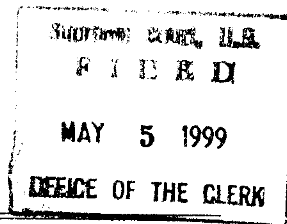

No. 98-963

In The

Supreme Court of the United States

JEREMIAH W. NIXON,
Missouri Attorney General,

Petitioner,

vs.

SHRINK MISSOURI GOVERNMENT PAC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF U.S. TERM LIMITS, INC. AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

STEPHEN J. SAFRANEK
Counsel of Record
1401 Vermont
Detroit, Michigan 48216
(313) 822-8559

Legal Counsel for Amicus Curiae
U.S. Term Limits, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the State of Missouri may, without a rational basis, constitutionally impose inflexible contribution limits for candidates for various state offices without violating the First Amendment of the United States Constitution?

MOTION FOR LEAVE TO FILE AMICUS BRIEF

U.S. Term Limits, Inc. seeks leave of this Honorable Court to file an Amicus Curiae Brief in support of the Respondent, Shrink Missouri Government PAC, in the above-referenced matter.

U.S. Term Limits, Inc. is a national, non-profit organization that is an advocate of competitive elections. U.S. Term Limits has promoted and assisted in having term limits enacted for various state elected officials across the country. In light of its participation throughout the United States regarding term limit legislation, U. S. Term Limits believes it can provide this Honorable Court with a broad view regarding how campaign finance regulation only heightens the advantages that incumbent candidates, self-financed, and/or well-known and recognized candidates possess, thereby seriously impeding U.S. Term Limits' interest in achieving and maintaining competitive elections.

Consent of the parties to this action was not sought by Amicus Curiae.

Respectfully submitted:

STEPHEN J. SAFRANEK
1401 Vermont
Detroit, MI 48216
(313) 822-8559

Legal Counsel for Amicus Curiae U.S. Term Limits, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE U.S. TERM LIMITS, INC	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. Introduction	6
II. Regulating Campaign Contributions and Expenditures Will Not Level the Playing Field	11
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES:

Abrams v. United States, 250 U.S. 616 (1919) 10

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990) 20

Buckley v. American Constitutional Law Foundation, 119 S.Ct. 636 (1999) 8

Buckley v. Valeo, 424 U.S. 1 (1976)(per curiam) 5, 7, 8, 9, 13, 18

Bullock v. Carter, 405 U.S. 134 (1972) 13

Clements v. Fashing, 457 U.S. 957 (1982) 15, 16

Consolidated Edison Company of New York, Inc. v. Public Service Comm'n of New York, 447 U.S. 530 (1980) 10

Hustler Magazine Inc. v. Falwell, 485 U.S. 46 (1988) 10

Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied sub nom.* City of Cincinnati v. Kruse, 119 S.Ct. 511 (1998) 5

McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) 8

Meyer v. Grant, 486 U.S. 414 (1988) 6

Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246 (E.D.Mo. 1995), *aff'd*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 2579 (1996) 5

Thornhill v. Alabama, 310 U.S. 88 (1940) 7

U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) 14

William v. Rhodes, 393 U.S. 23 (1968) 11

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I 5, 6, 7, 11

STATUTES:

Mo. Ann. St. § 130.032 (West Supp. 1998) 18

GOVERNMENT DOCUMENTS:

Campaign Finance Reform and Free Speech, 1997, 105th Congress, 1st Sess., *microformed on* CIS No. H521-57 (Congressional Info. Serv.). . . .5, 12, 17, 18, 19

136 CONG. REC. S2689 (daily ed. March 9, 1990). 6

136 CONG. REC. S4644 (daily ed. April 19, 1990). 2

139 CONG. REC. H10667 (daily ed. Nov. 22, 1993) . . . 3, 6, 11

OTHER AUTHORITIES:

Vincent Blasi, *Free Speech and the Widening Gyre of Fund-raising: Why Campaign Spending Limits may not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994) .18, 25

James A. Duffy, *Special Interests Pour Money into Incumbents' Campaigns*, SEATTLE TIMES, Tues., October 20, 1998, <http://www.seattletimes.com/news/nation-world/html98/altfund 102098.html>. 23

Janet Hook, *DECISION '98 Big Spenders Can Be Losers in Campaigns Despite Wealth, Checchi, Harman, Issa and others Come Up Short in Political Wars*, LOS ANGELES TIMES, June 5, 1998, at A1, *available in* 1998 WL 243220 9

TABLE OF AUTHORITIES – Continued

Page

Money isn't Everything, SAVANNAH MORNING NEWS ELECTRONIC EDITION, Top Stories Opinion, June 5, 1998, <http://www.savannahmorningnews.com/stories.060598/opioedtwo.html> 23

Perspective, CHI. TRIB., April 2, 1993, at 22, *available in* LEXIS, News Library, Mags, Majpap, Papers File 21

Molly Peterson, Note, *Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L.Q. 421 (1998) 3, 11

Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049 (1996) .... *passim*

Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311 (1998) 19

Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997) .. 3, 11, 19

Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994) 20

Philip J. Trounstine, *Experience worth more than cash this time around*, SAN JOSE MERCURY NEWS, (June 3, 1998),<http://www.mercurycenter.com/local/center/lesson060498.htm> 9

Samuel M. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-financed Candidates*, 27 HOFSTRA L. REV. 181 (1998) 3

TABLE OF AUTHORITIES – Continued

Page

Facts and Figures of the 106th Congress, WASH. POST, Nov. 5, 1998, at A39, <http://www.washingtonpost.com/wp-srv/poli...paigns/keyraces98/stories/facts110598.htm> 2, 22

Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994) .... *passim*

Julia C. Wommack, Comment, *Congressional Reform: Can Term Limits Close the Door on Political Careerism*, 24 ST. MARY'S L.J. 1361 (1993) 1

BRIEF OF U.S. TERM LIMITS, INC. AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE

U.S. Term Limits, Inc. is a national, non-profit organization located in Washington D.C.[1] It is interested in competitive elections. Recognizing the power that incumbency has over the outcome of state and federal elections, U.S. Term Limits has been dedicated to promoting and enacting term limit legislation across the country. It has successfully assisted numerous grassroots organizations throughout the United States in enacting term limits for various state elected public officials, including governors and state legislators.

