candidates who are committed to certain positions on issues. Candidates can use their ideas to attract donors because donors give to candidates whose ideas they like. *See, generally*, CLIFFORD W. BROWN *ET AL.*, SERIOUS MONEY: FUNDRAISING AND CONTRIBUTING IN PRESIDENTIAL CAMPAIGNS 140 *et seq.* (1995). Donors do not generally

cross the lines of political ideology.[22] "[C]ontributors generally gave to candidates with whom they were ideologically compatible . . . ."[23] Moreover, donors contribute primarily to candidates "with a tangible chance of winning," for election to office is the *sine qua non* of effective influence on public policy. SORAUF, *supra*, at 35. Therefore, the "political fortunes of the candidates define the potential contributors' chances of reaching their political goals." *Id.*

In sum, "[t]here is no simple and predictable connection between contributions and the desire for political privilege." HEARD, *supra*, at 69. For "[m]any factors other than hope for special favor prompt donations." *Id.* The decision to contribute "appears to stem from an assortment of political considerations." It is common among public-spirited individuals and groups. SORAUF, *supra*, at 42. Indeed, it "flourishes among those who display unusual levels of political activity, information, and involvement." *Id.*

It is true that in addition to pure public-policy concerns, some donors also contribute to campaigns in order to secure access to the decision-makers who formulate public policy. As Filip Palda has stated, "[c]ontributions do not . . . buy a candidate. Instead, they give interest groups 'access.'" PALDA, *supra*, at 98. For "[c]ontributing is only one means by which a group can get something from government; lobbying is the other means." *Id.* at 101. "Access" can be "equate[d] to a hearing." To the extent that a contribution

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[22] In a recent survey of donors to congressional campaigns, the candidate's ideology was "always important" to the decision to contribute of seventy percent of the respondents. John Green *et al.*, *Individual Congressional Campaign Contributors: Wealthy, Conservative and Reform Minded* 5 <http://www.crp/org/pubs/donors/donors.htm> (visited January 27, 1999).

[23] Clifford W. Brown *et al.*, *Serious Money: Fundraising and Contributing in Presidential Nomination Campaigns* 3-4 <http://www.usc.edu.dept/CRF/NET/PAPERS/paper6.html>(visited May 18, 1999) (adapted from the book of the same name).

can help in obtaining "access" it "facilitate[s] an opportunity to present one's case" to the decision maker. Grenzke, *supra*, at 19; *see also* HEARD, *supra*, at 88. Access "does not equate to decisive influence, but means the opportunity to make one's case at crucial times and places." *Id.*

Contrary to the views of the reformers, gaining access to politicians is not equivalent to "corruption or its appearance" in any sense, much less in the narrow way in which this Court has defined those terms. As the District Court for Colorado recently stated:

> The . . . attempt to broaden the definition of corruption to include mere access is unsupported by precedent. . . . Buckley . . . recognized that money, in many cases, may grant access to a candidate. It did not, however, concluded that such access is akin to corruption or the appearance of corruption.

Federal Election Commission v. Colorado Republican Federal Campaign Committee, 1999 WL 86840, *12 (D.Colo.). For, as stated above, access primarily involves only the chance to put one's best case before a legislator. In view of all of the other pressures on a legislator, it is not likely that a single contributor will be able to buy a legislator's vote. The

> contributor may then be able to shape legislation [, but only] to the extent that such efforts are not incompatible with the dominant legislative motives of ideology, party affiliation and agenda, and constituent views.

Smith, *supra*, at 1070. But a contributor who does not present a balanced case will not be successful in gaining influence.

> Lobbyists influence policy by providing legislators with accurate balanced information. As one member of Congress put it, "It doesn't take very long to figure which lobbyists are straightforward, and which ones are trying to snow you. The good ones will give you the weak points as well as the strong points of their case.

PALDA, *supra*, at 102.

