No. 98-963

In the Supreme Court of the United States

OCTOBER TERM, 1998

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

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREDMAN AND JOAN BRAY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE COMMON CAUSE, DEMOCRACY 21, CAMPAIGN FOR CONSUMER PROTECTION, CENTER FOR GOVERNMENTAL STUDIES, LEAGUE OF WOMEN VOTERS, NATIONAL CIVIC LEAGUE, PEOPLE FOR THE AMERICAN WAY FOUNDATION, AND PUBLIC CAMPAIGN IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Common Cause, Democracy 21, and other amici interested in campaign finance reform submit this brief amicus curiae with the consent of the parties.[1] Common

[1] Statements of interest for amici Campaign for Consumer Protection, Center for Governmental Studies, League of Women Voters, National Civic League, People for the American Way Foundation, and Public
(continued...)

Cause is a non-profit membership corporation with more than 225,000 dues-paying members nationwide. Common Cause promotes, on a non-partisan basis, its members' interest in open, honest, and accountable government and political representation. Common Cause seeks to achieve this objective by making government more responsive to citizens through government and election reform. Common Cause has participated as a party or amicus curiae in numerous Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws.

Democracy 21 is a non-profit, non-partisan public policy organization that favors campaign finance laws to prevent the undue influence of money in American politics and to protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched the relationship between money, power, and influence in the American political process, and has participated as an amicus curiae in litigation involving the constitutionality and implementation of campaign finance laws.

SUMMARY OF ARGUMENT

In considering the constitutionality of Missouri's content-neutral campaign contribution limits of $1075 (as of now) for statewide races and lesser amounts for other races, the Eighth Circuit should have followed this Court's holding in *Buckley v. Valeo*, 424 U.S. 1 (1976), sustaining the constitutionality of the $1000 limit on candidate contributions that Congress

[1] (...continued)
Campaign are attached in the appendix to this brief. Letters providing the consent of the parties are being filed with the Clerk of the Court concurrently with the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that the brief in its entirety was drafted by amici curiae and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than amici curiae, their members, or their counsel.

established in the Federal Election Campaign Act, 2 U.S.C. §§ 431 *et seq.*, 18 U.S.C. §§ 591 *et seq.* ("FECA"). Instead, the divided Eighth Circuit panel defiantly flouted every material aspect of *Buckley*'s reasoning in reviewing Missouri's campaign contribution limits.

While *Buckley* characterized campaign contributions as speech by proxy and contribution limits as a "marginal restriction" on a contributor's free speech that could therefore be enacted on the basis of less compelling justifications, 424 U.S. at 20-21, the Eighth Circuit expressly applied "strict scrutiny" in judging Missouri's limits, *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998).

While *Buckley* found that the federal government had compelling interests in controlling the dangers of real and apparent corruption that it found to be "inherent" where campaign contributions are unlimited, 424 U.S. at 28-30, the Eighth Circuit required Missouri to support its limits with detailed evidence of specific incidents of corruption relating to contributions above $1075 and then ignored probative record evidence to that effect, 161 F.3d at 521-22.

While *Buckley* held that courts should not second-guess, fine tune, or use a "scalpel to probe" the wisdom of the precise limit a legislature chooses, except in the rare circumstances where specific evidence demonstrates that the limits are so low that candidates cannot raise enough money to campaign, 424 U.S. at 21, 30, Chief Judge Bowman went so far as to state that the Eighth Circuit should substitute its judgment for that of the Missouri legislature based on a dubious inflation analysis, and he then ignored record evidence that many Missouri candidates had raised *more* money under the limits than they had in previous elections, 161 F.3d at 522-23.

For all these reasons, the Eighth Circuit's judgment should be reversed.

ARGUMENT

I. This Case Falls Squarely Within This Court's Holding in *Buckley v. Valeo* That Courts Should Defer to Legislative Line-Drawing in Setting Limits on Campaign Contributions.

Buckley v. Valeo, 424 U.S. 1 (1976), governs the disposition of this case. In *Buckley*, the Court upheld a $1000 federal contribution limit and prescribed general principles governing how courts should evaluate the constitutionality of contribution limits. Drawing a distinction between contributions and expenditures, *id.* at 19-22, the Court explained that the communicative quality of a contribution rests with the symbolic act of contributing and not with the amount of the contribution. *Id.* at 21. On this basis, the Court held that "[a] limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication . . . ." *Id.* (footnote omitted); *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 615 (1996) (plurality opinion) (reiterating that "restrictions on contributions impose 'only a marginal restriction upon the contributor's ability to engage in free communication'") (quoting *Buckley*, 424 U.S. at 20-21).