U.S. Term Limits has an interest in seeing that both state and federal elections become and remain competitive.[2] Currently, the advantages that incumbent candidates for state and federal public office have simply by virtue of being the incumbents seriously impede this effort. In short, so called "campaign finance reform" allows the incumbents to determine what is fair to the people who may challenge their incumbency. However, with the huge power of incumbency – to promote legislation favorable to groups, to help constituents through the labyrinth of problems created by government, to garner favorable news coverage for introducing the bill of the day – most elections are over even before they are begun.

The results of last November's elections demonstrate the effect that "incumbency" has on elections. The "privileges of membership," as the Washington Post referred to incumbency,

---

[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in part or in whole, this Amicus Curiae Brief. Furthermore, no other entity or person, aside from Amicus Curiae, made any monetary contribution for the preparation and submission of this brief to this Honorable Court.

[2] Julia C. Wommack, Comment, *Congressional Reform: Can Term Limitations Close the Door on Political Careerism?*, 24 St. Mary's L.J. 1361, 1383 (1993) ("Term limitations are designed to restore competitiveness to the election process.").

allowed 93% of the incumbents to win re-election in the United States Senate and 98% of the incumbents to win in the United States House of Representatives.[3] In an editorial in the Wall Street Journal, the paper wrote,

> The root of the problem with Congress is that barring major scandal, it is almost impossible to defeat an incumbent. In the past three elections, 96% or more of House incumbents who ran won. Franking privileges, huge staffs, gerrymandering and unfair campaign finance laws have combined to give incumbents a grossly unfair advantage. One out of four House districts this year likely will have an incumbent running with no major-party opposition-up from one out of five in 1988. One-candidate races are now spreading to the Senate.[4]

If this Court reverses the Eighth Circuit Court of Appeals' decision in this case and upholds Missouri's limits, incumbents' advantages will be magnified. Campaign contribution limits serve incumbency. Indeed, any regulation or rule regarding campaign finance will serve a specific type of candidate and will predetermine the type of candidate who gets elected.

Every word written by this Honorable Court will be considered closely by the States to see what measures regarding campaign finance they may enact. The power of the states to enact legislation in the name of "campaign finance reform" significantly threatens the possibility of having competitive elections. U.S. Term Limits, Inc. seeks to protect against this threat.

---

[3] *Facts and Figures of the 106th Congress*, WASH. POST, Nov. 5, 1998, at A39 <http://www.washingtonpost.com/wp-srv/poli . . . paigns/keyraces98/stories/facts110598.htm>.

[4] 136 CONG. REC. S4644 (daily ed. April 19, 1990) (statement of Senator Humphrey urging his fellow Senators to endorse congressional term limits, incorporating the Wall Street Journal Editorial from April 18, 1990).

SUMMARY OF ARGUMENT

It is undeniable that campaign finance reform has captivated both Capital Hill and state legislatures. Not only the United States Congress, but state legislatures across the country have dealt with and are dealing with the perceived problems associated with campaign financing and corruption in federal and state elections by enacting or amending their campaign finance reform legislation.[5]

One of the primary rationales offered in support of campaign finance reform is that it is necessary to "level the playing field."[6] Campaign finance reformers and their supporters argue that our democratic system of representation has

---

[5] *But see* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1056 (1996) ("The belief that modern campaigns have been corrupted by big money in some unprecedented manner simply does not square with historical fact.").

[6] *See* 139 CONG. REC. H10667 (daily ed. Nov. 22, 1993) (statement of Rep. Barrett of Nebraska) ("I take exception to the claim that 'leveling the playing field' among candidates will occur with the bill."). *See also* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685-86 (1997) (" . . . , a last argument would locate the key problem in current campaign finance practices in the advantage it confers on incumbents over challengers. Here the claim is that a healthy democracy depends on robust political competition and that campaign finance limits are needed to 'level the playing field.' "); Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1127 (1994) ("The present campaign finance system also has played a central role in shaping an electoral landscape that is grossly unfair to challengers."); Samuel M. Walker, Note, *Campaign Finance Reform in the 105th Congress: The Failure to Address Self-financed Candidates*, 27 HOFSTRA L. REV. 181, 187 (1998) (" '[b]y passing a [bipartisan] bill that limits the effect of money in politics and levels the playing field between the challenger and incumbent, we can change the face of politics today.' ") (quoting Senator McCain from a press release on January 21, 1997); and Molly Peterson, Note, *Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?*, 25 HASTINGS CONST. L.Q. 421, 445 (1998) ("Equality of opportunity to influence the political process, sometimes

been undermined by the increasingly higher amounts of money being contributed to and spent by our elected representatives. Given the current campaign finance system and the lack of competition in political races caused by that system, supporters of campaign finance reform claim that there is an "absence of accountability for elected officials that is a fundamental problem for our political system today."[7]

While this may be the perception of many state and federal legislators, allowing the State of Missouri or any state legislature to impose contribution limits or any other campaign finance restrictions will do nothing to solve the problem. It is impossible to think that incumbents will level the playing field between them and challengers. For instance, no legislature has voted to spend taxpayer dollars to raise the name recognition of a challenger to that of an incumbent at the beginning of an election to ensure a "level playing field." The necessary consequence of any campaign finance regulation is that this Court, other courts, Congress, and the state legislatures will predetermine what type of candidate will get elected. In general, campaign finance has merely helped incumbents stay in office. Any rule governing campaign finance necessarily gives a preference to certain particular candidates who decide to run for political office. For example, contribution limits favor those candidates running for political office who may be incumbents, wealthy individuals, or well-known/recognized individuals, and who already have a large pool of supporters from whom to accept contributions ("star" candidates). Because contributions are limited, it takes a large pool of contributors to amass the needed funds to run a campaign. For those individuals who are interested in running for political office but who may be unknown or without personal wealth, acquiring the necessary funds from a large

---

characterized as 'leveling,' should be recognized as a constitutionally compelling governmental interest.").

[7] Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy,* 94 COLUM. L. REV. 1126, 1126-27 (1994).

enough pool of contributors may prove insurmountable. Therefore, by imposing contribution limits, this Court, Congress, and the state legislatures have already predetermined the type of candidate who gets elected.

Such finance restrictions are all the more problematic because such restrictions limit the political speech of citizens who may choose to run for state elected office. Some proponents of campaign finance reform are even advocating the imposition of spending limits, despite the fact that this Court struck down spending limits in *Buckley v. Valeo*[8] as unconstitutional under the First Amendment of the United States Constitution.[9] Elections need fewer, not more governmental restrictions.

