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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, *et al.*,
Petitioners,
v.

SHRINK MISSOURI GOVERNMENT PAC, *et al.*,
Respondents.

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

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BRIEF FOR AMICI CURIAE SENATOR JOHN F. REED, CONGRESSMAN JOHN M. SPRATT, JR., CONGRESSMAN AMO HOUGHTON, CONGRESSMAN SHERWOOD BOEHLERT, CONGRESSMAN ALLEN BOYD, SENATOR MAX CLELAND, SENATOR SUSAN M. COLLINS, SENATOR TOM DASCHLE, SENATOR RICHARD J. DURBIN, CONGRESSMAN SAM FARR, SENATOR RUSSELL D. FEINGOLD, CONGRESSMAN MAURICE HINCHEY, SENATOR CARL LEVIN, SENATOR JOHN McCAIN, CONGRESSWOMAN CAROLYN B. MALONEY, CONGRESSMAN JAMES H. MALONEY, CONGRESSMAN MARTIN MEEHAN, CONGRESSMAN GEORGE MILLER, CONGRESSWOMAN JANICE D. SCHAKOWSKY, CONGRESSMAN CHRISTOPHER SHAYS, CONGRESSMAN JOHN F. TIERNEY, AND CONGRESSMAN ANTHONY D. WEINER IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Amici include the following Members of the United States Senate and the United States House of Representatives: Senator John F. Reed, Congressman John M. Spratt, Jr., Congressman Amo Houghton, Congressman Sherwood Boehlert, Congressman Allen Boyd, Senator Max Cleland, Senator Susan M. Collins, Senator Tom Daschle, Senator Richard J. Durbin, Congressman Sam Farr, Senator Russell D. Feingold, Congressman Maurice Hinchey, Senator Carl Levin, Senator John McCain, Congresswoman Carolyn B. Maloney, Congressman James H. Maloney, Congressman Martin Meehan, Congressman George Miller, Congresswoman Janice D. Schakowsky, Congressman Christopher Shays, Congressman John F. Tierney, and Congressman Anthony D. Weiner.

The Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, one of several campaign finance reforms passed by Congress, contains limits on campaign contributions similar to the Missouri state limits at issue in this case. *Amici*, a bipartisan group of present Senators and Representatives, believe that such contribution limits are essential, even if not independently sufficient, to maintain the public's confidence in the integrity of our political system. The Eighth Circuit's decision striking down such limits departs from *Buckley v. Valeo*, which upheld the FECA limits.

The personal experiences of *amici* since this Court's decision in *Buckley* demonstrate not only the necessity of the contribution limits upheld in that case, but also the need for clearer and more comprehensive authority to stem the evasion of those limits and to vindicate the central premise in *Buckley* --

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation or submission of this brief.

that the government does have a compelling interest in ensuring faith in the integrity of the political process. *Amici* advocate, and seek to enact, reforms to vindicate that compelling interest. As both representatives of the People and seasoned participants in the electoral process, *amici* believe they are entitled to broad deference in the regulation of federal elections. The Court in *Buckley* properly accorded legislatures such deference with regard to contribution limits. The Court should reaffirm that deference as to the contribution limits at issue here and extend it to campaign finance reforms in general. Without additional reforms, the public's faith and participation in the political process will continue to decline. Such reforms can be enacted without infringing upon First Amendment rights and without stifling the public debate essential to the functioning of our democracy.

SUMMARY OF ARGUMENT

This is a case of great moment. In the decision under review, the Eighth Circuit has refused to follow the clear holding of *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* upheld against a First Amendment challenge campaign contribution limits indistinguishable in substance from the state legislation invalidated by the Eighth Circuit in this case. Upholding such restrictions, the *Buckley* Court made clear that "Congress could legitimately conclude 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 United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). The Eighth Circuit's holding thus should be reversed on the authority of *Buckley*. More fundamentally, the Eighth Circuit's readiness to ignore the plain import of *Buckley* suggests that this Court's First Amendment jurisprudence regarding campaign finance regulation is in need of clarification. Nothing in the more than two decades of experience since *Buckley* calls into question the Court's decision to uphold the legislative judgment that campaign contribution limits are essential to preserving the public's faith in the electoral process and our representative institutions. To the contrary, the problem with the Court's campaign finance doctrine is that it has become a straitjacket disabling the People's elected representatives from responding meaningfully to the threat of disastrous erosion of public confidence posed by other uses of money in the political process -- a threat that grows more serious with each election cycle. This doctrinal hostility to legitimate efforts to preserve the integrity of the political process (which, as the Eighth Circuit's decision makes plain, now threatens even to undermine *Buckley*'s clear holding that contribution limits are constitutional) has gone too far. "[F]or while the Constitution

protects against invasions of individual rights, it is not a suicide pact" requiring Congress and state legislatures to stand helplessly by as the public's faith in democracy withers away. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963).