Having concluded that contribution limits impose only a marginal restriction on speech, *Buckley* further held that the government's interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office" was sufficient to uphold the $1000 federal contribution limit. 424 U.S. at 25. The Court recognized the significant danger that large contributors can secure political quid pro quos from candidates in a system of private election financing. Significantly, "[o]f almost equal concern" to the Court was

"the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.* at 27. The Court found these dangers to be both grave and "*inherent* in a system permitting unlimited financial contributions." *Id.* at 28 (emphasis added); *see also id.* at 30, 29 ("Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse *inherent* in the process of raising large monetary contributions be eliminated," and the interest in preventing those harms is constitutionally "sufficient" to justify contribution limits (emphasis added)).

Because contribution limits involve "little direct restraint on . . . political communication" and the government's interest in limiting contributions is so strong, *id.* at 21, 29, *Buckley* held that courts must defer to legislative determinations that particular contribution limits make sense. In *Buckley*, and thereafter, the Court has declared that courts may not second-guess legislative judgments or substitute their own judgment for that of the legislature when reviewing campaign contribution restrictions that apply to candidate elections: "'If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000.'" *Id.* at 30 (quoting *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)); *see also FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982). Even though other, higher limits might have been effective in certain elections and even though the limits might have been structured to take account of the particular office at stake, "Congress' failure to engage in such fine tuning [did] not invalidate the legislation." *Buckley*, 424 U.S. at 30.

Hence, *Buckley* wisely declined to plunge courts into the morass of evaluating the wisdom of the specific contribution limits a legislature prescribes. *Buckley* recognized only a

narrow exception to this rule of judicial deference: a contribution limit may violate the First Amendment if it is so low that distinctions in degree between it and alternative contribution ceilings "can be said to amount to differences in kind," *Buckley*, 424 U.S. at 30, such that it "prevent[s] candidates . . . from amassing the resources necessary for effective advocacy," *id.* at 21.

These basic principles established in *Buckley* remain bedrock constitutional law: Contribution limits involve relatively little direct restraint on speech, they serve the constitutionally sufficient interest of minimizing the risks of actual and apparent corruption inherent in a system of unlimited campaign contributions, and courts should therefore largely defer to legislatures when it comes to assessing the wisdom of a particular limit. *See, e.g.*, *Colorado Republican*, 518 U.S. at 614-15 (plurality opinion); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480 (1985); *California Med. Ass'n v. FEC*, 453 U.S. 182 (1981) (plurality opinion).

II. The Eighth Circuit's Decision Striking Down Missouri's Contribution Limits Flouts *Buckley v. Valeo*.

In striking down the content-neutral contribution limits the Missouri legislature prescribed, the Eighth Circuit Court of Appeals altogether disregarded every important aspect of *Buckley*'s holdings concerning judicial evaluation of campaign contribution limits.

A. *The Eighth Circuit Used Strict Scrutiny, Notwithstanding Buckley.*

The Eighth Circuit's first error was its application of "strict scrutiny" to Missouri's contribution limits. *Shrink Missouri Gov't PAC*, 161 F.3d at 521. *Buckley* articulated and applied a less exacting constitutional standard for

evaluating the constitutionality of contribution limits. And, since *Buckley*, this Court has never used strict scrutiny to evaluate a campaign contribution limit. As the Court recalled in *Massachusetts Citizens for Life, Inc.*, 479 U.S. at 259-60, "[w]e have consistently held that restrictions on [direct] contributions require less compelling justification than restrictions on" spending. *See also California Med. Ass'n*, 453 U.S. at 196 (plurality opinion) ("speech by proxy" is not "entitled to full First Amendment protection").[2] Thus, the Eighth Circuit fatally erred when, defying *Buckley*, it insisted that the State of Missouri had to establish a "compelling state interest" for enacting campaign contribution limits and had to defend the limits it chose as "narrowly drawn to serve that interest." 161 F.3d at 521.