---

[8] 424 U.S. 1, 58-59 (1976) (per curiam) ("These provisions place substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate.").

[9] *See* Campaign Finance Reform and Free Speech, 1997, 105th Congress, 1st Sess., *microformed on* CIS No. H521-57 (Congressional Info. Serv.) at 33 (Hearing before the House Judiciary Subcomm. on the Constitution) (statement by Representative Gephardt) ("I further believe that the dominance of money in politics debases the currency and destroys public confidence, and I believe that the only way to reduce the time spent on raising money and the dominance of special interests is to limit the amount of money that campaigns can spend. This is not a new idea."). *See also* Kruse v. City of Cincinnati, 142 F.3d 907 (6th Cir. 1998), *cert. denied sub nom.* City of Cincinnati v. Kruse, 119 S.Ct. 511 (1998) (Sixth Circuit Court of Appeals striking down the City of Cincinnati's ordinance imposing spending limits on city council candidates); Shrink Missouri Government PAC v. Maupin, 892 F.Supp. 1246 (E.D.Mo. 1995), *aff'd,* 71 F.3d 1422 (8th Cir. 1995), *cert. denied,* 116 S.Ct. 2579 (1996) (Eighth Circuit Court of Appeals struck down Missouri's expenditure limits for political candidates). *But see* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. 1049, 1059, 1060 (1996) who argues that spending less on campaigns may actually decrease the general public's awareness of and understanding of the issues. Bradley states, " . . . , there is actually good cause to believe that we do not spend *enough* on campaigns."

U.S. Term Limits' Amicus Brief presents this Court with a legal and public policy perspective regarding the implications of a legal decision regarding the constitutionality of campaign finance reform. This Amicus Brief will show that any campaign finance regulation has the undeniable effect of limiting that very speech that this Court has ruled is at the "zenith" of First Amendment protection.[10] Campaign finance regulations limit speech to those candidates who are incumbents, who are self-financed, or who are successful at fundraising from a $1,000.00 donor.

Limits on the amount of contributions favors incumbents. Incumbent candidates enjoy natural advantages in fundraising simply by virtue of being the incumbent.[11] Challengers must counter these advantages. Simply enacting campaign finance reform will not level the playing field, and it will not result in more fair and competitive elections.

ARGUMENT

THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION WEIGHS AGAINST THE ENACTMENT AND ENFORCEMENT OF REGULATIONS GOVERNING CAMPAIGN FINANCE.

I. Introduction

In the First Amendment of the United States Constitution, our Founding Fathers provided, in part, that "Congress shall make no law . . . abridging the freedom of speech . . . "

[10] Meyer v. Grant, 486 U.S. 414, 425 (1988).

[11] Other advantages that incumbent candidates enjoy include "name recognition, publicly paid staff, constituent services, free mailing privileges, and media access." *See* 139 Cong. Rec. H10667 (daily ed. Nov. 22, 1993) (information included in the record during Rep. Livingston's comments). *See also* 136 Cong. Rec. S2689 (daily ed. March 9, 1990) (statement of Sen. Dole) ("Incumbents already enjoy a number of tangible benefits not available to challengers – paid professional staff, the franking privilege, access to free media coverage – and they do not need yet another weapon in their arsenal against challengers.").

The protection afforded by the First Amendment restricts the States from unnecessarily inhibiting individuals' free speech. In *Thornhill v. Alabama*, this Court stated, "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State."[12]

The speech involved in this case is undeniably political speech. Persons running for public office in state and federal elections and their supporters and opponents are engaging in political speech. Indeed, this Court stated in *Buckley v. Valeo* that "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."[13] Furthermore, this Court recognized that the "First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[14] Moreover, this Court determined that the First Amendment guarantee " 'has its fullest and most urgent application precisely to the conduct of campaigns for political office.' "[15] Advocates of campaign finance reform circumvent this Court's precedent regarding the status of political speech in the United States by alleging corruption or at least the appearance of corruption. Appearance of corruption is a popular canard. It is an allegation impossible to prove or disprove. Virtually no proof has ever been advanced by any legislative body showing corruption before "campaign finance reform." Certainly, no proof was made of the corruption eliminated by campaign finance. In short, no evidence justifies restrictions on speech that has a history of being protected under the most

[12] 310 U.S. 88, 95 (1940).

[13] Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam).

[14] *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

[15] *Id.* at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

exacting scrutiny.[16] Proponents of campaign finance reform also argue that such reform is necessary in order to "level the playing field." That argument, however, was rejected by this Court in *Buckley v. Valeo*.

While the primary governmental interest offered in support of the Federal Election Campaign Act was prevention of corruption or the appearance of corruption, another "ancillary" interest offered in support of the expenditure limitations was that such limits would "equal[ize] the relative financial resources of candidates competing for elective office, . . . "[17] This Court responded, however, by stating that "That interest is clearly not sufficient to justify the provision's infringement of fundamental First Amendment rights."[18] Indeed, this Court stated that " . . . [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, . . . "[19] This Court recognized that limitations on a candidate's expenditures may not necessarily equalize the financial resources available to competing candidates. It pointed out that just because a candidate may spend less of his/her own money on their campaign, that candidate

[16] *Id.* at 44-45 (" . . . whether the governmental interests advanced in its support satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."). *See also* Buckley v. American Constitutional Law Foundation, ___ U.S. ___, 119 S.Ct. 636, 649 (1999) (Thomas, J., concurring) ("When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling governmental interest.") (cites omitted)); and McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

[17] Buckley v. Valeo, 424 U.S. at 53, 54.

[18] *Id.* at 54.

[19] *Id.* at 48-49.

may still outspend any challenger through better fundraising.[20] Or, as this Court acknowledged, a candidate's own personal wealth may inhibit his/her attempts to attract contributions or volunteers in order to have an effective campaign.[21]

As these statements in this Court's decision in *Buckley v. Valeo* demonstrate, campaign financial restrictions necessarily act to the detriment of particular classes of candidates, and they determine the type of candidate who gets elected. Such rules should be strictly scrutinized by this Court.

Any attempts to regulate campaign finance reform unnecessarily inhibit the freedom of speech protected by the First Amendment and upheld by this Court. Moreover, any campaign finance regulations act to the detriment of the persons for whom reformers are supposedly advocating – the challengers and voters. Whether a state or federal government imposes expenditure and/or contribution limits, these restrictions violate an individual's political speech, speech that is at the core of the First Amendment.