1. The Eighth Circuit can and should be reversed on the narrow ground that the Missouri contribution limits at issue in this case are indistinguishable from the limits upheld in *Buckley*. Missouri's contribution limits satisfy the reasoning and standard of review of *Buckley*, because the Missouri legislature made clear that it was acting to address voters' declining faith in the integrity of the political system. In addition, *Buckley*'s precise holding supports Missouri's limits. *Buckley* upheld an individual contribution limit of $1,000. Thus, Missouri's individual contribution limit of $1,075 must be permissible, particularly given the generally higher costs associated with federal as opposed to statewide elections. The effects of inflation since 1976 make no difference to the viability of the $1,000 limit, because the *Buckley* Court declared that future courts could reject contribution limits only if they "differed in kind" from the limits upheld in *Buckley*. As the Missouri limits still allow contributors the ability to express their support for their chosen candidates and allow candidates to mount viable campaigns, those limits do not differ in kind from the federal limits.

2. Although Missouri's contribution limits clearly pass muster under *Buckley*, the Eighth Circuit's erroneous decision to the contrary demonstrates the need for this Court to reexamine its campaign finance jurisprudence. The First Amendment should not be read to strip the majoritarian branch of government of the ability to protect the integrity of the political process. The accumulated experience of Members of Congress, reinforced by empirical evidence, is that the dominance of money in politics seriously threatens the public's

faith in the legitimacy of government and in the elections that choose whom shall govern. There must be leeway for the government to address the core societal interest, recognized by this Court, *see Buckley*, 424 U.S. at 26-27, in ensuring the integrity -- in every sense of the word -- of our representative system of government.

This leeway can be provided, consistent with the First Amendment, in two ways. First, strict scrutiny should not apply to any campaign finance reform that is justified by reference to something other than the communicative impact of speech. That is clear from this Court's First Amendment jurisprudence since *Buckley*. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) ("*Turner I*"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Ordinarily, campaign finance reforms are designed to regulate the underlying activities that generate the speech at issue, not the speech itself. Accordingly, these reforms should be reviewed under intermediate scrutiny. *See Turner I*, 512 U.S. at 642-43.

Second, legislatures should be given substantial deference to design and enact campaign finance reforms. *Buckley* provided such deference with regard to contribution limits, and the practical experience of *amici* since *Buckley* with respect to other types of campaign reform has demonstrated that deference is warranted for all such reforms. Justice White was correct: the Court should defer to the "many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). The Court should allow vindication of the predictive judgments of legislatures as to what reforms will sustain faith in the electoral process. As this Court has recognized, legislatures should not be held to a standard of proof that "'would necessitate that a State's political system sustain some level of

damage before the legislature could take corrective action.'" *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (*quoting Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)).

The judgment below should be reversed.

ARGUMENT

I. MISSOURI'S LIMITATIONS ON CAMPAIGN CONTRIBUTIONS ARE CONSTITUTIONAL AS A MATTER OF SETTLED LAW.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court confronted exactly the sort of limit on campaign contributions enacted by the Missouri legislature in this case. The *Buckley* Court upheld FECA's federal contribution limits against First Amendment challenge. *See id.* at 24-30. The rationale for contribution limits validated in *Buckley* was right in 1976, remains right today, and controls here.

The *Buckley* Court confirmed that the government has a compelling interest in combating real and perceived political corruption. "To the extent that large contributions are given to secure political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. In addition, the Court recognized the danger 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. These concerns were well-founded. In a market-oriented society, a campaign finance system that permits individuals to make large contributions fosters the perception that only contributors have a voice in the democratic process. That perception fulfills itself by alienating voters and discouraging them from participating in the process. As a result, the perception of a chasm between the interests of the people and

the priorities of their elected representatives is created, and public confidence in government corrodes.

Recognizing the compelling government interests at stake, *Buckley* held that contribution limits were a "closely drawn" means to address those interests: "contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions." *Id.* at 25, 28. This is so because "the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the $1,000 contribution ceiling." *Id.* at 29.[2] The Missouri legislature enacted the contribution limits at issue in this case to address the same compelling interests at stake in *Buckley*: the restoration and preservation of citizens' faith in the democratic process. *See Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 521-22 (8th Cir. 1998). No less than the Congress, the Missouri legislature "was justified in concluding that the interest in safeguarding against the appearance of impropriety" required the elimination of unlimited contributions. *Buckley*, 424 U.S. at 30. *Buckley* leaves no room to question the constitutional validity of that effort.

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[2] Although the *Buckley* Court did not attach a doctrinal label to the "rigorous" standard of review to which it subjected contribution limits, *Buckley*, 424 U.S. at 29, *amici* believe the Court applied intermediate scrutiny. In the view of *amici*, however, whether the *Buckley* level of review for the FECA contribution limits is more properly characterized as "intermediate" or "strict" scrutiny is beside the point, because the virtually identical Missouri limits survive the *Buckley* standard, whatever its label. Moreover, as *amici* discuss *infra* in Part II.A., this Court's First Amendment jurisprudence since *Buckley* independently establishes that, because Missouri's justification for its contribution limits is unrelated to the communicative impact of the speech, the limits should be analyzed under intermediate scrutiny.