B. *The Eighth Circuit Required Specific Proof of Corruption, Notwithstanding Buckley.*

The Eighth Circuit compounded this reversible error by requiring the State to provide detailed evidence of "a real problem with corruption or a perception thereof as a direct result of large campaign contributions," 161 F.3d at 522. Rejecting the premise thrice repeated in *Buckley* that at least the appearance of corruption is "inherent," *Buckley*, 424 U.S. at 25, 28, 30, the Eighth Circuit instead improperly required

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[2] The Court's less exacting standard for evaluating contribution limits is consistent with the standard the Court has applied in more recent First Amendment challenges to other election legislation. In *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), upholding a ban on "fusion" candidates, the Court weighed the nature of the burden on associational rights against the state's interest, and observed that:

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Id. at 358 (internal quotations and citation omitted); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (upholding ban on write-in voting).

"some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." 161 F.3d at 521 (citation omitted).

As shown, *Buckley* did not require Congress to support its conclusion that prophylactic limits were needed with case-specific evidence of actual or apparent corruption from large contributions. Wisely side-stepping that quagmire, the Court concluded that at least the appearance of corruption is "inherent" in a campaign finance system that lacks contribution limits. While the Court cited the abuses in campaign financing during the 1972 elections, those examples were not the basis for the Court's decision. Rather, the Court cited these examples to confirm what it deemed intuitively evident. *Buckley*, 424 U.S. at 27 (examples from 1972 elections confirmed that the problem was "not an illusory one"). The Court noted the obvious: "the scope of such pernicious practices can never be reliably ascertained." *Id.* For these sound reasons, the Court deferred to Congress' choice of particular limits: "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* (citation omitted). This Court has never endorsed any other method for judicial evaluation of campaign contribution limits.

Indeed, in other First Amendment and election law contexts where the Court has found a limited impingement on protected expression, the Court has relied on common sense, reasonableness, and historical experience to conclude that government action is justified to prevent certain dangers. *See, e.g.*, *Burson v. Freeman*, 504 U.S. 191, 206, 211 (1992) (discussing the historical experience and upholding legislation setting limits on campaigning in close proximity to voting booths because of "[a] long history, a substantial consensus, and simple common sense").

These cases teach that in such contexts it is simply not necessary for the government to offer systematic, empirical evidence of harm in particular instances where history and reasonableness show that the dangers the government seeks to prevent are obvious. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628-29 (1995) ("[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information. Indeed, in other First Amendment contexts, [the Court has] permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus and 'simple common sense.'" (citations omitted)); *see also Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (plurality opinion) ("[W]hen trenching on First Amendment interests, even incidentally, the government must be able to adduce *either* empirical support *or* at least sound reasoning on behalf of its measures." (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)) (emphases added)); *FCC v. League of Women Voters*, 468 U.S. 364, 401 n.27 (1984) (Hatch Act "evolved over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government" (citation omitted)).[3]

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[3] It was significant to the Court's analysis in *Burson*, *Buckley* and other cases that the restrictions adopted by the government did not "significantly impinge on constitutionally protected rights" of expression. *Burson*, 504 U.S. at 209-10. Where the Court has required detailed evidence of harm to justify a regulation, it is because the government's need for regulation has not been obvious and because the burden imposed by the regulations has more directly and significantly impinged upon protected expression. For example, in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995), the Court struck down a ban on the acceptance of honoraria by lower ranking government officials. In

(continued...)

Buckley is also consistent with other cases holding that courts should afford significant deference to a legislature's predictive judgments that certain laws are necessary to combat perceived evils. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."); *National Right to Work Comm.*, 459 U.S. at 210 ("Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

With regard to the issues at stake here, there is voluminous historical and experiential support for the

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[3] (...continued)
reaching its conclusion that the direct and substantial restrictions on speech in that case were not sufficiently justified, the Court reasoned that the danger of harm from speeches or articles by low-ranking executive officials was far from clear or evident, and that the government's concerns about potential harm were undermined by exceptions in the law and Congress' failure to require any connection between the honoraria at issue and the employee's job.

Similarly, while the Court in *Turner Broadcasting System* reaffirmed that "courts must accord substantial deference to the predictive judgments of Congress," 512 U.S. at 665 (plurality opinion), the Court recognized that the government's concerns about the viability of local television broadcasting and economic justification for the substantial speech restrictions of the "must-carry" rules were far from clear or self-evident. To the contrary, evaluating the proposed restrictions necessitated a complex economic analysis that had not been sufficiently demonstrated.