[20] *Id.*

[21] *Id.* Examples of how a candidate's personal wealth can work to his/her detriment include Ross Perot, Michael Huffington, Al Checchi, and Jane Harman, a representative from California. Checchi and Harman were both candidates for California's governorship in this past June's primary election, and both spent a considerable amount of their own personal money to run their campaign bids. However, both candidates lost. Checchi spent $40 million dollars and Harman spent $16 million dollars. *See* Philip J. Trounstine, *Experience worth more than cash this time around*, San Jose Mercury News, (June 3, 1998), <http://www.mercurycenter.com/local/center/lesson060498.htm>. *See also* Janet Hook, *DECISION '98 Big Spenders Can Be Losers in Campaigns Despite Wealth, Checchi, Harman, Issa and others Come Up Short in Political Wars*, Los Angeles Times, June 5, 1998, at A1, *available in* 1998 WL 243220. ("To be sure, vast personal wealth can give a candidate a leg up on little-known challengers who lack the fund-raising clout of incumbents, analysts said. But ready cash is not necessarily enough to get them across the finish line. And in some cases, voter backlash can turn a candidate's personal assets into a political liability.").

Any suggestion that government can inhibit such speech without providing real evidence or proof to suggest that restrictions are necessary and are the least restrictive means to such ends clearly violates this Country's and this Court's tradition of promoting a free marketplace of ideas with which to unveil truths. In *Abrams v. United States,*[22] Justice Holmes, in his dissenting opinion, established a metaphor which has dominated this Court's jurisprudence ever since. Justice Holmes stated,

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.[23]

[22] 250 U.S. 616 (1919).

[23] *Id.* at 630 (Holmes, J., dissenting). *See also* Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50-51 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. '[T]he freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole.' ") (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 503-504 (1984)); Consolidated Edison Company of New York, Inc. v. Public Service Comm'n of New York, 447 U.S. 530, 534 (1980) ("Freedom of speech is 'indispensable to the discovery and spread of political truth,' (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), and 'the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ' (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The First and Fourteenth Amendments remove 'governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . ' " (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

More recently, this Court explained that "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."[24] Yet, in the campaigns that will determine who will govern, such competition is stifled. It is stifled first by the sheer power of incumbency and then destroyed by so called "campaign finance."

II. Regulating Campaign Contributions and Expenditures Will NOT Level the Playing Field.

Advocates of campaign finance reform offer, as one reason for such reform, that regulation of campaign finance is necessary to create a level playing field on which candidates may compete equally for elected office.[25] Yet, campaign finance reforms have the opposite effect. Such reforms actually serve to predetermine who will get elected, and they further magnify the advantages that incumbent candidates possess regardless of their political abilities.

[24] William v. Rhodes, 393 U.S. 23, 32 (1968).

[25] *See e.g.*, 139 CONG. REC. H10667 (daily ed. Nov. 22, 1993) (statement of Rep. Livingston incorporating information that was made a part of the record) ("The fundamental goal is to level the financial playing field so that challengers are able to mount serious campaigns against incumbents who, an individual's political record aside, enjoy the considerable current advantages of incumbency."); Kathleen M. Sullivan, *Political Money and Freedom of Speech,* 30 U.C. DAVIS L. REV. 663, 685-86 (1997) ("Here the claim is that a healthy democracy depends on robust political competition and that campaign finance limits are needed to 'level the playing field.' The reformers contend that unfettered political money confers an anticompetitive advantage upon incumbents."); and Molly Peterson, Note, *Reexamining Compelling Interests and Radical State Campaign Finance Reforms: So Goes the Nation?,* 25 HASTINGS CONST. L.Q. 421, 445 (1998) ("Equality of opportunity to influence the political process, sometimes characterized as 'leveling,' should be recognized as a constitutionally compelling governmental interest.").

Another justification for such reform, and the one offered by the Petitioner in this case, is that such reform is essential to combating corruption and the appearance of corruption. Yet, campaign finance regulations have virtually no effect on "leveling" the playing field in which candidates compete or eliminating corruption or the appearance of corruption in the political process. Such legislation has the inevitable consequence of harming citizen debate. The campaign finance legislation that is currently being enforced by both Federal and State governments has failed in its attempts to achieve the primary stated purposes of campaign finance reform.

Any reform first inures to the benefit of incumbents who are well connected with lobbyists and other special interests. In addition, the finance reforms that this Court has upheld also benefit self-financed candidates or "famous" individuals who decide to run for office and can rely on their name recognition or personal wealth to accumulate the necessary contributions to run a campaign.

Limiting the size of contributions does not limit the power of incumbency. While most of the calls for campaign finance reform involve reform in the federal system of elections, the arguments made by proponents and opponents of campaign finance reform are equally applicable to state elections, just on a smaller scale.

On February 27, 1997, the United States House of Representative's Subcommittee on the Constitution, Committee on the Judiciary, met and held hearings on free speech and campaign finance reform. Chairman of the Subcommittee, Representative Canady, explained that the purpose of this hearing was "to present testimony regarding the relevant framework of constitutional law which is now in place."[26] One of the individuals testifying was Ira Glasser, the Executive Director of the American Civil Liberties Union. His

[26] *See Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., *microformed on* CIS No. H521-57 (Congressional Info. Serv.) at 1(Hearing Before the House Judiciary Subcommittee on the Constitution).

statements clearly demonstrate the fallacy behind the purposes sought to be served by campaign finance laws that restrict individuals' free speech, including the campaign contributions which Petitioners seek to impose in Missouri.

Mr. Glasser explained that by upholding contribution limits while striking down expenditure limits, a wealthy candidate like Ross Perot could spend whatever amount he wanted on his candidacy. Yet, if another wealthy individual wanted to support Perot's opponent, under the campaign finance laws, that individual could not. Thus, "Perot is able to spend whatever he wants to run for office but if an equally wealthy donor wants to enable Colin Powell to run against Perot, he commits a crime."[27] Similarly, under this Court's decision in *Buckley v. Valeo,* Perot may spend whatever amount of his own money he wants to if he is running for office. Yet, Perot is prohibited from using that same amount of money to support another well-qualified candidate's campaign.