Far from being a corrupting influence, donors' access to incumbent decision-makers is an important source of information. "Politicians also need [donors'] help." *Id.* at 101. For "legislation is often difficult to write and subject to piercing intellectual criticism." Therefore, legislators "rely heavily on lobbies to write their speeches and do office chores." Thus, "the exclusion of knowledgeable contributors from the legislative process can just as easily lead to poor legislation . . . as can their inclusion." Smith, *supra*, at 1070. Finally, contributions serve the vital goal of giving legislators information regarding "how deeply certain constituents feel about certain policies." PALDA, *supra*, at 98. "A limit on contributions" has the ill-effect of "reduc[ing] th[e] flow of information" from constituents to their representative. *Id.*

Not only is donors' access to politicians not corrupting, it is very useful in that it provides necessary information to representatives. But even assuming *arguendo* that donors' access were harmful, it is not clear that access by a given contributor will result in policy changes. For "[t]he competition for access . . . is stiff." HEARD, *supra*, at 89. Monetary donors are far from being the only persons who can gain access to politicians. "Money is but one contribution that can be made to electoral success and contributing to electoral success is but one factor affecting access." *Id.* at 89-90. Other types of service rendered to candidates and parties, such as get out the vote drives and

other campaign activity which translate directly into votes, may have much more value to candidates. "[F]ew American politicians will be corrupted for a lesser consideration than the favor of the voters." *Id.*

The reformers paint a broad-brush picture of widespread corruption stemming from campaign contributions, but the empirical evidence simply does not bear them out. The assumption that campaign "money can buy elections and politicians" is both "shaky and largely unproven." PALDA, *supra*, at 109. In fact, few legislators are influenced to act contrary to their obligations of office by the mere prospect of a campaign contribution. "'[R]elatively few senators are actually changed by lobbyists from a hostile or neutral position to a friendly one.'" *Id.* at 102 (citation omitted). In short, "a political gift does not automatically carry . . . [any] influence at all." HEARD, *supra*, at 69.

E. *Amici* and similar donors are responsible for a great deal of political speech. Therefore, low contribution limits have a substantial adverse effect on donors throughout the country.

Private funding of election campaigns is the norm rather than the exception in America. Millions of individuals donate money to campaigns for federal, state and local offices, either directly or through political action committees. These donations constitute the primary fuel for funding campaigns, which are the engine of democracy. Unless they are independently wealthy, candidates are able to engage in "core political speech" in campaigns only through the contributions of their fellow citizens:

> Through a single agent, thousands of citizens can pool many small contributions into a large contribution. Such money reflects popular opinion, and when used to buy advertising it provides the electorate at large with information about issues and candidates.

PALDA, *supra*, at 110. That collective activity in support of widely-disseminated candidate speech is uniquely American and is an aspect of our society which is to be applauded rather than condemned. However, as Filip Palda states "[l]aws of the sort now in the federal statutes, that limit contributions, make it hard for ordinary people to pool their funds." *Id.* at 110. The instant *amici*, their state affiliates and many other donors to state campaigns throughout the country, are heavily burdened by low contribution limits, despite the fact that their donations have no tendency toward corruption or the appearance of corruption.

III. THE COURT BELOW CORRECTLY APPLIED THE FIRST AMENDMENT PROTECTIONS DEVELOPED BY THIS COURT IN INVALIDATING MISSOURI'S CONTRIBUTION LIMIT.

This brief has demonstrated that there is a great deal of First Amendment activity in this country, both free speech and free association, which exists in the form of individual and group contributions to political campaigns. The court below was correct in holding that strict scrutiny analysis was applicable to limits on such contributions, because, *inter alia*, contributions constitute free association. Therefore, the court below was correct in requiring the proponents of the restriction to carry the heavy burden of precisely demonstrating the elements of strict scrutiny, that is, the existence of a compelling governmental interest and narrowly tailored means. *Amici* have also shown that the kind of activity in which they and countless other individuals and groups are involved, namely making contributions to political candidates, does not cause "corruption or its appearance" under this Court's narrow definition of that term. Giving money to candidates in order to aid their chances of election is not the same as vote-buying and is

certainly not "corruption" under this Court's precedents. Even those groups which may attempt to buy "access" to politicians are not giving the "appearance of corruption." Nevertheless, the proponents of contribution restrictions argue for an understanding of the "appearance of corruption" which is so broad that it would justify the restriction of all manner of ordinary political activity; for there are countless situations in which citizens come into contact with politicians. Such access is all to the good: it is the essence of a representative democracy. This Court should be leery of accepting the petitioners' invitation to restrict "retail politics" under the guise of avoiding an unreasonable, subjective perception of corruption.

CONCLUSION

For the above reasons, this Court should affirm the decision of the court below.

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