In *Colorado Republican*, the Court, relying on *Buckley*, found that while contribution limits directly furthered the government's interest in preventing the potential corruption caused by large campaign contributions, limits on truly independent party expenditures did not. 518 U.S. at 611-17. It was under these circumstances -- the absence of any evidence of a "special" corruption problem that stemmed from political party independent expenditures -- that *Colorado Republican* refused to assume that limits on party *expenditures* were necessary. *Id.* at 611-13.

proposition that the dangers of actual and apparent corruption are inherent and threaten confidence in government where there are no limits on campaign contributions to candidates. Large campaign contributions from corporations to Theodore Roosevelt's 1904 presidential campaign were the impetus for the Tillman Act of 1907, Pub. L. No. 50-37, 34 Stat. 864, which prohibited corporations and national banks from contributing to candidates for federal election. *National Right to Work Comm.*, 459 U.S. at 209 (discussing history of the Tillman Act); *see also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 811-12 (1978) (White, J., dissenting); *Massachusetts Citizens For Life, Inc.*, 479 U.S. at 246-47 (discussing history of Congressional limits on corporate expenditures in connection with campaigns). Similarly, Congress enacted the disclosure requirements of the Federal Corrupt Practices Act of 1925 in response to the Teapot Dome scandal. *See National Right to Work Comm.*, 495 U.S. at 209. That scandal involved large, unreported gifts and loans to federal officials made by oil developers in non-election years to secure the leasing of naval oil reserves to private companies. In 1966, a campaign contribution scandal erupted when members of the Democratic "President's Club," which included government contractors, gave more than $1000 each to President Johnson's campaign. *Buckley*, of course, noted the unfortunate practices in the 1972 presidential election. 424 U.S. at 26 & n.28; *see also* E. Joshua Rosenkranz, *Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 23-24 (1998) [hereinafter "Rosenkranz"] (discussing examples of corruption in campaign contributions that led to the adoption of the FECA).

Today, the dangers of actual and apparent corruption associated with large campaign contributions continue to

abound because of the so-called "soft money" loophole.[4] In one particularly redolent example, in April of 1997 Amway President Richard DeVos and his wife, Bev DeVos, contributed a total of $1 million to the Republican National Committee in soft money contributions. Later that year, with "the help of House Speaker Newt Gingrich (R-Ga.)," Amway benefited when a joint conference committee controlled by a majority of Republicans inserted a special tax break for Amway into the 1998 federal budget during a late night conference. Ruth Marcus, *Lobbying's Big Hitters Go to Bat; Some Swat Home Runs, Others Strike Out on Budget Deal*, Washington Post, Aug. 3, 1997, at A1.[5]

Roger Tamraz's efforts to secure the United States' "backing for his oil pipeline project in the Caucasus" provide another example of the inherent appearance of corruption that accompanies large campaign contributions. *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns*, Final Report of the Committee on Governmental Affairs, S. Rep. No. 105-167, Report

[4] "Soft money" refers to contributions that are made to political parties ostensibly for uses other than in connection with federal elections, but that, in practice, are used to support federal candidates. For this reason, the Federal Election Commission, which allowed this loophole to open in a 1978 Advisory Opinion, FEC Advisory Opinion 1978-10, has recently opened a new rulemaking proceeding to consider means to close the loophole, *see* Prohibited and Excessive Contributions; "Soft Money," 63 Fed. Reg. 37,722 (1998) (to be codified at 11 C.F.R. pts. 102, 103 & 106) (proposed July 13, 1998), and Members of Congress in both bodies have introduced legislation to ban soft money contributions, *see* Bipartisan Campaign Finance Reform Act of 1999, Title I, H.R. 417, 106th Cong. (1999) (Shays-Meehan bill); Bipartisan Campaign Finance Reform Act of 1999, Title I, S. 26, 106th Cong. (1999) (McCain-Feingold bill).

[5] The new provision changed the rules for determining whether the assets of Amway's two Asian subsidiaries are subject to taxation and is estimated to be worth millions of dollars to Amway. Amway admits that the provision particularly benefited it. *See id.*

Summary at 43 (1998). Tamraz gave $300,000 in soft money donations to the Democratic National Committee, concededly for the purpose of securing access to and support from high ranking executive branch officials. When the National Security Council opposed Tamraz's "scheme as untenable and harmful to U.S. foreign policy interests," it received the following advice: Tamraz has "already given $200,000, and if he got [what he wanted] he would give the DNC another $400,000." *Id.* at 44 (alteration in original). Tamraz frankly admitted to a congressional committee investigating corruption in campaign financing that he gave to buy access to the President. In fact, Tamraz met with President Clinton on at least six occasions. *Id.* at 43-44.