Contribution limits seriously impair a challenger's ability to have a successful campaign.[28] As the few simple examples above suggest, campaign finance regulations necessarily predetermine the type of individuals who will be able to run for office and eventually get elected. This consequence of campaign finance regulations must be closely scrutinized by this Court in order to avoid condoning preferential treatment for candidates who are incumbents or who are independently wealthy, and who are therefore capable of financing their own campaign.[29]

[27] *See id.* at 51 (statement of Ira Glasser).

[28] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. 1049, 1073 (1996).

[29] In Bullock v. Carter, 405 U.S. 134 (1972), this Court determined the constitutionality of a Texas statute that required a candidate to pay a filing fee before being allowed to participate in the state's primary election. *Id.* at 137. The issue was whether this unconstitutionally discriminated against the candidates who could not pay and the voters who supported

In *U.S. Term Limits, Inc. v. Thornton,*[30] this Court considered the constitutionality of an amendment to Arkansas' Constitution that precluded candidates who had served a particular amount of time in either the United States House or Senate from running again for that same office. This Court upheld the Arkansas Supreme Court's decision finding the term limit amendment to be unconstitutional under the Qualifications Clause of the United States Constitution.[31] This Court held that "**a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates** and has the sole purpose of creating additional qualifications indirectly."[32] (emphasis added). While Amicus Curiae does not argue here that these campaign finance regulations should be challenged under the Qualifications Clauses of the United States Constitution,[33] Amicus Curiae thinks it is self-evident that campaign finance regulations undeniably have the effect of "handicapping" classes of candidates who are not incumbents, who are not personally wealthy, or who may lack name recognition.

Although candidacy is not a fundamental right, this Court acknowledged that its ballot access cases focus on the degree

---

them. *Id.* at 141. This Court applied strict scrutiny to invalidate the filing fee requirement noting that the members of the less affluent segment of society whose candidates were unable to pay the filing fee would bear more of the burden of this requirement. This Court stated, " . . . , it tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons who they favor." *Id.* at 144.

[30] 514 U.S. 779 (1995).

[31] *Id.* at 783, 837-38.

[32] *Id.* at 836.

[33] *See id.* at 925 (Thomas, J., dissenting) ("To analyze such laws under the Qualifications Clauses may open up whole new vistas for courts. If it is true that 'the current congressional campaign finance system . . . has created an electoral system so stacked against challengers that in many elections voters have no real choices,' (cite omitted), are the Federal Election Campaign Act Amendments of 1974 unconstitutional under (of all things) the Qualifications Clauses?").

to which a challenged restriction inhibits certain classes of candidates from getting on the ballot. This Court stated, "The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.' "[34] Two instances involving ballot cases in which this Court did not follow traditional equal protection principles involved classifications based on wealth and classifications that burdened new or small political parties or independent candidates.[35]

Regarding classifications based on wealth, this Court stated, "we have departed from traditional equal protection analysis [in analyzing such cases] because such a 'system falls with unequal weight on voters, as well as candidates, according to their economic status.' (cite omitted). 'Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status.' "[36] Contrary to these expressed sentiments, however, campaign finance regulations clearly inure to the benefit of particular classes of candidates. These classes include self-financed, independently wealthy candidates and incumbents who, by virtue of their incumbency, have created a campaign "war chest" and who have established a vast network of campaign contributors. Candidates of more modest means are burdened by the campaign rules because they cannot finance their campaign themselves. They must rely on a larger number of contributors who make smaller contributions because of the contribution limits; rather than needing to rely on only a handful of contributors who would be willing to make very large contributions but are unable to do so legally.

With respect to the line of ballot access cases regarding classifications that burden small or new political parties or independent candidates, this Court conceded that it has

---

[34] Clements v. Fashing, 457 U.S. 957, 964 (1982) (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)).

[35] *Id.* at 964.

[36] *Id.* (quoting Lubin v. Panish, 415 U.S. 709, 717-18 (1974)).

upheld state restrictions to the ballot that require political parties and their candidates to demonstrate a certain level of support before they may be placed on the ballot.[37] However, in upholding one of the Texas constitutional amendments in *Clements v. Fashing,* this Court distinguished it from the filing fee or level of support requirements stating "§ 19 in no way burdens access to the political process by those who are outside the 'mainstream' of political life."[38] Unlike § 19 of the Texas Constitution which this Court upheld in *Clements v. Fashing,* campaign finance regulations clearly burden access to the political process by those candidates who are indeed "outside the mainstream of political life." Such individuals include third-party candidates, non-incumbent candidates of modest wealth, first-time challengers who lack name recognition and who may also be of limited financial means.

Campaign finance regulations predetermine who will be successful in an election, and they preclude individuals who fall outside of those predetermined classes from participating equally in the political process. Such regulation certainly requires closer scrutiny to determine the validity of such regulations rather than the traditional rational review that is generally applied by this Court to most legislatively created classifications.

Campaign finance reform also fails as a "leveling" device with respect to limits on types of contributions. Under the federal campaign finance laws, the limits on contributions apply only to "cash" contributions. The result is that an owner of a newspaper could and some owners do use their newspapers to campaign for candidates. However, a wealthy individual who does not own a newspaper, but who wishes to give the challenger money in order to run an advertisement on behalf of the challenger's own campaign, is precluded from making the contribution because the campaign finance laws preclude that wealthy individual from making such an expensive contribution. The result is that "one candidate gets an

[37] *Id.* at 965.

[38] Clements v. Fashing, 457 U.S. at 967.

entire newspaper's support every day, while the other is denied even one page once during the campaign."[39]

Another example of this unlevel playing field is the "franking" privilege that incumbents enjoy by virtue of being incumbents. Incumbents may mail information to their constituencies free of charge to themselves, but at a cost to the taxpayers. This money is not considered a campaign expense or contribution by the taxpayers. Yet, if a challenger receives a contribution large enough to cover the cost of similar mailings, the contribution would be illegal. Finally, while incumbent candidates have the ability to make "news" and thereby get additional television or newspaper coverage for themselves, a challenger who wants to buy space to respond to the incumbent candidate cannot receive a contribution to cover the expense without violating the campaign finance laws.[40]

As these vivid examples demonstrate, limiting the amount of money that may be spent or contributed to a candidate's campaign fails to serve the purported interest of "leveling the playing field." Rather, campaign finance regulations that impose limits on the amount of contributions and/or expenditures magnify the inequality that campaign finance reformers claim to want to ameliorate. In the process, the First Amendment's protection of core political speech is undermined.