The constitutionality of Missouri's $1,075 limit on contributions to candidates for statewide office is assured not merely by the broad reasoning of *Buckley* but also by the precise holding in that case. The *Buckley* Court upheld FECA's $1,000 limit on individual contributions to any candidate for federal office. *See Buckley*, 424 U.S. at 23-35. That limit persists in federal law to this day. 2 U.S.C. § 441a(a)(1)(A).[3] If a $1,000 limit is constitutional, then a $1,075 limit must be constitutional. Moreover, the higher cost of campaigns for federal office ensures that a contribution of any given amount will have a greater impact in most state elections than in most federal elections.[4] Thus, the impact on expressive freedom of the contribution limits at issue in this case likely will be even less than that of the limits upheld in *Buckley*.

Nor do the effects of inflation warrant departure from *Buckley*. The author of the Eighth Circuit's opinion argued that

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[3]The federal contribution limit applies to "any candidate . . . with respect to any election for Federal office," 2 U.S.C. § 441a(a)(1)(A) -- the Presidency, Vice Presidency, Senate, and House. The Missouri $1,075 limit applies to candidates for governor, lieutenant governor, secretary of state, state treasurer, and state auditor. Mo. Rev. Stat. § 130.032 (Supp. 1997).

[4]Expenditures in recent elections demonstrate that statewide candidates for federal offices in Missouri spent far more than statewide candidates for Missouri offices. In 1994, the State's two major-party candidates for United States Senate spent a total of $7.57 million in the general election campaign. *See* Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1998*, at 826-27 (1997). In the 1992 Senate race, the candidates spent $6.16 million. *Id.* In contrast, the two major-party candidates for governor in 1996 spent the considerable but significantly smaller sum of $3.35 million in the general election. Will Sentell, *Governor Bid Cost Kelly, Carnahan $3.4 Million*, Kansas City Star, Dec. 6, 1996, at C3. The cost of the 1992 gubernatorial race was $4.3 million. *Id.* Lower-level statewide races cost even less. In 1996, for example, the two major-party candidates for lieutenant governor spent $2.3 million, while the two candidates for state treasurer spent $370,000. *Id.*

price inflation since the 1976 *Buckley* decision justified striking down the Missouri contribution limit. *See Shrink Missouri*, 161 F.3d at 522-23. That argument did not even persuade the concurring judge below, *see id.* at 523 (Ross, J., concurring), and nothing in *Buckley* or this Court's subsequent decisions supports it. In fact, the *Buckley* Court anticipated the judicial urge to calibrate the amounts of contribution limits when it rejected the argument that Congress in FECA should have set different limits for presidential, Senate, and House campaigns because of their varying costs. "Congress' failure to engage in such fine tuning does not invalidate the legislation. . . . [A] court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Buckley*, 424 U.S. at 30 (internal quotation marks and citation omitted); *see also id.* at 242 (Burger, C.J., concurring in part and dissenting in part) (raising inflation argument against Court's holding). Rather, the Court set a high standard for any judicial action directed at the specific level of a contribution limit: "Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* at 30.

A $1,075 contribution limit for statewide office in 1998 does not differ in kind from a $1,000 contribution limit for federal office in 1976. Based on the two decisions cited in *Buckley*, legal restrictions "differ in kind" only if one of them completely denies some constitutional entitlement that the other leaves intact. *See Buckley*, 424 U.S. at 30 (citing *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Rosario v. Rockefeller*, 410 U.S. 752 (1973)). *Rosario* upheld a New York requirement that voters register their party affiliations eleven months in advance of primary elections as a condition on participation. *Kusper* struck down an Illinois statute that required party commitments 23 months in advance of primaries. The *Kusper* Court distinguished *Rosario* on the ground that the New York law did not prevent any voter from choosing to participate in any

party's primary in a given year. In contrast, the Illinois law "locked in" a voter's party preference more than one year before the primary, thereby barring anyone who had voted in one party's primary from choosing to vote in some other party's primary the following year. *See Kusper*, 414 U.S. at 60-61. This complete denial of the right to vote in a particular primary was the *Buckley* Court's example of a "difference in kind." No such difference exists here. The level of Missouri's contribution limits, as with the limit in *Buckley*, still allows a contributor to make "a general expression of support for [a] candidate and his views." *Buckley*, 424 U.S. at 21; *see also Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 615 (1996) ("the symbolic communicative value of a contribution bears little relation to its size") (plurality opinion). *Buckley* made clear that such limits do not preclude "the potential for robust and effective discussion of candidates and campaign issues." *Buckley*, 424 U.S. at 28-29. Thus, the effects of inflation have not created a difference in kind.

This Court in *Buckley* properly upheld the prerogative of legislatures to protect the integrity and viability of our democratic institutions by restricting campaign contributions. Based on their experiences, *amici* submit that the dominance of money in politics has sparked a crisis in American democracy; without the modest limits legislatures have placed on contributions, that crisis would be deepened. The Eighth Circuit's decision in this case represents a frontal assault on this Court's judgment and on the ability of legislatures to provide at least some check on the forces of cynicism and malaise that threaten to destroy Americans' faith in politics and government. This Court should reaffirm and fortify *Buckley*'s vindication of contribution limits.

II. THIS COURT'S CAMPAIGN FINANCE JURISPRUDENCE SHOULD NOT STIFLE THE ABILITY OF LEGISLATURES TO ENACT NECESSARY REFORMS.

Although this Court can and should uphold Missouri's contribution limits on the basis of *Buckley* alone, the Court should make clear in so doing that legislatures have leeway to enact campaign finance reforms in general. The Court should not leave the majoritarian branches of government in a straitjacket, preventing enactment and enforcement of campaign finance reforms needed to restore and maintain Americans' faith in "the integrity of [the] electoral process," an attribute "basic to a democratic society." *United States v. International Union, United Automobile Workers*, 352 U.S. 567, 570 (1957). Rather, practical experience since *Buckley*, as well as the Court's own precedent, support application of a lenient standard of review and the provision of substantial deference to legislative judgment. Specifically, as demonstrated below, this Court should make clear that intermediate scrutiny applies to contribution limits and to all campaign reforms that are not aimed at the communicative impact of speech, and it should recognize the institutional competence uniquely possessed by legislatures both to identify threats to the electoral system and to implement corresponding reforms.

A. Intermediate Scrutiny Should Apply to Campaign Finance Reforms Not Aimed at the Communicative Impact of Speech.

This Court's jurisprudence since *Buckley* has made clear that "[t]he government's *purpose* is the *controlling* consideration" in determining the standard of review for regulations challenged on First Amendment grounds. *Ward*, 491 U.S. at 791 (emphasis added). Strict scrutiny applies only to "regulations enacted for the purpose of restraining speech on

the basis of its content." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). The more lenient requirements of intermediate scrutiny apply "to those cases in which the governmental interest is unrelated to the suppression of free expression," *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (quotation omitted), or where the legislation is "justified without reference to the content of the regulated speech." *Renton*, 475 U.S. at 48 (quotation omitted); *see also Ward*, 491 U.S. at 791. This is true even if the regulation has "an incidental effect on some speakers or messages but not on others." *Ward*, 491 U.S. at 791. Indeed, intermediate scrutiny is appropriate for laws that may directly regulate speech activity, as long as the government's justification for doing so is unrelated to the content of the expression limited by the regulation. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-14 (1997) ("*Turner II*").[5]

Because the appropriate standard of review depends on the government's "overriding objective" in passing the challenged regulation, *see Turner I*, 512 U.S. at 646, not all campaign finance regulations should be subjected to strict scrutiny. Rather, such regulations should be subjected to strict scrutiny only if they are imposed for the purpose of regulating the communicative impact of speech. This conclusion is consistent with *Buckley*. That case applied strict scrutiny to the expenditure limits at issue because those limits were justified on

[5] The mere fact that campaign finance regulations only address regulations related to campaign financing does not mean such regulations are aimed at the communicative impact of speech. In *Renton*, for example, this Court declined to apply strict scrutiny to a zoning restriction that directly burdened expression of a particular content -- "adult" films -- because the government's "predominate concerns" in preventing "secondary effects" were unrelated to suppression of the regulated speech. *Renton*, 475 U.S. at 47 (internal quotation marks omitted).

the basis of the communicative value of the speech. As this Court explained in *Turner I*, "[t]he Government [in *Buckley*] justified the law as a means of 'equalizing the relative ability of individuals and groups to influence the outcome of elections.' . . . Because the expenditure limit in *Buckley* was designed to ensure that the political speech of the wealthy not drown out the speech of others, we found that it was concerned with the communicative impact of the regulated speech." *Turner I*, 512 U.S. at 657-58 (quoting *Buckley*, 424 U.S. at 48).[6] Accordingly, to determine the appropriate standard of review, a court must consider whether the justification offered by the government relates to the communicative impact of the speech.

A number of purposes that are unrelated to the communicative impact of speech motivate campaign finance regulations. First and foremost, regulating campaign finance increases citizens' faith and confidence in the political system. Efforts to restore faith in our representative government are unrelated to "the ideas or views expressed" by campaign contributions. *Turner I*, 512 U.S. at 643. Recent reform efforts in a number of states, including Missouri, indicate continued dissatisfaction with the current system of campaign financing.[7]

[6] To be sure, the *Buckley* Court rejected an argument, premised on *United States v. O'Brien*, 391 U.S. 367 (1968), that regulation of contributions and expenditures was regulation of conduct, not speech. *Buckley*, 424 U.S. at 16-17. But that is hardly dispositive of *amici*'s argument in favor of intermediate scrutiny. It has been clear at least since *Ward* that it is the government's justification that is controlling. *Ward*, 491 U.S. at 791.

[7] *See* <http://www.publicampaign.org/statemap.html> (visited Apr. 7, 1999) (indicating that, as of February 1999, public financing bills had been or probably would be introduced in 16 state legislatures, such proposals may be the subject of voter initiatives in four states in the year 2000, coalitions in 24 other states were pursuing reform, and four states -- Maine, Vermont, Arizona, and Massachusetts -- already have passed such reform by initiative or legislative action); *State Capitols Report* (Sept. 26, 1997) (listing status of

As recognized in *Buckley*, avoiding corruption or the appearance of corruption is necessary to serve this broader purpose; indeed, it is "'critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Buckley*, 424 U.S. at 27 (quoting *Letter Carriers*, 413 U.S. at 565).

Reforms also can be justified by the related need to address voter apathy. Studies have shown a correlation between the decrease in voter turnout and the increase in campaign spending. E. Joshua Rosenkranz, Buckley *Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform* 17 (1998). Voter apathy, and alienation from the government in general, is exacerbated by public perception that elected officials are more responsive to those who contribute to their campaigns than to those who do not. One study in Minnesota revealed that "almost one-third of those surveyed were less likely to vote or participate in politics because they believed that givers have more influence over elected officials than [non-givers] do." David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Reform Laws*, 18 Rev. Litig. 86, 122 (Winter 1999). This Court has recognized that the government has a compelling interest in addressing this public disdain for the electoral process, in order "to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government." *Automobile Workers*, 352 U.S. at 575.

In addition, certain campaign finance reforms can be justified by the need to reduce the amount of time elected officials must spend amassing campaign "war chests." This justification in no way depends upon the communicative impact

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reform proposals in all 50 states).

of any expression that might be curtailed as a result of such a regulation, and it is not based in any way on government hostility to the messages expressed by candidates. Rather, such limits seek to ameliorate harmful effects that occur when office-holders and candidates must devote enormous amounts of their time to solicitation of contributions. That this burden exists and has come to dominate the professional lives of office-holders and candidates is not open to serious question.[8] For example, in announcing earlier this year that he will not run for re-election in November 2000, Senator Frank Lautenberg noted that a "powerful factor" in his decision was "the searing reality that I would have to spend half of every day between now and the next election fundraising."[9] The incessant demands of fundraising hinder the ability of elected representatives to fulfill their public duties, and those demands divert candidates' time from discussing their positions on the issues to raising funds. In the words of former Representative Vin Weber, "[T]he amount of time people have to put into raising money is a serious problem in the country. . . . There's no way you can prove its impact on the quality of the Congress's work . . . . But when the members making decisions can't devote serious quality time to serious decisions, it has to [result in] a lower quality of work."[10] In addition, the necessity of amassing a huge campaign "war chest" creates a strong disincentive to run for

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[8] *See generally* Vincent Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate The First Amendment After All*, 94 Colum. L. Rev. 1281, 1281-82 & nn.1-3 (1994).

[9] Rachel Van Dongen & John Bresnahan, *Lautenberg Decides to Call It Quits in 2000, House Members, Whitman, in Mix For Open Seat*, Roll Call, Feb. 18, 1999.

[10] *Speaking Freely*, Center for Responsive Politics <http://www.crp.org/pubs/speaking/speaking03.html> (visited Apr. 7, 1999) (alterations in original).

office, for both incumbents and challengers. This burden would exist even if contributions were not limited; the "arms race" would simply involve greater dollar amounts.

Each of these justifications for reform addresses a public concern wholly unrelated to the communicative impact of campaign speech. As to preserving public confidence in the system and combating voter apathy, the problem is not the political message funded by a large contribution or expenditure, but rather the perceived significance of the very fact that a large amount of money is donated or spent. *Cf. United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973) (upholding restrictions on federal employees' political activities justified in part on ensuring that "[public] confidence in the system of representative Government is not . . . eroded to a disastrous extent"). As to limiting the time candidates spend raising money, the problem is not the message any candidate seeks to fund, but rather the extent to which the fundraising process itself hampers the job performance of public servants. *Cf. Renton*, 475 U.S. at 47 (reviewing zoning restriction on "adult" theatres under intermediate scrutiny because the restriction was meant to control "the secondary effects of such theatres on the surrounding community"). As in other instances of nonspeech regulations with ancillary effects on expressive freedom, *e.g.*, *Turner I*, *supra*, intermediate scrutiny should apply to campaign finance reforms that address problems unrelated to the content of political speech.

In this case, however, the Eighth Circuit rigidly applied strict scrutiny to the contribution limits at issue without considering whether the limits were justified by reasons unrelated to the communicative value of the speech at issue. *Shrink Missouri*, 161 F.3d at 521. This was error. The Eighth Circuit's approach ignores that, in First Amendment cases, this Court has carefully avoided "imposing judicial formulas so rigid

that they become a straitjacket that disables government from responding to serious problems." *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996). The principal purpose of Missouri's statute was to preserve the integrity of the State's electoral process. *Shrink Missouri Government PAC v. Adams*, 5 F. Supp. 2d 734, 738 (E.D. Mo. 1998). The legislature heard testimony on, and discussed, "'the potential for buying influence.'" *Id.* (citation omitted). The state senator who co-chaired the legislature's committee on campaign finance reform believed that the limits were necessary because contributions in excess of the limits would "'have the appearance of buying votes as well as the real potential to buy votes.'" *Id.* (citation omitted). This objective of preserving the integrity of the electoral process is wholly unrelated to the communicative impact of the regulated contributions. Intermediate scrutiny is accordingly the appropriate level of review.

B. Substantial Deference Should Be Given to Legislatures to Address the Significant Public Interests Implicated by Campaign Financing.

Answering the question of which standard of review to apply does not dictate the standard of proof that should be required of legislatures to withstand that review. *See Burson*, 504 U.S. at 198, 208-09 (applying strict scrutiny but giving substantial deference to legislative determination). Not only should the Court apply a lenient standard of review, it also should apply a deferential standard of proof that will allow vindication of legislative judgments that campaign finance reforms are necessary. This is particularly essential given that the governmental interest at stake -- the viability of our representative branches of government -- is one of constitutional magnitude.

This Court has long recognized both the compelling nature of the interest at stake and the legislature's power to address it. "[A] government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly" must necessarily possess "the power to protect the elections on which its existence depends from violence and corruption." *Ex Parte Yarbrough*, 110 U.S. 651, 657-58 (1884). Not only has the Court recognized the legislature's power to protect its very existence, but it has deferred to the legislature's predictive judgments as to the best way to do so. The "choice of means" to protect the integrity of elections "presents a question primarily addressed to the judgment of Congress." *Burroughs v. United States*, 290 U.S. 534, 547 (1934) (upholding the Federal Corrupt Practices Act of 1925); *see also Letter Carriers*, 413 U.S. at 566. Therefore, if "the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." *Burroughs*, 290 U.S. at 547-48.

This deference has been applied to campaign reforms even in the face of First Amendment challenges when, as here, significant competing government interests are at stake. For example, in *Burson*, the Court did not require stringent proof from the legislature to uphold a 100-foot boundary around polling places. *Burson*, 504 U.S. at 209. As *Burson* noted, "this Court never has held a State 'to the burden of demonstrating empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Id.* at 208-09 (quoting *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986)) (alteration in original). There, the Court affirmed a campaign reform, even in the face

of strict scrutiny, on the basis of "[a] long history, a substantial consensus, and simple common sense." 504 U.S. at 211.

This deference is provided in part because "it is difficult to isolate the exact effect" of campaign reforms on the harms they are designed to address. *Id.* at 208. Deference is especially important where, as with many campaign finance reforms, the justification for regulation is declining public faith in the electoral system -- a problem that is inherently difficult to prove by direct evidence and that legislators are distinctly well-positioned to assess. Moreover, the Court has recognized that it should not require that "a State's political system sustain some level of damage before the legislature could take corrective action." *Munro*, 479 U.S. at 195. The Court therefore has provided deference to permit legislatures "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." *Id.* at 195-96.

Accordingly, the *Buckley* Court went out of its way to defer broadly to legislative judgments about the need for contribution limits. The Court upheld the FECA contribution limits based not on anything Congress actually proved but merely because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" justified restrictions on contributions. *Buckley*, 424 U.S. at 27. As to the threat of actual corruption, the *Buckley* Court relied on common sense in acknowledging the importance of fundraising to elections and the danger that donors might exchange campaign funds for political favors. *Id.* at 26-27. The Court did not demand actual evidence of corruption, noting only that examples cited by the Court of Appeals showed that "the problem was not an illusory one." *Id.* at 27. Indeed, the Court declared that "the scope of such pernicious practices *can never*

be reliably ascertained." *Id.* (emphasis added). Finally, *Buckley* admonished courts to avoid "fine tuning" of legislative limits on contributions. *Id.* at 30. The Court has reiterated this deferential portion of *Buckley* in subsequent cases. *See FEC v. National Right To Work Comm.*, 459 U.S. 197, 209-10 (1982) (finding that congressional judgment about electoral laws "warrants considerable deference"); *id.* (Court will not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *California Medical Ass'n v. FEC*, 453 U.S. 182, 199 (1981) (holding that contribution limit was "an appropriate means by which Congress could seek" to advance governmental interest).

The deference that the Court afforded Congress on contribution limits was appropriate, and the Missouri legislature should be afforded the same deference here. The appropriateness of this deference is borne out by practical experience since *Buckley* with respect to issues on which the *Buckley* Court departed from this deferential tradition. For example, the *Buckley* Court substituted its own judgment for that of Congress with respect to expenditure limits, concluding that independent expenditures did not "presently appear to pose dangers of real or apparent corruption." *Buckley*, 424 U.S. at 46. In so doing, the Court rejected the legislative judgment that the regulation of independent expenditures was necessary to prevent would-be contributors from circumventing contribution limits. *Id.* at 46-47.[11] The *Buckley* Court also substituted its

[11] Congress recognized at least as early as 1945 that the failure to limit expenditures creates a means to circumvent contribution limits. *See Automobile Workers*, 352 U.S. at 581-82 ("'Of what avail would a law be to prohibit the contributing direct to a candidate and yet permit the expenditure of large sums in his behalf?'") (quoting *1945 Report of the House Special Committee to Investigate Campaign Expenditures*, H.R. Rep. No. 79-2739 at 40).

own judgment for that of the legislature about the potential corruptive aspects of independent expenditures. *Id.* at 47. Only after substituting its judgment on these matters for the judgment of experienced participants in the political process was the Court able to conclude that there was an insufficient governmental interest in stemming corruption, or the appearance thereof, from unlimited expenditures. *Id.* at 47-48.

Practical experience since *Buckley*, however, has vindicated the legislative judgments that the *Buckley* Court disdained on these issues. Contrary to the *Buckley* Court's prediction, the first-hand experience of *amici* indicates that the campaign regulations upheld in *Buckley* are insufficient, by themselves, to stop the decline of voter confidence in the integrity of the electoral process. *See generally* Schultz, *supra*, 18 Rev. Litig. at 113-19.[12]

Amici's assessment is supported by empirical evidence. The public's loss of faith in the system is most apparent in citizens' failure to participate in the democratic process. The 1996 presidential election, with its explosion in "soft money" attack advertising, attracted only 49 percent of registered voters, the lowest total in 70 years. Rosenkranz, *supra*, at 17. Our woeful level of electoral participation -- the lowest in the democratic world, *id.* -- can be traced in large part to "the problem of perceived influence" by large campaign contributors

[12] *See also, e.g.*, Anthony Corrado, *Party Soft Money: Introduction*, in *Campaign Finance Reform: A Sourcebook* 171-73 (A. Corrado *et al.* eds., 1997) (describing rise of soft money as a means of circumventing FECA contribution limits); Rosenkranz, *supra*, at 94; *Soft Money: A Look at the Loopholes* <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm> (visited Mar. 25, 1999) ("Essentially, soft money blew a hole through the reforms of the 1970s. By any reasonable interpretation, the [1996] campaigns no longer adhered to contribution or spending limits.").

over elected officials.[13] In 1964, 29 percent of Americans believed that the government was "'pretty much run by a few big interests looking out for themselves'" and not "'for the benefit of all people.'"[14] By 1992, that number had ballooned to 76 percent.[15] Numerous opinion surveys confirm that Americans believe elected officials serve wealthy donors and not ordinary citizens. For example, a 1997 *New York Times*-CBS poll found that 75 percent of the public believes "many public officials make or change policy decisions as a result of money they receive from major contributors."[16] More bluntly, 71 percent of respondents in a 1994 Gallup Poll agreed with the statement: "Our present system of government is democratic in name only. In fact special interests run things."[17]

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[13] Robert C. Sahr, *Campaign Finance Reform: The Issue in Brief*, Project Vote Smart <http://www.vote-smart.org/issues/1998rsb/campfin.html> (visited Mar. 13, 1999).

[14] Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 Cal. L. Rev. 1, 3 & n.4 (1996) (citing University of Michigan Center for Political Studies, American National Election Studies 1952-1990).

[15] *Id.* at 3 & n.3.

[16] Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, New York Times, Apr. 8, 1997, at A1.

[17] <http://www.commoncause.org/states/connecticut/polls.htm> (visited Mar. 31, 1999). Numerous polls have produced variations on the same theme. In a 1994 Bannon Research study of registered voters in five states, 83 percent expressed the view that "politicians pay more attention to monied special interests than people." *Id.* A 1995 Mellman Group/Public Opinion Strategies poll found that 68 percent of respondents "worried . . . a great deal" that "large campaign contributors get special favors from politicians." *Id.* Similarly, a 1997 CNN-*USA Today*-Gallup poll found that 53 percent of the public believed campaign contributions influenced policy choices "a great deal," while only 11 percent believed the effect was "not much" or "not at all." <http://www.publicampaign.org/pollsumm.html> (visited March 25, 1999).

This experience, which indicates that the campaign regulations upheld in *Buckley* are insufficient to stem the public's declining loss of faith in the democratic process, differs markedly from the Court's predictive judgments in *Buckley* and vindicates Justice White's separate opinion. Justice White admonished the Court for its willingness to "claim[] more insight as to what may improperly influence candidates than is possessed by the majority of Congress that passed [the campaign finance bill] and the President who signed it." *Buckley*, 424 U.S. at 261 (White, J., concurring in part and dissenting in part). As it did with contribution limits in *Buckley*, this Court should provide substantial deference to legislatures to enact all campaign finance reforms. Legislatures, not courts, are institutionally better suited to assess the need for campaign finance regulations and what types of regulations will best address the declining faith of their constituents in the political process. And, as seasoned participants in that process, legislators have practical experience as to the potentially negative aspects of the campaign financing system and the best way to ameliorate them. As Justices Stevens and Ginsburg recognized in *Colorado Republican*, "Congress surely has both wisdom and experience in these matters that is far superior to ours." 518 U.S. at 650 (Stevens, J., dissenting). This experience warrants "accord[ing] special deference to its

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A 1997 Center for Responsive Politics survey found that two thirds of respondents believed the influence of contributions on elections and government policy was a major problem and that their own representatives would listen to the view of a large contributor before that of a constituent; 71 percent believed the high cost of campaigns was discouraging good people from seeking public office. <http://www.crp.org/pubs/survey/s2.htm> (visited Mar. 25, 1999). A study of voters in Minnesota indicated that 88 percent of those surveyed believed that elected officials were more likely to respond to individuals and organizations that contributed to their campaigns than to those who did not. *See* Schultz, *supra*, 18 Rev. Litig. at 121.

judgments." *Id.* The Court must allow vindication of the predictive judgments of legislatures, such as the Missouri legislature here, that reforms are needed to address compelling government interests, interests that are themselves of constitutional magnitude.

Contrary to the Eighth Circuit's suggestion, *see Shrink Missouri*, 161 F.3d at 522 n.3, this principle of deference is supported rather than undermined by this Court's decision in *Turner I*. That decision reaffirmed that "courts must accord substantial deference to the predictive judgments of Congress." *Turner I*, 512 U.S. at 665 (plurality opinion). This is true even when regulations are challenged on First Amendment grounds. *See id.* (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973)). Although the *Turner I* plurality noted that according deference did not foreclose judicial review, that review did not give the Court "license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own." *Id.* at 666. That, in essence, is what the Eighth Circuit did here. The record evidence Missouri presented regarding the need for contribution limits was no less strong than the evidence about contribution limits before this Court in *Buckley*. *See* 424 U.S. at 26-27, 30. Missouri certainly did more than simply "posit the existence of the disease to be cured." *Turner I*, 512 U.S. at 664 (citation omitted); *cf. Colorado Republican*, 518 U.S. at 618 (plurality opinion) (noting that the government did not point to any record evidence of legislative findings). The fact that a plurality of this Court in *Turner I* held that the government presented insufficient evidence to support its regulations in that factually dissimilar case, *see Turner I*, 512 U.S. at 667 (plurality opinion), does not support the Eighth Circuit's decision here.

The Eighth Circuit's reliance upon *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995)

("*NTEU*"), is similarly unavailing. This Court in *NTEU* expressly acknowledged "our obligation to defer to considered congressional judgments about matters such as appearances of impropriety," *id.* at 476, but simply found the government's evidence in that case too flimsy to trigger that obligation. That is because the honoraria ban at issue in *NTEU* -- which barred even nonpolicymaking federal employees, *see id.* at 472-73 & n.18, from receiving compensation for expressive activity that had nothing to do with their work, *see id.* at 474 -- addressed a threat of harm that was "'a hypothetical possibility and nothing more.'" *Id.* at 475 n.21 (quoting *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985)).[18] In contrast, as the experience of *amici* and empirical evidence demonstrate, campaign finance regulations, such as the contribution limits at issue here, address much more than a "hypothetical" threat. Accordingly, the Eighth Circuit's requirement that the legislature present "some demonstrable evidence" of "genuine problems," *Shrink Missouri*, 161 F.3d at 521-22, is inconsistent with this Court's precedent, and it fails to accord sufficient deference to the legislature's assessment of the public's concerns with campaign financing and the best way to ameliorate those concerns. As this Court has recognized, legislatures should not have to wait until our representative system of government has sustained damage to pass reforms to protect it. *Burson*, 504 U.S. at 209 (quoting *Munro*, 479 U.S. at 195-96).

Nor should this Court refuse to accord proper deference to legislative judgments about campaign finance reform because of

[18] Indeed, the Court questioned whether Congress ever had contemplated the rationale advanced by the government for the challenged regulation, *see NTEU*, 513 U.S. at 473, and it noted that the government relied primarily on an "administrative convenience" justification that effectively denied the need for any congressional judgment. *See id.* at 474.

concerns that such reforms might favor incumbents over challengers. Campaign regulations apply to every candidate -- whether Democrat or Republican, incumbent or challenger. Such evenhanded restrictions are entitled to deference unless there is evidence of "invidious discrimination against challengers as a class." *Buckley*, 424 U.S. at 31. In fact, as the Court acknowledged in *Buckley*, certain reforms, including contribution limits, generally will negatively affect incumbents more than challengers. *Id.* at 32.

Moreover, the proven inaccuracy of the *Buckley* Court's substituted judgment about the electoral process demonstrates that refusing to defer to legislative judgments is unwise. Indeed, the Court's unfamiliarity with the campaign financing system has led it to overestimate the effect that regulations have on First Amendment interests. Even though the purpose of a reform is unrelated to the communicative impact of speech, the effect can be to enhance, rather than to restrict, the interests protected by the First Amendment. "It is quite wrong to assume that the net effect of limits on contributions and expenditures -- which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials -- will be adverse to the interest in informed debate protected by the First Amendment." *Colorado Republican*, 518 U.S. at 649-50 (Stevens, J., dissenting).

Congress comprises the elected representatives of the sovereign People. U.S. Const. art. I. Public opinion surveys consistently show that Americans want meaningful campaign

finance reform.[19] Refusing to accord proper deference to the legislature in this most political of arenas will overprotect against a risk that legislators will subvert the public good, while denying the People's authority to conduct the political process as they see fit.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[19] A 1997 survey found strong consensus for a wide range of finance reform proposals, including limiting "soft money" contributions to political parties (favored by 75 percent of respondents), limiting a candidate's ability to spend personal wealth on a campaign (70 percent), requiring congressional candidates to raise a certain percentage of their campaign funds in their own states (85 percent), and limiting or banning PAC contributions (61 percent). <http://www.crp.org/pubs/survey/s2.htm> (visited Mar. 25, 1999), Princeton survey. Similarly, a 1996 Gallup poll found that 79 percent of respondents favored expenditure limits for congressional candidates. <http://www.publicampaign.org/pollsumm.html> (visited Mar. 25, 1999), *Public Campaign: The Power of Public Opinion*. A variety of polls conducted in 1996 and 1997 also reported that substantial majorities favored various proposals for public financing of federal campaigns. *See id.* (summarizing poll results).