As if the public's concerns about corruption in our political system are not already heightened, it appears now that the role of large campaign contributions in our federal elections may even be further threatening our national security. It has only recently been reported that the head of China's military intelligence program, General Ji Shengde, funneled $300,000 in soft money contributions to Democratic fundraiser Johnny Chung, according to Chung. *See* William C. Rempel, *et al.*, *Testimony Links Top China Official, Funds for Clinton*, Los Angeles Times, Apr. 4, 1999, at A1. [6]

Contributors are not the only ones to acknowledge the unfortunate link between large contributions and the appearance of corruption -- legislators recognize and lament it as well. *See generally* Martin Schram, *Speaking Freely: Former Members of Congress Talk About Money in Politics* (1995) (interviewing current and former Members of Congress from both major parties). As former Georgia

[6] Johnny Chung has reportedly told federal investigators that he met with the intelligence official from China on three occasions and used part of the money deposited in his bank account to subsidize campaign contributions to the Democratic National Committee in an effort to assist President Clinton's reelection efforts in 1996. *See id.*

Senator Wyche Fowler confessed, "I am sure that on many occasions -- I'm not proud of it -- I made the choice that I needed this big corporate client and therefore I voted for, or sponsored its provision, even though I did not think that it was in the best interests of the country or the economy." *Id.* at 28 (quoting Wyche Fowler). Former Congressman Vin Weber of Minnesota has said that "[w]hen you raise money from PACs, members have almost a mental checklist of the things they need to do to make sure their PAC contributors continue to support them." *Id.* at 3 (quoting Vin Weber).

Ominously for the health of our participatory democracy, voters believe that large campaign contributions buy influence for the contributor. One recent poll shows that 77% of Americans think that special interests carry more weight with federal lawmakers than the best interests of the country. *See, e.g.*, Lydia Saad, *Americans Not Holding Their Breath on Campaign Finance Reform*, Gallup Poll, Oct. 11, 1997; *see also* Rosenkranz at 16 (reporting that in three polls, three-quarters of respondents agreed that "Congress is largely owned by the special interest groups," that "[s]pecial interest groups have too much influence over elected officials," and that "[o]ur present system of government is democratic in name only. In fact, special interests run things"). The result is a sharp decrease in the confidence of our citizens in their government. *See, e.g., id.* at 17 (reporting "shockingly low" voter turnout in 1994 congressional races and 1996 presidential election).

In short, the dangers of actual and apparent corruption arising from large contributions have not diminished. It is just as obvious today as it was to Congress in 1974 and to the Court in 1976 when the Court wrote in *Buckley* that "the avoidance of the appearance of improper influence 'is [] critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 424 U.S. at 27 (quoting *CSC v. Letter Carriers*, 413 U.S. 548, 565

(1973)); *see United States v. UAW-CIO*, 352 U.S. 567, 575 (1957) ("[S]ustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government" is a critical government interest.).

Thus, the Eighth Circuit committed reversible error when it required Missouri to prove specific instances of corruption or the appearance thereof to justify the state's contribution limits. As Judge Gibson observed in his dissent, "[i]t is hardly counterintuitive that large campaign contributions might corrupt politics and invite public cynicism. The State has imposed only modest restrictions on political speech, and it need not justify them with scientific precision." *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d at 526 (Gibson, J., dissenting).

Not only did the Eighth Circuit apply the wrong standard, in doing so, it also blinded itself to a factual record that, to the district court's satisfaction, established Missouri's strong interest for enacting its contribution limits.[7] State Senator Wayne Goode, co-chair of the Interim Joint Committee on Campaign Finance Reform, testified by affidavit that the Committee had "heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence" and that contributions in excess of the limits "have the appearance of buying votes as well as the real potential to buy votes."

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[7] The district court, applying the Eighth Circuit's erroneous "strict scrutiny" standard, held that "[i]f a showing of 'real harm' is required (the State claims it is not), the Court finds that defendants have made that showing." 5 F. Supp. 2d at 737.