[39] *See Campaign Finance Reform and Free Speech,* 1997, 105th Congress, 1st Sess., *microformed on* CIS H521-57 at 51 (Congressional Info. Serv.) (Hearing Before the House Judiciary Subcommittee on the Constitution) (statement of Ira Glasser).

[40] *Id. See also* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. 1049, 1079 (1996) ("Restricting the flow of money into campaigns also increases the relative importance of in-kind contributions and so favors those who are able to control large blocks of human resources. Limiting contributions and expenditures does not particularly democratize the process, but merely shifts power from those whose primary contributions is money to those whose primary contribution is time, organization, or some other resource . . . ").

Campaign contribution limits, like the Missouri law involved in this case, increase, rather than decrease, the inequality that exists between incumbents and challengers and demonstrate a preference that the campaign finance laws have for incumbents and wealthy individuals who want to run for political office. "Quite apart from differential impact on challengers and incumbents, campaign spending limits might adversely affect Republicans more than Democrats, or third-party candidacies more than major party candidacies, or business-oriented candidates more than environmentalist candidates."[41] Again, any regulation this Court allows will determine the type of candidate who will successfully run for political office. Since speech is supposed to work in a marketplace, this Court should let the marketplace decide how much and what type of campaign speech it wants.

Mr. Glasser of the ACLU has explained that while an incumbent has considerable exposure via being the incumbent, a challenger must try to overcome this incumbent advantage "*only* by outspending the incumbent."[42] However, contribution limits inhibit a challenger's attempts. In addition, because of this Court's opinion in *Buckley v. Valeo*, a candidate is legally prohibited from accepting contributions that exceed $1,000 under the Federal Election Campaign Act, and that exceed $1,075.00, $525.00, and $275.00 for various offices under Missouri's campaign finance law.[43]

Other commentators have drawn the same conclusions. James Bopp, Jr., an attorney whose law firm has a major area of practice involving Federal and State election laws, also

---

[41] Vincent Blasi, *Free Speech and the Widening Gyre of Fund-raising: Why Campaign Spending Limits may not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1292 (1994)

[42] *See Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., *microformed on* CIS H521-57 at 52 (Congressional Info. Serv.) (Hearing Before the House Judiciary Subcommittee on the Constitution) (statement of Ira Glasser) (emphasis supplied).

[43] *See* Mo. Ann. St. Sec. 130.032 (West Supp. 1998).

testified before the House Judiciary Subcommittee on the Constitution. He stated,

> [L]imiting money will not level the playing field; it will simply advantage certain people over others. Those that need to raise the money the most to participate in issue advocacy in our society are citizens' groups and individuals. It is not the press. It is not the movie stars and athletes. It's not the Washington consultants. It's not the political insiders. It's not incumbent Members of Congress. It's not the wealthy. It is those that are of modest means that want to join their money together to multiply their voice. So if you take money out of the process, what you are taking out of the process is the voice of everyday citizens to participate in the political process, advantaging those that have these other assets that can command public attention.[44]

---

[44] *Campaign Finance Reform and Free Speech*, 1997, 105th Congress, 1st Sess., *microformed on* CIS H521-57 at 57 (Congressional Info. Serv.) (Hearing Before the House Judiciary Subcommittee on the Constitution) (statement of James Bopp, Jr.). *See also* Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 321-23 (1998) ("First, it is a mistake to think that contribution and spending limits simply inhibit the speech of the rich. They do not merely inhibit such candidates as Ross Perot or Michael Huffington from spending large sums of personal wealth, but also inhibit individuals and groups who are good at fund raising, regardless of personal wealth, from spending the money they are able to raise . . . Second, it is a mistake to think that spending and contribution limits will meaningfully diminish the voice of the rich and powerful, for those limits cannot begin to cover their alternative outlets" such as issue advocacy or control of the mass media.); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 686 (1997) ("Campaign finance limits themselves may help to entrench incumbents in office. Incumbency confers enormous advantages: . . . To offset these advantages, challengers must amass substantial funds. Challengers' lack of prominence may make it more difficult for them to raise funds from large numbers of small donations. They may therefore depend more than incumbents on concentrated aid from parties, ideologically sympathetic PACs, or even wealthy individual

Similarly, Justice Scalia, in his dissenting opinion in *Austin v. Michigan Chamber of Commerce*,[45] questioned the Michigan state legislature's sincerity in its interest of "equalizing" political debate by restricting corporations from expressing their points of view.[46] Justice Scalia explained that although the Michigan legislature may have had a "noble" objective of equalizing debate in the political arena by preventing corporations from having a disproportionate voice in that arena, under our Constitution, specifically our Bill of Rights,

> there are some things – even some seemingly *desirable* things – that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a 'balanced' presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not unsubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a 'balanced' presentation because it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech 'for fairness sake' simply out of bounds.[47]

private backers. Of course, once again, contribution limits under the split regime of Buckley exacerbate the problem, as incumbents are more likely to be able to raise a large number of capped contributions than challengers can."); and Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1402 (1994) ("The risk of incumbent self-dealing becomes even more troublesome in light of the fact that dissidents or challengers may be able to overcome the advantages of incumbency only by amassing enormous sums of money, either from their own pockets or from numerous or wealthy supporters . . . Campaign finance limits threaten to eliminate one of the few means by which incumbents can be seriously challenged.").

[45] 494 U.S. 652 (1990).

[46] *Id.* at 692 (Scalia, J., dissenting).

On the other side of the argument are proponents of campaign finance reform that, while recognizing that incumbents enjoy many advantages over their challengers, advocate spending and contribution limits supplemented by public campaign financing. They argue that what is at stake in campaign finance reform is "the **fairness of the electoral process itself** and the ability of citizens to hold their elected representatives accountable."[48] However, incumbents – our elected officials – will not "equalize" the playing field between themselves and challengers. They never will. In an editorial article, a writer wrote,

> The March 9 guest column 'Case for Campaign Spending Limits,' is of scant value; it deals with only one aspect of the advantages of incumbency. The franking privilege and allowances for staffing and expenses are of equal importance . . . Because they're so big, unless the other financial benefits of incumbency are considered, changing campaign spending limits at best will have little effect; at worst, it misleads the public into thinking there's a level playing field for incumbent and challenger and that a continued incumbent re-election rate of over 95 percent is the natural state of affairs.[49]

[47] *Id.* at 692-93 (Scalia, J., dissenting).

