No. 98-963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JEREMIAH W. (JAY) NIXON, Attorney General of Missouri; RICHARD ADAMS, PATRICIA FLOOD, ROBERT GARDNER, DONALD GANN, MICHAEL GREENWELL and ELAINE SPIELBUSCH, members of the Missouri Ethics Commission; and ROBERT P. MCCULLOCH, St. Louis County Prosecuting Attorney,

Petitioners,

—v.—

SHRINK MISSOURI GOVERNMENT PAC and 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 PAUL ALLEN BECK, THAD BEYLE, JANET M. BOX-STEFFENSMEIER, LEON D. EPSTEIN, DONALD P. GREEN, RUTH S. JONES, IRA KATZNELSON, JONATHAN S. KRASNO, DAVID B. MAGLEBY, MICHAEL J. MALBIN, THOMAS E. MANN, BURKE MARSHALL, FRANK J. SORAUF AND RAYMOND E. WOLFINGER IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE

Amici are political scientists, many of whom have experience in, and all of whom are students of, the political process. *Amici* submit this brief *amicus curiae* in support of Petitioners with the consent of the parties.[1] *Amici* have dedicated all or a substantial part of their careers to studying, analyzing and discussing the history of and trends in the political system in the United States. As a result, *amici* have considerable knowledge of campaign financing practices and the effects of various practices on the electoral process. Furthermore, the *amici* are all well informed about the multitude of other factors that also affect campaigns and elections. *Amici* thus have reasoned opinions on the issues in this case and all share an interest in bringing their views before this Court.

In particular, the *amici* are: Paul Allen Beck, Professor, Ohio State University, former Program Chair of the American Political Science Association, whose writings include Party Politics in America (8th ed. 1997); Thad Beyle, Thomas C. Pearsall Professor of Political Science, University of North Carolina at Chapel Hill, former Chairman of the Board of the North Carolina Institute of Political Leadership, whose writings include Governors and Hard Times (1992); Janet M. Box-Steffensmeier, Associate Professor, Ohio State University, whose writings include *A Dynamic Model of Campaign Spending in Congressional Elections*, 6 Pol. Analysis 37 (1997) (co-authored with Tse-Min Lin); Leon D. Epstein, Hilldale Professor of Political Science Emeritus, University of Wisconsin-Madison, former President of the American Political Science Association, whose writings include Polit-

[1] The parties have consented to the submission of this brief. Their letters 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 was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel.

ical Parties in the American Mold (1986); Donald P. Green, Professor of Political Science and Director of the Institution for Social and Policy Studies, Yale University, whose writings include *The Dynamics of Campaign Spending in US House Elections*, 56 J. Pol. 459 (1994) (co-authored with Jonathan S. Krasno and Jonathan A. Cowden); Ruth S. Jones, Professor, Arizona State University, whose writings include *A Decade of U.S. State-Level Campaign Finance Reform, in* Comparative Political Finance Among the Democracies 57 (Herbert E. Alexander & Rei Shiratori eds., 1994); Ira Katznelson, Ruggles Professor of Political Science and History, Columbia University, whose writings include The Politics of Power: A Critical Introduction to American Government (rev. 3d ed. 1987) (co-authored with Mark Kesselman); Jonathan S. Krasno, Senior Policy Analyst, Brennan Center for Justice at New York University School of Law, whose writings include Challengers, Competition, and Re-Election: Comparing Senate and House Elections (1994); David B. Magleby, Distinguished Professor and Chair, Department of Political Science, Brigham Young University, whose writings include The Money Chase: Congressional Campaign Finance and Proposals for Reform (1990) (co-authored with Candice J. Nelson); Michael J. Malbin, Professor of Political Science, State University of New York at Albany, whose writings include The Day After Reform: Sobering Campaign Finance Lessons from the American States (1998) (co-authored with Thomas L. Gais); Thomas E. Mann, Director, The Brookings Institution, whose writings include Campaign Finance Reform: A Sourcebook (1997) (co-edited with A. Corrado, D. Ortiz, T. Potter and Frank J. Sorauf); Burke Marshall, Nicholas D. Katzenbach Professor Emeritus of Law and George Crawford Professorial Lecturer in Law, Yale Law School, and member of the Board of Editors of *Political Science Quarterly*; Frank J. Sorauf, Regents' Professor Emeritus of Political Science, University of Minnesota, former President of the Midwest Political Science Association, whose writings include Inside Campaign Finance: Myths and Realities (1992); and Raymond

E. Wolfinger, Heller Professor of Political Science, University of California, Berkeley, whose writings include The Myth of the Independent Voter (1992) (co-authored with Bruce E. Keith, David B. Magleby, Candice J. Nelson, Elizabeth Orr and Mark C. Westlye).

PRELIMINARY STATEMENT

Rules of ethics are built not only on sanctioning actual impropriety but also on avoiding the appearance of impropriety so as to enhance public confidence in the regulated process or profession. Rules of ethics, and in large part this is what limits on campaign contributions are under *Buckley v. Valeo*, 424 U.S. 1 (1976), are drawn by a judgmental balancing of those conditions that tend to preserve public confidence against those conditions that allow for the proper functioning of the process or profession in question. As professional political scientists, we value both ethical standards and the ability of candidates to function within them.

We argue below that when fixing rules of ethics for candidates for public office and for the electoral process, state legislatures should be granted latitude to strike the balance within a range of reason. Because there is good reason to grant some flexibility to state legislatures when it comes to fixing contribution limits, this Court need not become a Universal Ethics Review Commission.

Next we analyze publicly available data from U.S. Senatorial races, which indicate that Missouri's contribution limits are high enough to allow for robust campaigns, including particularly a robust challenge to an incumbent. Finally, we urge that when reviewing ethical rules for campaign finance, actual practices in the real world of political fundraising must be taken into account and that these practices provide further support for the reasonableness of the limits at issue here.

One key point needs emphasis. This brief should not be taken as reflecting agreement with the specific limits the Mis-

souri Legislature fixed under the statute at issue in this case. Were we testifying before a legislative body, some of us might favor limits that are higher and others of us might favor limits that are lower. What we all agree on is that the Legislature needs to be able to operate within a range of reason and that the Missouri Legislature in this instance fixed limits that fall within that range.

POINT I

THE LEGISLATURE SHOULD HAVE LATITUDE TO FIX CONTRIBUTION LIMITS WITHIN A RANGE OF REASON

We are confident that other briefs filed in this case will provide this Court with a full discussion of the legal analysis to be applied under the First Amendment to contribution limits fixed by a State Legislature. We expect they will urge that the *Buckley* decision did not apply strict scrutiny, did not insist on a narrowly tailored regulation and did not require application of the least restrictive means test in its review of the $1,000 contribution limit at issue there. We are in general agreement with those views, but the purpose of this brief is not to offer a strictly legal analysis.

We rather offer this brief to aid this Court with a statement of the reasons why, in our judgment, State Legislatures should be granted considerable latitude when First Amendment review of contribution limits is undertaken by the judiciary.[2]

[2] Our discussion assumes a system of campaign financing largely dependent on nonpublic financing, including individual contributions. Although the issue is not presented here, this Court should not preclude itself by what it writes here from deciding in a case that does fairly present the issue whether a State Legislature may mandate that campaigns be financed entirely or nearly entirely with public funds and whether under such a regime the financing of campaigns through individual contributions or the candidate's own resources may be prohibited.

That latitude has two parts: latitude in deciding what level of contribution creates an appearance of impropriety and latitude in deciding whether the limit so constrains fundraising as to damage the responsiveness of the electoral process. We discuss each in turn.[3]

A. Latitude with Respect to the Appearance of Impropriety

How big a contribution creates an appearance of impropriety? This is a complex question because the question of the impact of contributions on governmental decision making is itself complex. Many factors influence the conduct of elected officials and their political appointees, and it is extremely difficult to reach general conclusions regarding the threshold at which campaign contributions create a widespread impression of undue influence. There is no doubt, however, that there is a strong populist component to the thinking of a significant part of the populace, and we think a State Legislature should be able if it chooses to take that thinking into account as it strives to increase public confidence in government. The median household income in the United States in 1996 was $35,492, the income of 20.4% of all households fell below $15,000 and the income of an additional 15.4% of all households fell below $25,000. *See* U.S. Bureau of the Census, Statistical Abstract of the United States: 1998, at 468 tbl.738 (118th ed. 1998). Thus for many Americans $500, let alone $1,000, is a lot of money. If someone gave them $1,000 to help them keep their job, or to get a new one, that would be an important event.

The viewpoint of the person receiving the contribution is important too. What will a candidate do to get a contribution of more than $1,000, and how responsive to the contributor's concerns will the candidate feel he or she must be in order to

[3] For the Court's general reference, Appendix B sets forth a bibliography of selected works from the academic literature concerning campaign finance and the electoral process.

expect a like contribution in the next election cycle? Further, we need to keep in mind that it is not merely a $1,000 contribution at issue, but a $1,000 primary election contribution, a $1,000 general election contribution and often contributions in each race from two spouses.[4] It can add up to $4,000 for a single "ask."

Even limiting the analysis to $1,000, and taking account of the complexity of the political process, we have no doubt that many voters believe, and reasonably believe, that a successful candidate will be reluctant not to return the phone call of a person who contributed more than $1,000, particularly if that contributor was personally solicited by the candidate. A typical voter would likely think that a person contributing at some lesser level, or not contributing at all, is more likely to have the call returned by a staff person.

We urge that the likely prevalence and plausibility of the belief that substantial contributions, and certainly those of over $1,000, bring access should be enough to support a legislative judgment that an appearance of impropriety exists. The ability to make an argument directly to an officeholder and to address on the spot the officeholder's concerns need not be outcome determinative to be materially influential. The legislature should have the latitude to conclude that this perception, and indeed reality, of improved access does enough to impair confidence in government that it should be reduced by barring contributions of over $1,000.

Even if the perception and reality of improved access for the over-$1,000 contributor were insufficient to create an appearance of impropriety, the perception and reality of bias in favor of the interests of the over-$1,000 contributor would be sufficient to create such an appearance. Such bias could reasonably be perceived as potentially outcome determinative

[4] We do not mean to suggest that one spouse can be assumed to speak for the other, but rather merely observe that many spouses approach political contributions together in a spirit of partnership.

when deciding whom to appoint or whom to sue or whose organization to favor with a grant or a contract or a favorable regulatory adjudication.

A State Legislature could also reasonably conclude that the bias in making an individual- or institution-specific governmental decision is not the only relevant kind of bias. Another source of bias that arises from contributions of over $1,000 is the policy choice bias in weighing the interests of the class of people who can afford to make contributions of over $1,000 and against the interests of the class of people who cannot afford to contribute even $200. This kind of bias has a potential to influence such issues of key concern to the mass of voters as who benefits from tax reductions, what quality of education will be provided in middle and low income school districts and how the balance will be struck between competitiveness and job security. A State Legislature should have the flexibility, if it chooses, to consider the impact of this kind of bias on public confidence in government.

Not only should a State's political branches be permitted to take the foregoing issues into consideration, but the judiciary should recognize the political branches' greater institutional capacity for determining contribution limits that would reduce public perceptions of impropriety. The Eighth Circuit's decision below, if affirmed, must inevitably lead to close judicial scrutiny of the specific limits set by each State that chooses to adopt campaign finance reform legislation. Yet by what judicial calculus can a court distinguish between the impact on promoting public confidence in government of a $1,000 limit and, for example, a $5,000 limit?

The fact-finding methods available to legislators, both formal and informal, are more appropriate to the task. Legislators have close contact with the very people whose perceptions are at issue, namely constituents and contributors.

B. Latitude with Respect to Impact on Fundraising

How much money is needed to conduct a robust campaign? Again this is a complex question. For a statewide race it depends on the size of the state, the attentiveness of the voters, norms with respect to the availability of so-called "free" or "earned" media, whether one or more media markets straddle state lines and therefore involve media expenditures that are in part wasted on persons not entitled to vote, the extent to which media expenditures are wasted on unregistered voters, whether the vote turns itself out or requires heavy expenditures to get a good turnout of supporters, the norms with respect to negative ads which can be expensive to counteract, the availability of data to target direct mail, the norms with respect to volunteering to work for a campaign without pay, prevailing pay rates for political workers, whether there is a clubhouse structure, norms with respect to the use of phone banks, the role of unions, the role of independent issue advocacy and a number of other factors.

The effort to study this issue is also made more difficult by a chicken and egg problem. Is the campaign won because the candidate has more money or does the candidate have more money because he or she has the appeal to win the campaign?

There is one group of people who have deep personal knowledge of all these factors and of their impact on the cost of a robust campaign within the political jurisdiction in question. That group is the Legislators who make the laws for that jurisdiction and the Governor who signs them. A court could study the issue in depth, and after lengthy hearings and the testimony of competing experts, it could only hope to approach the expertise of the political insiders. Or it could spend an equal amount of time studying the legislative process to assure itself that a "hard look" had been taken at all the various relevant factors when the limits were set. Yet there would be little reason to draw comfort from this approach, since it is nearly impossible to be confident about

what calculus produces a particular legislative conclusion. The variables are countless.

Under either form of heightened judicial scrutiny, the litigation burden on the State to create and present a detailed record in support of a precise dollar figure would be considerable; the prospect alone could chill the enactment of campaign finance reform legislation. This Court might therefore consider whether in-depth judicial study under the adversary system of the costs of political campaigns is necessary to prevent an abridgment of the freedom of speech and political association guaranteed by the First Amendment? We respectfully submit that the answer is no.

First, the assessment of how much it takes to run a robust campaign is not an exact science, and a range of judgment inheres in the very process of analysis. Throughout this brief we have referred to a $1,000 contribution limit and not the $1,075 limit that is actually at issue. That is because it would be misleading to suggest that dollars and tens of dollars are of scientific significance. To the contrary, the impact on fundraising revenue of a particular change in a contribution limit is hard to pin down with any precision. The impact of local political culture on the cost of a campaign is also difficult to quantify with accuracy. These uncertainties suggest the need for a range of reason.

Also, Legislators and Governors have some motivations that work against setting too low a contribution limit. It has often been observed that, among the many advantages enjoyed by incumbents, they are in a better position than are challengers to raise larger contributions.[5] This is because of

[5] In 1998, U.S. Senate incumbents averaged $1,481,861 in large contributions ($750 to $1,000) from individuals, whereas challengers did half as well, averaging $654,667. The pattern was the same in the 1998 U.S. House of Representatives campaigns, with incumbents collecting $123,266 in large donations and challengers collecting $44,053. (Information compiled from downloadable databases prepared by the U.S. Federal Election Commission available at <http://www.fec.gov/finance/finmenu.htm>.)

the perception that they have the power to give a quicker and more certain return to the contributors who invest in them. The fundraising advantage of incumbents means that when an incumbent votes to reduce a contribution limit, he or she is almost certainly voting to give up more large contributions than his or her challengers.

We do not suggest that this circumstance means that no need exists for scrutiny under the First Amendment. Incumbents have many advantages in access to free media, and in other respects, and, if they secure the enactment of a contribution limit so low that it leaves most challengers without viable funding, they may be able to hinder the emergence of effective opposition. Moreover, Legislatures controlled by a single party might strive to reduce the opposing party's ability to raise and spend funds. However, such a strategy may be risky to many incumbents, because if the contribution limit gets low enough, it may open up a grassroots fundraising advantage to the challenger. Another and stronger disincentive to this strategy is the self-financed challenger. Here, the contribution limit cannot under the First Amendment apply to the large amount of personal resources the self-financed candidate may devote to the campaign. *See Buckley v. Valeo*, 424 U.S. 1, 51-54 (1976). Too low a limit will leave the incumbent vulnerable.

When deciding how much latitude to give to a State Legislature, we urge the Court to focus on the minimum amount that a quality challenger needs to mount a campaign that has a chance of success. As we discuss below, a quarter century of experience with a $1,000 contribution limit under the Federal Election Campaign Act ("FECA") shows no ill effect on the success of challengers. It is important, in this regard, to keep in mind that to the extent the contribution limit restricts the supply of money, it does so for both the incumbent and the challenger. Accordingly the minimum amount is an amount needed to get basic exposure and not an amount needed for competitive exposure. A contribution limit that

makes it reasonably foreseeable that a challenger will be unable to raise that amount runs afoul of the First Amendment. Above that minimum, the range of judgment in balancing what is needed to secure public confidence and what is needed to insure the proper functioning of the system should rest with the legislative process.[6]

POINT II

FUNDRAISING DATA FROM U.S. SENATORIAL CAMPAIGNS CONFIRMS THE CONSTITUTIONALITY OF THE MISSOURI STATEWIDE LIMIT

We urge above that a campaign contribution limit runs afoul of the First Amendment when it makes it reasonably foreseeable that a challenger will be unable to raise enough to run a robust campaign. Respondents offered no evidence that Missouri's $1,075 contribution limit runs afoul of this standard and accordingly their challenge should have been rejected out of hand. To the extent this Court considers the position adopted by one member of the panel in the decision below that inflation has gradually transformed a $1,000 contribution limit into an unconstitutional "difference in kind," *see Shrink*

[6] Although we focus in this brief on a $1,000 contribution limit, and specifically Missouri's $1,075 contribution limit for statewide races, the same principles would apply to smaller contribution limits, such as the $525 and $275 contribution limits enacted by Missouri with respect to Missouri's smaller, nonstatewide electoral districts. In smaller races, voters could reasonably believe that candidates may be willing to do more for a smaller contribution because the supply of potential contributors is smaller. The Legislature should have the latitude to take this perception into account when fixing limits to preserve public confidence in the electoral process. Likewise, the Legislature should have the latitude when establishing limits for smaller races to take into account factors, such as a smaller numbers of voters or the existence of fewer media markets, that may reduce the costs necessary to run a robust campaign. Accordingly, if this Court reviews Missouri's lower contribution limits in addition to the $1,075 limit, we would urge the Court to reverse the judgment below in all aspects.

Missouri Government PAC v. Adams, 161 F.3d 519, 523 (8th Cir. 1998) (Bowman, C.J., opinion announcing the judgment of the court), we urge this Court that publicly available fundraising data for U.S. Senatorial campaigns do not support such a view and instead confirm that the risk that a $1,000 contribution limit runs afoul of this standard, even in today's dollars, is remote.[7]

Appendix A sets forth by state the amount raised and spent by each of the major two party candidates in each of the U.S. Senate races in 1998, 1996, 1994 and 1992. A study of these tables shows the following about the ability of a challenger to conduct a robust campaign under a $1,000 contribution limit.

First, challengers for election to the U.S. Senate have been able to raise substantial sums to finance their campaigns. As discussed above, identifying just what amount is necessary to mount a competitive campaign is a complex question, subject to numerous variables that differ from race to race and which by their nature defy precise quantification. But one indication that the $1,000 contribution limit has not prevented challengers from raising sufficient funds to mount competitive campaigns is the fact that many challengers have raised amounts rivaling or exceeding the amounts raised by opposing incumbents.[8] However much more money candidates might deem necessary to run the perfect campaign, the fact that challengers have been able to raise substantial sums on par with incumbents provides some comfort that the $1,000 contribution limit has not placed challengers at a financial disadvantage.

This fact provides further comfort in light of available data showing that some candidates have been able to run winning campaigns despite being outspent by a substantial margin, as for example in 1996 when Joseph (Max) Cleland defeated Guy Millner in an open election for one of Georgia's Senate seats, even though he was outspent by more than 3 to 1 ($9.9 million to $2.9 million). *See* Appendix A, at 14a. As Cleland's campaign illustrates, the minimum amount necessary to run a competitive campaign is not necessarily an amount that equals that raised by the candidate's opponent, but rather may be a lower threshold amount that nonetheless provides a candidate the basic exposure necessary to present a viable challenge.[9] Of course, not all challengers have raised significant

[7] Although we urge that inflation has not rendered challengers unable to compete under FECA's $1,000 contribution limits, many of us do regard the Missouri Legislature's provision for periodic inflation-adjusted increases in the contribution limit at issue here as a much needed improvement over FECA. While many of us favor such provisions as a matter of legislative policy, we urge this Court that the inclusion or omission of automatic inflation-adjustment provisions in campaign finance legislation should not be a matter of constitutional analysis. A contribution limit that is presently necessary to restore public confidence and that permits challengers to run robust campaigns should not be constitutionally suspect based simply on concern that it may not anticipate future developments adequately. A court cannot be certain that the cost of campaigns will increase in accordance with general price inflation (however measured) or that the Legislature will not periodically amend the statute to adjust contribution limits in accordance with the best available information then known about the costs of campaigns or even to what extent candidates may become more or less dependent on individual contributions, depending on the future evolution of campaign finance legislation and fundraising practices.

[8] Examples from the 1998 Senate elections include races in California (challenger Matthew Fong raised $10.8 million compared to incumbent Barbara Boxer's $12.7 million), Georgia (challenger Michael Coles raised $5.2 million compared to incumbent Paul Coverdell's $5.9 million), Nevada (challenger John Ensign raised $3.4 million compared to incumbent Harry Reid's $3.9 million), New York (challenger Charles Schumer raised $16.3 million compared to incumbent Alfonse D'Amato's $17.6 million), Washington (challenger Linda Smith raised $5.1 million compared to incumbent Patty Murray's $5.3 million) and Wisconsin (challenger Mark Neumann raised $4.4 million compared to incumbent Russell Feingold's $4.1 million). *See* Appendix A, at 2a, 4a, 7a-8a, 12a.

[9] Many political scientists have argued that it is more important for challengers to reach a minimum threshold of expenditures than to achieve total parity with the incumbent. *See, e.g.*, Gary C. Jacobson, *The Effects of Campaign Spending in Congressional Elections*, 72 Am. Pol. Sci. Rev. 469 (1978).

amounts of money, but the successful fundraising efforts of so many other challengers suggests that, of the numerous factors that may have led to such inadequate financing, the $1,000 contribution limit was not one of them.

A second indication that the $1,000 contribution limit has not prevented challengers from running robust campaigns is the fact that since FECA was passed, overall campaign spending for congressional elections has outpaced inflation. Total congressional campaign expenditures increased more than six-fold from $99.0 million for the 1975-76 election cycle to $617.1 million[10] for the 1997-98 election cycle, constituting an increase of 523.3%. *See* Frank J. Sorauf, Inside Campaign Finance: Myths and Realities 158 (1992); U.S. Fed. Election Comm'n, *1998 Congressional Financial Activity Declines* (Dec. 29, 1998) <http://www.fec.gov/press/cn3098tx.htm>. By contrast, prices increased by less than threefold, rising 182.1% over the same general period, as measured by the Consumer Price Index (for the period from 1976 to 1997). *See* U.S. Bureau of the Census, *supra*, at 489 tbl.772.

Perhaps most important of all, over more than two decades of experience with the $1,000 federal limits, there is no evidence that incumbents have become more entrenched. While incumbents who run for re-election, particularly for House of Representatives seats, win in a high percentage of races, their success rate before and after passage of FECA has not materially changed.[11] From 1956 to 1974, 81.3% of incumbent

[10] The 1997-98 election cycle expenditures are stated as of November 23, 1998, excluding expenditures in special elections and by candidates who lost in the primaries.

[11] *See generally* Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections to the U.S. House of Representatives, 1952-82*, 31 Am. J. Pol. Sci. 126 (1987). Similarly, although the average margin of victory remains high for incumbents, this pattern was established in the 1960s and has not experienced any appreciable worsening since the enactment of FECA. *See generally* David R. Mayhew, *Congressional Elections: The Case of the Vanishing Marginals*, 6 Polity 295 (1974); Jacobson, *supra*.

U.S. Senators and 91.6% of incumbent U.S. Representatives were re-elected; from 1976 to 1996, 80.7% of incumbent Senators and 93.7% of incumbent Representatives were re-elected. *See* U.S. Bureau of the Census, *supra*, at 289 tbl.468; Norman J. Ornstein et al., Vital Statistics on Congress, 1989-1990, at 56-57 tbls.2-7 to 2-8 (1990).

The available data placed in the record from several statewide races held under Missouri's newly enacted contribution limits, although limited in nature, do not reveal a pattern markedly divergent from the federal experience with $1,000 contribution limits. Of the statewide races for governor, lieutenant governor, secretary of state, attorney general and treasurer, general election campaign expenditures increased in three of the five races and average expenditures per candidate (including primaries) increased in four of the five races in 1996, after the enactment of Missouri's then-existing $1,000 contribution limit, as compared to the amounts spent in 1992, when Missouri had no contribution limits. *See* State Defs.' Suggestions Opp'n Pls.' Mot. Prelim. Inj. and Supp. State Defs.' Mot. Summ. J. Ex. A (Campaign Finance Data from Recent Elections). Although total campaign expenditures (including primaries) decreased in the races for governor, treasurer and attorney general in 1996, those decreases appear likely to be attributable to the fact that all three races featured contested primaries without any incumbents in 1992, whereas the same races featured incumbents and no primaries in 1996. *See id.* The limited number of races constrains the conclusions that can be drawn, but experience under Missouri's statewide contribution limit has not manifested an appreciable impediment to candidates' ability to maintain adequately financed campaigns.

Our discussion of the campaign fundraising experience under the federal $1,000 contribution limit should not be taken as an endorsement of $1,000 contribution limits in particular. As noted above, many of us might favor higher or lower limits were we considering the issue as a matter of

legislative policy. What we do urge is that Legislatures should have latitude when fixing ethical rules governing campaign finance to determine the appropriate contribution limit so long as the limit does not become so low as to make it reasonably foreseeable that a challenger cannot raise sufficient funds to run a robust campaign. We urge this Court that the likelihood that a $1,000 contribution limit runs afoul of this standard appears remote in light of the publicly available fundraising data. Moreover, we are aware of no systemic evidence to the contrary, and Respondents have certainly placed none in the record. Under these circumstances, we urge that the Missouri Legislature's judgment that a $1,075 contribution limit strikes the appropriate balance between the needs of preserving public confidence and ensuring robust campaigns should be respected.

POINT III

CERTAIN PRACTICAL CONSIDERATIONS SUPPORT THE MISSOURI STATEWIDE LIMIT

Ethical rules governing campaign finance that seek to avoid an appearance of impropriety and promote public confidence in government and the electoral process should be effective in real world terms. Therefore they should be evaluated in the context of how fundraising actually works. Three prevalent fundraising practices are particularly worthy of consideration. They are dialing for dollars, the impact of contribution limits on the "giving pyramid," and self-financed candidates.

A. Dialing for Dollars

Dialing for dollars is the practice whereby a candidate directly contacts a potential contributor to get that contributor to pledge a specific amount on the spot. In urban areas, runners are often used to pick up the check immediately

following the call. The practice is widespread[12] but candidates do not enjoy doing it.[13] Some have cited dialing for dollars as a reason not to run for office or not to seek re-election.[14]

Because of the ethical problems with direct solicitation by the candidate, some favor barring direct solicitation of money by candidates for certain offices such as judgeships and dis-

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[12] *See, e.g.*, Ceci Connolly, *Democrats Leading Dash for Cash in Some Key House Contests*, Wash. Post, July 18, 1998, at A6 (quoting the chairman of the Democratic Congressional Campaign Committee as advising candidates that "[y]ou have got to devote an enormous amount of your personal time . . . on the phone and in person asking for money"); Elaine S. Povich & Ellen Yan, *Can Cash Magnet Attract Votes?*, Newsday, July 3, 1998, at A21 (reporting the opinion of a political consultant who had worked on more than 100 campaigns that the "successful candidates are the ones who realize they must bow their heads over the phones for hours each day"); Tim Nickens, *Calling All Contributions*, St. Petersburg Times, June 15, 1998, at 1D (describing a "typical day" for Florida gubernatorial candidate Rick Dantzler during the Democratic primary campaign as "[d]ial for dollars between 9:30 and noon . . . Hit the phones again from 1:30 to 5 p.m. . . . . [and return] to the barren downtown office to make calls from 7:30 to 9 p.m.").

[13] *See, e.g.*, Paul Kane, *Reaction to Lautenberg*, States News Service, Feb. 17, 1999 (quoting U.S. Representative William Pascrell as stating that "You've got to sit down and make calls from a private phone for hours and hours a week . . . It detracts from what you're sent there to do"), *available in* LEXIS, Cmpgn Library, Curnws File; Bill Steigerwald, *Moral Victory: On the Way to His Landslide Loss to Congressman Ron Klink, Mike Turzai Discovered That Even in Politics, Some Things Are More Important Than Winning*, Pittsburgh Post-Gazette, Nov. 8, 1998, Lifestyle, at G1 (reporting that U.S. Representative candidate Mike Turzai spent several hours a day dialing for dollars during his campaign and hated it, stating that "[i]t's the crass part of it . . . but you can't have a winning campaign without it").

[14] *See, e.g.*, Amy Westfeldt, *Lautenberg Won't Seek Fourth Term*, Associated Press, Feb. 18, 1999 (reporting U.S. Senator Frank Lautenberg's explanation that he would not run for re-election because "[t]he compelling factor . . . was the searing reality that I would have had to spend half of every day between now and the next election fund raising"), *available in* LEXIS, Cmpgn Library, Curnws File.

trict attorney. *See, e.g.*, Op. N.Y. City Bar Comm. Professional and Judicial Ethics No. 1994-7 (May 16, 1994) (opining that candidates for Attorney General, District Attorney and similar offices, "like candidates for judicial office, . . . should not personally solicit campaign contributions" but instead "should establish committees to do so and . . . avoid learning the names of the contributors and the amount of their donations"), *available in* LEXIS, Ethics Library, Nycbar File. Also, direct solicitation by an incumbent creates a particularly strong appearance of impropriety. The public can reasonably believe that specific matters pending before the incumbent are discussed during such direct solicitation. Of course the incumbent cannot as a practical matter be barred from direct solicitation without barring his or her adversaries as well.

Lower contribution limits sharply constrain the ethical objection to dialing for dollars. Because the favor being asked is limited, the favor that can be asked in return is also limited. The public can reasonably conclude that the conversation that surrounds a modest request differs not just in degree but in order of magnitude from the conversation that accompanies a large request, even a request for $1,000.

Nor is there reason to believe that a $1,000 limit eliminates a candidate's ability to raise enough money to conduct a robust campaign. Some have argued that as the contribution limit is lowered the candidate has to call so many more people that dialing for dollars becomes an impossible burden. This is not the case for several reasons.

First, the lowered "production" from dialing for dollars affects all the candidates in the race. Time spent on this activity is influenced by what is required to be competitive and if the rules are the same for everyone there is no *a priori* reason to believe that the amount of time spent on this activity will increase if, for example, the limit is $1,000 as opposed to $2,000.

Second, anecdotal evidence suggests that when contribution limits are lowered candidates will shift from calling to ask for a specific contribution pledge to calling to ask for a commitment to raise a specific amount from other donors. For example in Florida, where the contribution limit is $500, the St. Petersburg Times recently quoted the executive director of the Florida Democratic party as saying "It's calling and saying, 'I need you to raise $ 10,000 for me,' not that you call everyone who is contributing the $10,000." Tim Nickens, *Calling all Contributions*, St. Petersburg Times, June 15, 1998, at 1D.

Of course it is fair to ask whether this shift benefits public confidence in government. The answer is that it does. Surrogates in direct conversation with contributors are not in a position to make a deal to anywhere near the extent that the candidate is. And as for contact between the candidate and the fundraiser, gratitude for fundraising effort in the context of low contribution limits is less likely to impair public confidence in government than is gratitude for the large gift that the fundraiser could have given directly. To the contrary, fundraising effort, like other volunteer work, is an important form of civic participation to be encouraged.

B. The Giving Pyramid

The giving pyramid is a pictoralization of the principle that as the amount of the contribution goes up the number of contributors giving that amount goes down. A chart of the number of contributors at various giving levels will look like a pyramid with the relatively few largest contributors at the top and a broader base of smaller contributors on the bottom.

The effect of a contribution limit is to cut off the top of the pyramid so that it looks like the truncated pyramid on the back of a one dollar bill. The contributors who were at the top of the pyramid, however, do not all disappear. Some drop out because the contribution is now a waste of time from the

point of view of buying influence, but those who were contributing because of true support should remain. The number of the contributors making the maximum, permissible contribution therefore increases as those who would have given more reduce their contributions to the statutory limit.

Consider, for example, the impact of reducing a $2,000 contribution limit to $1,000. At this level it is reasonable to assume that few of the $2,000 contributors will drop out. Even the influence seekers will give $1,000 because this number is high enough to provoke clear gratitude on the part of the candidate. Because of the giving pyramid, the number of these former $1,001 to $2,000 contributors who are now contributing $1,000 (i.e., those who were at the top of the pyramid) is almost certainly fewer than the number who under the old $2,000 limit were contributing at the $1,000 level or below (i.e., those who were at the base of the pyramid). For this reason, a halving of the contribution limit results in nowhere near a halving of the revenue. To the contrary, as a matter of mathematics, and assuming no drop outs, the loss of revenue is equal to the number of contributions between $1,000 and $2,000 under the old limit multiplied by an amount equal to the average amount of such contributions minus $1,000. For example, a campaign which under a $2,000 contribution limit raised a total of $3.4 million, one half of which came from contributions in excess of $1,000 and where the average amount of these excess contributions was $1,700, the loss of revenue from the reduction of the contribution limit to $1,000 is $700,000 or 21%. If the base is broader such that one-third of the revenue comes from contributions in excess of $1,000, the loss of revenue is $466,667 or 14%.

This analysis is not empirical and is therefore only suggestive of sensitivity to the amount raised at levels between the old and new contribution limits. However, we do know that in the most recent Senate races approximately one-third of all contributions were under $500 and in House races approximately 44% of all contributions were under $500. *See*

Research and Policy Comm., Committee for Econ. Dev., Investing in the People's Business: A Business Proposal for Campaign Finance Reform 14 (1999). It is thus highly possible that in a $2,000 limit regime, more than a majority of the contributions would be in the amount of $1,000 or below. It is also worth noting that in the race at issue here only 2 percent of the campaign contributions would have been affected had the $1,075 limit not been enjoined.

Further since it is no longer necessary to spend effort upgrading $1,000 contributors to $1,500 or $2,000 contributors, that time can now be devoted either to finding new contributors or to upgrading contributors below $1,000. Thus without any increase in effort, the revenue loss is mitigated so that it falls below the numbers and percentages just mentioned.

Also a reduction in the contribution limit may well encourage campaigns to spend more effort increasing the number of contributions lower down in the giving pyramid. This promotes the State's interest in reducing the appearance of impropriety. A campaign which relies more heavily on $500 or $250 contributions is less likely to be perceived as having been bought by the "monied interests."

It is thus apparent that the calibration of specific contribution limits is a complex process. The effect on a candidate's total revenue of even a 100% difference in contribution limits is difficult to assess, and depends on the structure of the candidate's giving pyramid, the candidate's change in fundraising tactics in response to the contribution limit, and numerous other factors. Any decrease in revenue, moreover, does not translate directly into proportionally decreased chances for electoral victory. All other candidates must operate under the same constraints, and in any event, there is no evidence of a linear relationship between total contributions and chances of success.

None of these considerations was taken into account by the court below. The danger of that court's approach is apparent. The Legislature, consulting the opinion, would have no guidance as to what limits would be held permissible. If Missouri nonetheless raised the limit to attempt to comply with the court's analysis, the Eighth Circuit would have no way of knowing whether the change made a substantial difference, let alone one that overcame the constitutional deficiencies it perceived in the $1,075 limit. Ultimately, there would be no principled way to divide constitutional limits from unconstitutional ones. In each case, the court would apply a seat-of-the-pants or "common sense" guess as to the effect of a specific limit. For the foregoing reasons, common sense is likely to overstate the effect of any limit. An accurate calculus requires a far more complex analysis than that employed by the court below. It is therefore prudential that the judiciary confine itself to decide whether the limit falls below a floor that is necessary to allow a challenger to run a robust race.[15]

C. The Self-Financed Candidate

Self-financed candidates are an important part of the political landscape.[16] As noted above, the incumbent's fear of a self-financed challenger is one reason this Court can have

[15] It is only when contribution limits are so extreme as to hinder the emergence of effective challengers, or to disadvantage political minorities, that the judiciary ought to interfere; otherwise, adjustments to or outright repeal of campaign finance regulation should be left to the political process. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

[16] *See, e.g.*, Ceci Connolly, *Huge Money Chase Marks 2000 Race; Some in GOP May Forgo Federal Funds*, Wash. Post, Feb. 28, 1999, at A1 (reporting that Texas Governor George W. Bush may forgo federal funding and its accompanying spending limits in the 2000 presidential campaign in order to compete with self-financed candidate Malcolm S. Forbes, who spent $32 million of his own money in the 1996 presidential campaign).

confidence that State Legislatures will not fix excessively low contribution limits. However, since the ability of a candidate to compete against a self-financed candidate should be a part of the overall First Amendment analysis, we consider it briefly here.

We urge that so long as the reduced contribution limit allows the candidate with plausible voter appeal to raise enough for a robust campaign, the self-financed candidate should not be used as a bogey man to strike down a contribution limit fixed by a State Legislature. First, as we have shown, the drop in fundraising revenue is not proportional to the drop in the contribution limit and can be mitigated both through freed up effort and new effort. Second, self-financed candidates often have access to such awesome resources that the financial advantage due to wealth overwhelms any increase in that advantage due to the reduction in the contribution limit. Finally, if a candidate has enough money to get out the message, opposition by a self-financed candidate can be a potent ground for an appeal to contribute, to increase contributions or to devote time as a volunteer to soliciting contributions within the limit.

CONCLUSION

For the foregoing reasons and for the reasons advanced in the Petitioners' brief herein, it is respectfully submitted that the question presented in the Petition should be answered in the affirmative, or in the event that this Court reviews all aspects of the judgment below, that the judgment should be reversed and judgment entered in favor of Petitioners granting Summary Judgment herein.

Respectfully submitted,

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APPENDICES