Shrink Missouri Government PAC v. Adams, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998).[8]

In addition, the district court referenced several newspaper stories and editorials to support the Senator's statements. One article reported that a candidate for state auditor had received a $40,000 contribution from a brewery and a $20,000 contribution from a bank; another observed that the state treasurer's selection of a bank to do state business raised an appearance of favoritism, because the bank had contributed approximately $20,000 to the treasurer during his last campaign. *See id.* at 738 n.6. Moreover, the appearance of corruption was clear: Missouri citizens had voted overwhelmingly for the significantly lower Proposition A limits that the Eighth Circuit invalidated in *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995). This evidence suffices to sustain the limits, particularly since the serious problem it exemplifies has been held to be inherent where there are no limits on campaign contributions.[9]

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[8] The Missouri legislature neither collects nor preserves legislative history.

[9] It is hard to see how on this record the Eighth Circuit could have granted summary judgment against the State. Summary judgment is only appropriate where the court concludes, after reviewing all of the record before it and viewing that evidence in the light most favorable to the nonmoving party, that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (holding that the evidence "must be viewed in the light most favorable to the party opposing the motion" (intenal quotation and citation omitted)).

C. *There Is No Evidence That the Limits Missouri Selected Are So Low That They Significantly Impinge on Political Dialogue by Preventing Candidates from Amassing the Resources Necessary for Effective Campaigning.*

Because Missouri's interest in preventing real or apparent corruption is constitutionally sufficient to justify its decision to impose some contribution limits, courts have no "scalpel to probe" the particular limits the Missouri legislature set -- those limits are entitled to considerable judicial deference. *Buckley* could not have been clearer on this point. 424 U.S. at 30; *see Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.) (upholding Kentucky's $1000 contribution limit), *cert. denied sub nom. Kentucky Right to Life, Inc. v. Stengel*, 118 S. Ct. 162 (1997). Thus, courts may not second-guess legislative judgments regarding the degree of appropriate prophylaxis unless a plaintiff proves on the basis of empirical evidence that the limits the legislature chose are in fact so low that they amount to "differences in kind" that prevent candidates from amassing sufficient funds for effective campaigning. *Buckley*, 424 U.S. at 21, 30.

To make the showing *Buckley* requires, a plaintiff must carry his burden of proof through specific evidence like that before the district court in *National Black Police Ass'n v. District of Columbia Board of Elections and Ethics*, 924 F. Supp. 270 (D.D.C. 1996), *vacated as moot by* 108 F.3d 346 (D.C. Cir. 1997) (invalidating District of Columbia $*100* contribution cap). There, the evidence proved three facts to the court's satisfaction: (1) a large percentage of contributors had given amounts in excess of the $100 cap before that cap was imposed; (2) candidates' total fundraising receipts decreased significantly after the $100 cap was imposed; and (3) the amounts candidates raised under the $100 cap were "insufficient to promulgate candidates' political messages." *Id.* at 275. Concluding that the first two facts were not

sufficient to invalidate the $100 cap, the court rested its decision on the crucial last factor. *Id.* at 277.[10] No lower court outside the Eighth Circuit has struck down a contribution limit without making such a finding, and no such court has ever invalidated statewide limits higher than $500.

Respondents have not made the requisite showing -- indeed, the record evidence proves exactly the opposite! As the district court specifically found, Missouri's limits have in fact had no material adverse effect on the ability of candidates to speak and to run for office. The evidence from the 1992 and 1996 elections shows that only a small fraction of contributors had given more than the limits before Missouri enacted those limits. 5 F. Supp. 2d at 741. Likewise, the evidence shows that candidates for state office were in fact able to raise sufficient funds to conduct effective campaigns despite the limits. *Id.* at 740-41. With the limits in effect, candidates for many Missouri state offices *raised more money* than they had in previous elections. Average candidate expenditures increased in four of the five races for which the State collected data between 1992 and 1996. (*See* J.A. at 24-28.) Total candidate expenditures increased significantly as well: Between 1992 and 1996, total expenditures in the general elections increased 76% in the Lieutenant Governor

[10] A district court granted a preliminary injunction enjoining enforcement of California's contribution limits of $500 per election for statewide candidates on the basis of similar reasoning:

> Plaintiffs have tendered a wealth of factual and opinion evidence in support of their position. The court has found myriad facts which, taken together, require the court to conclude that on the record made at trial the effect of the initiative is not only to significantly reduce a California candidate's ability to deliver his or her message, but in fact to make it impossible for the ordinary candidate to mount an effective campaign for office.