[48] Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1136 (1994) (emphasis added).

[49] *See e.g.*, *Perspective*, CHI. TRIB., April 2, 1993, at 22, *available in* LEXIS, News Library, Mags, Majpap, Papers File.

Proponents of campaign finance reform report that the gap is widening between what financial resources are available to incumbents versus what is available to challengers.[50] They have advocated imposing spending limits on congressional campaigns arguing that "because the congressional campaign finance system so favors incumbents, challengers, regardless of party affiliation, are all but locked out of the competition."[51] Some advocates of reform argue that it is the unlimited spending that is presently allowed in elections "that is the ultimate protection scheme for incumbents."[52]

Supporters of campaign reform point to figures showing that in the 1992 elections, United States House of Representative incumbents spent almost four times more than the challengers and had more than $248 million in total available campaign funds compared to the $49 million that challengers had. In the United States Senate, the "average incumbent" spent approximately $4.2 million while the "average challenger" spent approximately $1.7 million. In 27 of 28 Senate races, the incumbent candidate outspent the challenger, and only four of the incumbents lost.[53]

Larry Makinson, Executive Director of the Center for Responsive Politics, a nonprofit research organization, has explained that money has become "an instrument of political power." As a result of this, only about 20% of congressional incumbents in this past year's congressional elections had

---

[50] Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. at 1133.

[51] *Id.* at 1136.

[52] *Id.* at 1152.

[53] *Id.* at 1134-35. In 1998, the re-election percentage of incumbents in the United States House of Representatives and United States Senate was 98% and 93%, respectively. *See Facts and Figures of the 106th Congress*, WASH. POST, Thurs., Nov. 5, 1998 at A39, <http://www.washingtonpost.com/wp-srv/poli . . . paigns/keyraces98/stories/facts110598.htm>.

serious opponents thus making them perhaps the least competitive elections in memory. Makinson attributes this to the fact that the would-be challengers do not have the resources to compete. Based on reports filed with the Federal Election Commission, almost 180 House incumbents' challengers had virtually no financial support, and in almost two-thirds of the House districts, incumbents had a fund-raising advantage of 10 to 1 or more compared to their opponents.[54] Studies trying to determine the effect that campaign spending has on votes have shown that money benefits the challenger rather than the incumbent. Therefore, spending limits on campaigns would actually harm, rather than help challengers.[55] This is clearly contrary to at least one of the aims to be achieved by the advocates of campaign finance reform – "leveling the playing field" and making elections more competitive.

Advocates of campaign finance reform are pushing for limiting the amount of money that is spent on campaigns

---

[54] *See* James A. Duffy, *Special Interests Pour Money into Incumbents' Campaigns*, SEATTLE TIMES, Tues., October 20, 1998, <http://www.seattletimes.com/news/nation-world/html98/altfund 102098.html>. Despite these statistics, not spending as much money as your opponents does not mean automatic loss. In the 1998 Democratic primary for California Governor, among the candidates included Al Checchi who spent $40 million of his own money and State Representative Jane Harman who spent $15 million of her husband's money. Despite spending only a fraction of what his opponents spent, however, Lieutenant Governor, Gray Davis, won. In addition, in the California Republican Primary for U.S. Senate, the California State Treasurer, Matt Fong, won despite his challenger outspending him 4 to 1. *See Money Isn't Everything*, SAVANNAH MORNING NEWS ELECTRONIC EDITION, Top Stories Opinion, June 5, 1998, <http://www.savannahmorningnews.com/stories.060598/opioedtwo.html>. Note, however, that in both of these cases, the candidate who won was an incumbent in a different political office. Thus, again, even if there were spending and/or contribution limits, incumbents are still holding advantages over their challengers, even challengers who outspend them.

[55] *Money Isn't Everything*, SAVANNAH MORNING NEWS ELECTRONIC EDITION, June 5, 1998 (based on comments made by Bradley Smith of the Cato Institute).

under the guise that such limits will increase the competitiveness of elections and level the playing field in elections. However, these same reformers fail to address how spending and contribution limits will offset the other advantages that incumbent candidates have.[56] Former president of Common Cause, Fred Wertheimer, and the Vice-President of Issue Development of Common Cause, rely on "campaign scholars" David Magleby and Candice Nelson, to provide additional support for their call to impose spending limits and provide public financing of campaigns.

In their book, *The Money Chase: Congressional Campaign Finance Reform,* Magleby and Nelson state:

> Under a system of public financing with spending limitations, few incumbents would go unchallenged, and challengers' campaigns would be on a more even financial footing with incumbents. **Although incumbents would retain many of the other advantages of incumbency, sufficiently high spending limits coupled with public financing would make challengers more competitive.**[57]

While admitting that incumbents have financial advantages, nowhere do these reformers of campaign finance explain how such advantages that incumbents enjoy can be addressed by simply limiting the amount of money that is spent on a campaign.

The only means by which non-incumbent challengers have any real chance to win a seat occupied by an incumbent

[56] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. 1049, 1065 (1996) ("In the 1994 U.S. House elections, for example, many incumbents won while spending considerably less than their opponents . . . Given the inherent advantages of incumbency, this is powerful evidence that a monetary advantage alone does not mean electoral success.").

[57] Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy,* 94 COLUM. L. REV. at 1153 (quoting David B. Magleby and Candice J. Nelson, *The Money Chase: Congressional Campaign Finance Reform* 164 (1990)) (emphasis added).

is through spending money, either their own or that of contributors, trying to get their message across to voters. By eliminating this option, challengers have no hope of presenting any serious challenge to incumbents who already enjoy name recognition, visibility, paid staff, mailing privileges, and other advantages. How could a challenger compete against an incumbent who has all of these other advantages without spending money? By imposing campaign spending and contribution limits, reformers of campaign finance will stack the deck against the very interests they seek to promote – increasing electoral competitiveness and eliminating corruption or the appearance of corruption.

Limited contributions are followed by an overall decrease in spending since a candidate relies on contributions to fund his/her campaign.[58] This is particularly true if the candidate has fewer personal funds available to spend. An overall decrease in campaign spending handicaps challengers because, as discussed above, incumbents already enjoy other advantages that come with being the incumbent.

In his article, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* Bradley A. Smith explains that in the few studies conducted regarding the effect of campaign spending on votes, the result has been that additional spending by a candidate after he/she has already spent the minimum amount necessary to reach the public, affects only a limited number of votes.[59] However, Smith explains that any positive consequence of additional spending benefits challengers more than incumbents because results of studies show that an incumbent's added spending typically means that the incumbent's campaign is having problems and

[58] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. 1049, 1073 (1996).

[59] *Id.* at 1074. In his article, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate The First Amendment After All,* 94 COLUM. L. REV. 1281, 1294-95 n.48 (1994), Vincent Blasi notes that the study upon which Bradley A. Smith relies has been challenged.

that the incumbent is being challenged by another well-financed candidate. Bradley concludes, "Because an incumbent's added spending is likely to have less of an effect on vote totals than the additional spending of a challenger, limits on total campaign spending will hurt challengers more than incumbents."[60]

Contribution limits, such as those enacted by the State of Missouri and struck down by the Eighth Circuit Court of Appeals, have a tendency of favoring incumbent candidates over the challengers. The lower the contribution limit is set, the more difficult it is for a candidate to acquire money from a small group of avid supporters. The result is that a candidate must rely on large groups of supporters who must make smaller contributions. This consequence inures to the benefits of incumbents who have already established a vast network of dependable contributors, who have an established campaign system, and who can collect funds from PACS with whom the incumbent has established a relationship. Other persons who benefit from contribution limits include candidates who are wealthy or who have name recognition. These individuals may rely on their financial resources or on their name recognition. Challengers who are harmed by contribution limits include individuals who lack the name recognition and the ability to raise enough funds from a large group that is making smaller contributions.[61] Therefore, any regulation of campaign finance predetermines what type of candidate will get elected. Such a result demands that close scrutiny be used to examine the constitutionality of any such regulation.

Petitioners and other like-minded reformers who advocate the imposition of limits on campaign contributions as a means of reducing corruption or the appearance of corruption are actually perpetuating the problem they seek to eliminate. In addition, a lack of campaign limits will have no effect on politicians. The red herrings of "corruption" and "appearance

[60] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. at 1074.

[61] *Id.* at 1073.

of corruption" can easily be sniffed out. Candidates themselves, as well as the press, can expose how a candidate is being financed. Voters can then vote based upon that financing. Voters can readily choose whether to vote for a candidate with many or few contributors. An "appearance" of corruption is likely to take a toll at the ballot box.

Contribution limits will **not** eliminate corruption or the appearance of corruption in the electoral process because such limitations merely increase the desire of contributors to seek to influence legislators rather than elect like-minded legislators.[62] This is because campaign contributors such as PACs and other monied special interests will not "waste" their financial resources on challengers. Given the very high re-election of incumbents, contributing money to a challenger would be "counterproductive."[63] By limiting how much an individual may contribute to a campaign, the contribution is likely to have minimal effect on increasing the odds of a challenger's victory over an incumbent. Therefore, the best alternative is for contributors to donate to incumbents with the hope of minimizing any negative consequences towards the contributors' interests.[64] Thus, campaign contributions do not serve the interests of the Petitioners by reducing the corruption or appearance of corruption in the electoral process. Instead, contributions look to influence the pre-determined winners – incumbents. Furthermore, campaign regulations ensure that a predetermined class of candidates

[62] *Id.* at 1075.

[63] *Id. See also* Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of our Democracy,* 94 COLUM. L. REV. 1126, 1135 (1994) ("For most PACs, contributions to challengers is seen as a waste of money. Moreover, few PACs are willing to run the risk of antagonizing an incumbent Member of Congress by contributing to his or her opponent. The contribution patterns of PACs strongly reflect this preference for incumbents.").

[64] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L.J. at 1075-76.

are elected, and re-elected – incumbents and wealthy individuals who run for office.

CONCLUSION

Campaign finance reform, while sounding lofty, is really a prescription for further entrenching incumbent candidates in office and confining the type of candidate who will be elected. First-time challengers, persons of modest wealth, third-party candidates, and independent candidates are all seriously disadvantaged by campaign finance regulations.

The alleged goals of advocates of campaign finance reform are not achieved by regulations. As this Amicus Brief has demonstrated, campaign contribution and expenditure limits inure to the benefit of incumbents and show a preference for incumbents, media stars, and wealthy candidates. Campaign finance regulations do not rectify the problems asserted to be served by such regulations, but instead, perpetuate the problems.

Any regulation of campaign finance that restricts the amount of money that may either be spent or contributed restricts core political speech. The best corrective is more speech, not less. Limiting speech is contrary to the First Amendment's protection of political speech. In *Buckley v. Valeo,* this Court reiterated that the First Amendment "was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[65]

Instead of restricting the amount of money that may be contributed or expended in a campaign, there should be no regulation of political speech. The result of this non-regulation under the First Amendment allows for Justice Holmes'

[65] 424 U.S. 1, 49 (1976) (per curiam) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)) (internal quotes omitted).

"competition in the market" to freely function. As one author explained,

> By assuring freedom of speech and of the press, the First Amendment allows for exposure of government corruption and improper favors and provides voters with information on sources of financial support. There is no shortage of newspaper articles reporting on candidate spending and campaign contributions, and candidates frequently make such information an issue in campaigns. By keeping the government out of the electoral arena, the First Amendment allows for a full interplay of political ideas and prohibits the type of incumbent self-dealing that has so vexed the reform movement. It allows challengers to raise the funds necessary for a successful campaign and keeps channels of political change open. By prohibiting excessive regulation of political speech and the political process, the First Amendment, properly interpreted, frees individuals wishing to engage in political discourse from the regulation that now restrains grassroots political activity. And because the First Amendment, properly applied to protect contributions and spending, makes no distinctions between the power bases of different political actors, it helps to keep any particular faction or interest from permanently gaining the upper hand. In each respect, it promotes true political equality.[66]

Any rule of law this Honorable Court makes will determine the type of candidate who gets elected. Predetermined classification based on campaign finance regulations should be and must be closely scrutinized. Missouri's campaign

[66] Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform,* 105 YALE L. J. at 1090.

finance regulation does not survive strict scrutiny. The Eighth Circuit's decision should be affirmed.

Respectfully submitted,

STEPHEN J. SAFRANEK
1401 Vermont
Detroit, MI 48216
(313) 822-8559

Legal Counsel for Amicus Curiae
U.S. Term Limits, Inc.