California Prolife Council Political Action Comm. v. Scully, 989 F. Supp. 1282, 1297 (E.D. Cal. 1998) (footnote omitted), *aff'd*, 164 F.3d 1189 (9th Cir. 1999).

campaign (from $1,008,047 to $1,777,872), 398% in the race for Secretary of State (from $316,161 to $1,576,471), and 89% in the Treasurer's race (from $193,088 to $365,486). (*See* J.A. at 25-27.)

Furthermore, experience of more than twenty years under the federal $1000 contribution limit (slightly lower than the Missouri limit at issue) shows that it has not prevented federal candidates from building significant and steadily increasing campaign coffers. Federal Election Commission ("FEC") data show that total contributions from individuals have grown steadily since 1975 when the limits first went into effect. During the 1997-1998 election cycle, individual contributions (totaling $372.44 million) were 5.7 times the total individual contributions during the 1975-1976 election cycle ($65.12 million).[11] These data are for contributions subject to the federal contribution limit, and exclude "soft money" contributions that escape federal regulation.

Nor is inflation itself relevant to the constitutional analysis. The federal contribution limits *Buckley* upheld in 1976 remain in effect today, and at no time has the Court suggested that the passage of time has made them constitutionally suspect. Attempting to apply debatable inflation factors to those limits would require just the judicial "fine tuning" that the Court expressly proscribed in *Buckley*.[12]

[11] *Compare 1998 Congressional Financial Activity Declines*, FEC Press Release (Dec. 29, 1998) *with* FEC Disclosure Series No. 6: 1976 Senatorial Campaigns Receipts and Expenditures (Apr. 1977) *and* FEC Disclosure Series No. 9: 1976 House of Representatives Campaigns Receipts and Expenditures (Sept. 1977). Even as adjusted for inflation, individual contributions during the 1997-1998 election cycle were twice as much as the total contributed by individuals during 1975 and 1976.

[12] The problem of accounting for inflation is exacerbated by the practical difficulties of choosing the proper method of calculation. *See* 5 F. Supp. 2d at 742.

In addition, general inflation statistics do not answer the only germane constitutional question -- whether particular limits in a particular jurisdiction are so unreasonably low that they in fact prevent effective campaign advocacy in that jurisdiction. The amount of money necessary to campaign effectively is subject to a potentially infinite number of variables. Campaigning methods change over time, and differ from jurisdiction to jurisdiction, campaign to campaign, and office to office. The use of new campaign techniques in recent elections -- including, in particular, the Internet and e-mail -- shows that the costs of campaigning in real money terms can decrease as well as increase.[13] *See, e.g.*, Ron Faucheux, *How Campaigns Are Using the Internet: An Exclusive Nationwide Survey*, Campaigns & Elections, Sept. 1998, at 22 (reporting that, of the 1998 campaigns surveyed, over 63% had websites); *see also* Lance Gay, *Campaigning on the Internet*, Business Today, Oct. 23, 1998; Peter Lewis, *Web Campaigning Gains Ground*, Seattle Times, Oct. 17, 1998, at A1.

The question for constitutional purposes is not what $1000 in 1976 dollars can buy today, but rather whether the limit chosen by the legislature is today preventing candidates from effectively communicating with the electorate. While a legislature may legitimately include an inflation adjustment in campaign contribution limits, as the Missouri legislature did, that is purely a matter of legislative discretion.

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[13] As the district court observed:

> [T]he CPI cannot, by definition, reflect increases in the cost of non-consumer services such as conducting a mass-mailing, operating a telephone bank, or running a thirty-second radio or television advertisement. And if some or all of those costs have risen, perhaps they are offset, at least to some degree, by post-1976 technological advances such as the fax machine, e-mail, and the Internet . . . .

Shrink Missouri Gov't PAC, 5 F. Supp. 2d at 742.

Otherwise, the courts would find themselves engaged in a perpetual and ultimately futile review of the economics of campaign financing and the myriad and changing factors related thereto. That type of analysis intrudes on legislative policymaking and is not a constitutional requirement.

CONCLUSION

For these reasons and those stated by petitioners, we respectfully urge the Court to reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX