No. 98-963

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

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

v.

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

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's campaign contribution limits for statewide office, which exceed the limits expressly approved by this Court for national elections in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), violate the First Amendment?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are listed in the petition. Pursuant to Fed. R. App. P. 43(c)(1), Donald Gann and Michael Greenwell, newly appointed members of the Missouri Ethics Commission, are substituted for their predecessors, Ervin Harder and John Howald.

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OPINIONS BELOW

The opinion of the court of appeals, Petitioners' Appendix ("App.") 1a-19a, entered on November 30, 1998, is reported at 161 F.3d 519 (8th Cir. 1998). The court of appeals' order entering an injunction pending appeal is reported at 151 F.3d 763 (8th Cir. 1998). App. 20a-23a. The opinion of the United States District Court is

reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998). App. 24a-41a.

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. The petition for certiorari was filed on December 11, 1998, and granted on January 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment, as applied to the States through the Fourteenth Amendment. The statutory provision involved is Mo. Rev. Stat. § 130.032 (Supp. 1998). Both are set forth in the petition for certiorari.

INTRODUCTION

Headlines in every major newspaper in the United States and television broadcasts nearly every night reveal unmistakably a widespread perception of abuse and corruption in campaign financing. There is a real fear, perhaps stronger today than at any time in recent memory, that money is harmfully distorting the nation's political process. Not surprisingly, in such an environment, there is strong political pressure on legislators at all levels to adopt restrictions that will eliminate or at least deter pollution of the political process.

The court of appeals in this case has issued a First Amendment ruling that effectively overrules the decision that has been the foundation of campaign finance reform efforts for more than twenty years: *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The ruling below seriously complicates an already complex process of reform by declaring all restrictions on campaign contributions subject to the strictest form of judicial scrutiny; by requiring States somehow to prove that their citizens in fact perceive corruption in a system of unlimited campaign contributions; and by commanding States to prove that contribution limits are set at the precise point beyond which that perception of corruption occurs. At issue in this case, then, is the ability of any government to implement even the most minimal restrictions on campaign finance.

STATEMENT OF THE CASE

1. In July 1994, the Governor of Missouri signed into law Senate Bill 650, a package of campaign finance reforms enacted with strong bi-partisan support. Through this law, Missouri for the first time adopted limits on contributions to candidates for state and local offices, including per-election maximums of $1,000 to a candidate for statewide office, $500 to a candidate for state senate, and $250 to a candidate for state representative. See Mo. Rev. Stat. § 130.032.1, .3 (Supp. 1998). The limits have been adjusted for inflation, and presently are $1,075, $525, and $275. See *id.* § 130.032.2 and Joint Appendix ("J.A.") 37. Those who violate the limits are subject to sanctions. Mo. Rev. Stat. §§ 130.032.7, 130.081 (1994 and Supp. 1998).[1]

The contribution limits were developed by the Joint Committee on Campaign Finance Reform, which included

[1] Senate Bill 650 also defined what the legislature found to be reasonable ceilings on candidates' campaign expenditures, set up a mechanism to persuade candidates to live within those ceilings, and banned contributions to any candidate for any state office during the annual five-month legislative session. Those provisions, which were invalidated in *Shrink Missouri Government PAC* v. *Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), and *Shrink Missouri Government PAC* v. *Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996), are not at issue here. Other provisions of Senate Bill 650, principally relating to the disclosure of contributions, remain in force.

state legislators from both political parties with many years of experience in political campaigns. J.A. 46-47. The Committee heard testimony and deliberated at length on both the cost of an effective campaign and the level of contributions that might potentially buy influence or create a "political debt" for a candidate. The Committee reached a consensus that the limits in Senate Bill 650 were necessary to serve the State's overriding interest in avoiding actual and potential corruption in the election process and in government, yet permitted contributions large enough to allow candidates effectively to get their messages to potential voters. *Id.*

Even before the legislature took up Senate Bill 650, two bi-partisan groups of citizens began vigorous efforts to adopt campaign finance reforms by popular referendum. In November 1994, Missouri voters declared *their* perceptions (1) that large campaign contributions to candidates for state office tended to corrupt the election process and representative government, and (2) that limits significantly lower than those set in Senate Bill 650 were necessary to combat this evil. In Proposition A, Missourians placed limits on contributions to candidates by individuals or committees (other than contributions by candidates to their own committees) that ranged from $100 to $300 per "election cycle" (*i.e.*, the entire period between general elections for a particular office). The stricter, popularly-adopted limits preempted the limits set by the legislature. See 94 Mo. Op. Att'y Gen. 218 (1994).

The contribution limits in Proposition A were invalidated in *Carver* v. *Nixon*, 72 F.3d 633, 645 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).[2] That left Sen-

2 Like Senate Bill 650, Proposition A also contained other campaign finance reforms that were held to be invalid. *See Shrink*

ate Bill 650 as the only source of limits on contributions to candidates for state and local office in Missouri. These limits took effect in January 1995, and governed all state office elections held in 1996, including those for governor, lieutenant governor, secretary of state, treasurer, attorney general, and the state legislature, as well as other elections held in 1995 and 1997. And they governed the 1998 campaigns for the state legislature and state auditor—until late last July.

2. On March 2, 1998, just days before the close of candidacy filings and three years after Senate Bill 650 took effect, Shrink Missouri Government Political Action Committee ("Shrink PAC") and Zev David Fredman filed this action against those charged with enforcing the contribution limits. Fredman, a candidate for state auditor, alleged that he could not run an effective primary campaign without accepting contributions in excess of $1,075 per election. Shrink PAC, which had already contributed $1,075 to Fredman, asserted that, but for the limits, it would contribute more to Fredman and would contribute similar large sums to other unidentified candidates for state and local office.

Claiming infringement of their First Amendment rights, Fredman and Shrink PAC moved to enjoin enforcement of the contribution limits. The district court denied their motion for a temporary restraining order. The parties then filed cross-motions for summary judgment; and, on May 12, 1998, the court granted summary judgment to petitioners.

The district court assumed, first (as Eighth Circuit precedent required, see App. 5a), that strict judicial

Missouri Government PAC v. *Maupin*, 71 F.3d 1422, 1429 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996).

scrutiny of the contribution limits was the proper standard of review. App. 30a. It then explained that "[i]f a showing of 'real harm' is required (the state claims it is not), the Court finds that defendants here have made that showing." *Id.* The court observed that the State has a compelling interest in eliminating or at least ameliorating the public perception that large contributions corrupt the election and governance process. Although Missouri neither collects nor preserves legislative history for its enactments, the district court noted that the State provided evidence that, in enacting Senate Bill 650, the legislature was responding directly to the reality and the perception that campaign contributions buy influence in government. *Id.* 31a. Specifically, the court credited the affidavit of the state senator who co-chaired the interim Joint Committee on Campaign Finance Reform. J.A. 46-47. The senator's sworn assertions were corroborated with contemporaneous newspaper stories and editorials.[3]

Relying on *Buckley* v. *Valeo,* 424 U.S. 1 (1976), the district court explained that "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent

[3] The district court cited: Jo Mannies, *Auditor Race May Get Too Noisy To Be Ignored,* St. Louis Post-Dispatch, Sept. 11, 1994, at 4B (reporting that a candidate for state auditor received a $40,000 contribution from a St. Louis-based brewery and $20,000 from a St. Louis bank); John A. Dvorak, *Election Reform Backed Lid on Contributions to Campaigns Wins Carnahan's Support,* Kansas City Star, Nov. 14, 1993, at B1 (quoting Governor Carnahan as stating, "We need a system that will make sure that our democratic institutions care as much about John Doe and Jane Doe as they do about any big company or any wealthy individual"); Editorial, *The Central Issue is Trust,* St. Louis Post-Dispatch, Dec. 31, 1993, at 6C (noting questions raised by the state treasurer's decision to handle most of the state's banking business through a bank that had contributed to his 1992 election campaign). App. 31a n.6.

in a regime of large financial contributions." App. 31a-32a (internal quotations omitted). And, while the court did not believe that *Buckley* requires a poll of the citizenry to establish that the "state's election process is facing a perceived threat," it noted that Proposition A could be viewed as such a poll, one that plainly showed that the public indeed has such a perception. *Id.* 32a & n.7. In addition, the court noted, "members of the legislature are uniquely qualified to gauge whether allowing those contributions to go unchecked endangers our democratic system of government, and, if so, to prescribe an appropriate remedy therefor." *Id.* 32a. The district court concluded that Missouri's interest in enacting contribution limits was as compelling—and at least as fully demonstrated—as the federal interest asserted in *Buckley.*

The court also rejected Fredman and Shrink PAC's argument that the contribution limits were "too low to allow meaningful participation in protected political speech and association." *Id.* 36a (internal quotation omitted). Relying again on this Court's analysis in *Buckley* and comparing expenditures in elections before and after Senate Bill 650 took effect, the district court found no evidence that the limits prevented candidates from obtaining the resources they needed to speak effectively. *Id.* 37a (detailing, *inter alia,* that in 1992, when Missouri had no contribution limits, the seven candidates for secretary of state spent $647,000, while in 1996, the three candidates spent $1,819,000). The court noted that Missouri's contribution limits were entirely in line with the limits judged necessary by numerous other state legislative bodies. *Id.* 37a n.11. The court also found that, even prior to enactment of the limits, only 3% of those who contributed more than $100 to a single candidate for state auditor made *aggregate* contributions to that candidate in excess of $2,000 (*i.e.,* the unadjusted $1,000 each for the primary

and general elections authorized by Senate Bill 650). Thus "there is no reason to believe that Missouri's contribution limits have any 'dramatic adverse effect' on funding campaigns for state office" or that they significantly burden individual speech and association rights. *Id.* 39a.

Finally, the court concluded that invalidating Missouri's contribution limits would be inconsistent with—indeed, an improper overruling of—*Buckley*. *Id.* The court explained that, before discarding the *Buckley* holding that a $1,000 limit is constitutional, a court would have to consider a host of changes in circumstance, not merely the effect of inflation on the present value of $1,000 (*e.g.*, whether the consumer price index accurately reflects changes in the costs associated with campaigning; whether technological advances have rendered campaign speech less expensive; and whether the average Missourian, with a median household income of $31,046, considers $1,000 a large contribution). *Id.* In light of all the circumstances, the court concluded that *Buckley* should not be overruled, and that the considered judgment of the Missouri legislature regarding campaign contribution limits should be accepted under the holding in *Buckley*.

3. Respondents appealed, and sought an injunction pending appeal. On July 23, 1998, a mere twelve days before the Missouri primary elections, the court of appeals enjoined enforcement of the limits pending its decision. Petitioners immediately sought rehearing *en banc*. When the court of appeals did not timely rule, petitioners sought a stay from the Circuit Justice, which was denied. The court of appeals *en banc* denied the motion for rehearing on August 20, and the case was argued August 21, 1998.

On November 20, 1998, the Eighth Circuit issued its 2-1 decision, holding unconstitutional, *inter alia*, a contribution limit higher than the one affirmed by this Court in *Buckley*, which governs all federal elections to this day. The court of appeals first stated that Missouri's contribution limits are subject to strict scrutiny. The court agreed that States have a compelling interest in eliminating public perceptions of corruption. But the court refused to accept either the Missouri legislature's judgment that a public perception of corruption exists or the evidence of such a perception cited by the district court. The court instead required some additional "demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place" before Missouri could even avoid summary judgment against it. App. 5a.

In the court's principal opinion, Chief Judge Bowman also argued that the contribution limits do not withstand scrutiny under the "least restrictive means" test as it had been defined and applied in Eighth Circuit decisions beginning with *Day* v. *Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995). He characterized *Buckley*'s $1,000 limit as "something of a benchmark," but nevertheless rejected Missouri's limits as unconstitutionally "heavy-handed" in light of inflation over the past 25 years. App. 8a.

Judge John Gibson dissented. He pointed out that the evidence of a compelling state interest in *Buckley* was no different than the proof in this case, and concluded that "the State has adequately justified the contribution limits at issue." App. 14a. He also explained that the limits at issue are not "differen[t] in kind" from the limits approved in *Buckley*. *Id.* 11a. In his view, the court of appeals was bound by this Court's decision in *Buckley*

"unless and until the Supreme Court declares otherwise." *Id.* 19a.

SUMMARY OF ARGUMENT

At issue in this case are limitations on direct contributions to candidates for state and local political offices, most centrally a $1,075 limitation on contributions to candidates for statewide offices. The considered judgment of the State of Missouri—expressed through the enactment of a law by the citizens' elected representatives and through a citizens' referendum—is that limits on contributions to candidates for state and local offices are necessary to ensure the integrity of the State's political process.

But respondents claim, and the court of appeals held, that the contribution limitations enacted violate the First Amendment of the Constitution, as applied to the States through the Fourteenth Amendment. This Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), however, governs the disposition of this case, and demontrates that both respondents and the court below are wrong. Like the federal campaign contributions limit at issue in *Buckley*, Missouri's limits on contributions to candidates for state and local office only marginally affect the First Amendment rights of contributors and candidates. The limits clearly and appropriately serve the public's vital interest in preventing the reality and appearance of corruption and in fostering confidence in Missouri's representative government and do not unduly burden First Amendment rights. Thus, under *Buckley*, Missouri's law is plainly constitutional.

As explained in *Buckley*, the speech and associational rights of contributors are only modestly affected by limits on direct contributions to candidates. This is because: (1) the act of contributing to a candidate constitutes

only "symbolic" speech; (2) contribution limits "involve[] little direct restraint on [a contributor's] political communication"; and (3) there are numerous effective alternative ways for a contributor to convey support for a candidate. 424 U.S. at 21. *Buckley* further states that a $1,000 contribution limit does not undermine "to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties." *Id.* at 28-29. The overall effect of such a limit is simply to require candidates "to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." *Id.* at 22. The empirical evidence concerning contributors and campaigns in Missouri confirms what *Buckley* holds—that contribution limits only modestly affect First Amendment rights. In these circumstances, as *Buckley* makes clear, strict scrutiny is not the standard. Part I.A.

Buckley's flat refusal to examine the propriety of the federal limit under a "narrow tailoring" or "least restrictive alternative" test provides further confirmation that strict scrutiny is not applied to contribution limits. This Court explained that courts may not second guess or fine tune legislative judgments imposing contribution limits: "If it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30. *Buckley* establishes that courts must uphold limits as long as they are reasonable and there is no evidence that they in fact impose undue burdens on protected First Amendment activities. Part I.B.

Although Missouri's limits are not subject to strict scrutiny, they indisputably serve a compelling public in-

terest in assuring the integrity of government and of the election process, protecting from both the appearance and reality of corruption. The court of appeals—while noting the compelling nature of Missouri's interest in enacting contribution limits—was of the view that a State can act to further that interest only where there is "demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place" before doing so. App. 5a. *Buckley* is to the contrary. *Buckley* recognizes that a regime of large direct political contributions "inherent[ly]" creates an appearance of corruption that undermines public confidence in the political process. 424 U.S. at 27. The fundamental reality recognized in *Buckley*—that government officers who receive money appear to be in debt to the donor—is reflected not only in campaign finance law, but also in a vast array of federal and state conflict of interest laws. And *Buckley* further makes absolutely clear that government may act to limit campaign contributions based on the assumption that a regime of unlimited contributions gives rise to corruption or its appearance, without waiting for actual damage to representative government to occur. *Id.* at 30. Part II.A-B.2.

In any event, although not required to do so, Missouri presented evidence of a public perception of corruption fully warranting its imposition of reasonable contribution limits. Part II.B.3.

Buckley thus makes clear that courts must uphold reasonable contribution limits absent evidence that they unduly restrict protected First Amendment activities—*i.e.*, as long as they are not "differen[t] in kind" from the limits affirmed in *Buckley*. As long as a $1,000 contribution limit is not qualitatively different in its effect on the contributor's symbolic speech and on the candidates' ability to communicate with voters, such a limit is as constitutional in 1999 as it was in 1976. The burden of proof is squarely on those who seek to invalidate a contribution limit. Part III.A.

Here, respondents plainly failed to carry their burden. Indeed, they offered little more than speculation that the effects of inflation since 1976 render a limit of $1,075 constitutionally "different in kind" from the $1,000 federal limit upheld in *Buckley*. Respondents entirely failed to show that the effects of inflation are such that a previously constitutional limit now operates to negate or cripple the First Amendment rights at stake. To the contrary, Missouri demonstrated, and the district court found, that Missouri's limits do not significantly affect, let alone cripple or unduly burden, First Amendment rights. Part III.B.

ARGUMENT

This Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), disposes of this case in petitioners' favor. Missouri has enacted into law content-neutral limitations on campaign contributions to candidates for state and local political office that only modestly and indirectly affect the constitutional rights to speak and associate. Missouri's reasonable contribution limits plainly and appropriately serve the vital public interest in preventing corruption and the appearance of corruption and in protecting the electorate's confidence in Missouri's system of representative government, without unduly burdening First Amendment rights. Accordingly, under *Buckley*, Missouri's law is clearly constitutional.

I. MISSOURI'S CONTRIBUTION LIMITS HAVE ONLY A MARGINAL EFFECT ON FIRST AMENDMENT RIGHTS AND ARE NOT SUBJECT TO STRICT SCRUTINY.

In *Buckley*, this Court provided the parameters to be used in evaluating the constitutionality of limits on direct

political contributions. The Court acknowledged the centrality of the First Amendment rights of speech and association to intelligent self-government in a democratic system and held that limits on *campaign expenditures* are subject to strict scrutiny because they substantially burden First Amendment rights.

But most critically here, the Court held that limits on *campaign contributions* to candidates or political committees have only a marginal effect on the First Amendment freedoms of contributors and candidates for political office. Content neutral laws with such minimal and incidental restrictive effects on constitutional rights are not subject to strict scrutiny. Indeed, this Court's express refusal to apply a "narrow tailoring" and "least restrictive means" test plainly confirms that strict scrutiny does not apply. We show in Part I that *Buckley*'s recognition that contribution limits only modestly burden constitutional rights is firmly embedded in the principles of First Amendment law and that, based on this recognition, *Buckley* refused to apply strict scrutiny to laws enacting such limits, applying instead a balancing test which respects legislative judgments about the need for contribution limits so long as the limits do not unduly burden First Amendment freedoms.

A. Contribution Limits, At Most, Marginally Burden First Amendment Rights.

Critically, the *Buckley* Court first considered the extent of the burden that contribution limits impose on the First Amendment rights of contributors, political candidates and committees, and concluded that generally such limits impose little if any burden on protected activity. That conclusion is fully applicable to the limits established by Missouri law.

1(a). *Speech Rights of Contributors.* Shrink PAC, a contributor to campaigns for state and local office in Missouri, argues that the Missouri limits abridge contributors' rights to free speech. But this Court expressly held that a $1,000 limit on direct contributions to candidates for public office does not "in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley*, 424 U.S. at 21. The Court recognized that "contributions may *result in* political expression if spent by a candidate or an association to present views to the voters," but held that "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* (emphasis supplied). See *California Medical Ass'n* v. *FEC*, 453 U.S. 182, 196 (1981) (plurality opinion) (contributions to a candidate are "speech by proxy").

Contribution limits restrain only a single species of expressive conduct (direct contributions of money). But contributions of money convey only a "symbolic" or "general expression of support for the candidate and his views." *Buckley*, 424 U.S. at 21. The amount of a contribution provides only "a very rough index of the intensity of the contributor's support for the candidate." *Id.* Indeed, given the number of contributors who give comparable amounts to competing candidates, the gift may not even do that. And there are *no* restrictions on the ability of Shrink PAC and other contributors to engage in other more communicative conduct in support of a favored candidate, including the independent expenditure of unlimited funds to endorse individual candidates and their positions.[4]

For these sound reasons, the Court held in *Buckley* that "a limitation upon the amount that any one person

[4] *Cf., e.g., Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 297-98 (1984) (upholding the constitutionality of a law prohibiting sleeping in the public parks as part of a demonstration where the restrictive effect of the law is not severe and where speakers can readily shift to alternative ways to convey their message).

or group may contribute to a candidate or political committee entails only a *marginal restriction* upon the contributor's ability to engage in free communication." *Id.* at 20-21 (emphasis supplied).[5]

(b) *Associational Rights of Contributors. Buckley* also makes clear that contribution limits have only a mild effect on political contributors' freedom of association. 424 U.S. at 28-29. The effect is weak because a contribution is only one of many ways in which people may affiliate with a candidate. As *Buckley* explains, a multitude of alternative avenues remain available to those wishing to associate with candidates for political office and with others who support such candidates. Individuals may provide, without limit, volunteer services on their own, and they are "free to become . . . member[s] of any political association and to assist personally in the association's efforts on behalf of candidates." *Id.* at 22. Contributors are free to aggregate their direct contributions with those of others "to promote effective advocacy." *Id.* And, under current law, contributors are free alone or in combination with others, independently to expend *unlimited* money to associate themselves with candidates. Thus, contribution limits restrict (but do not preclude) only one type of associational act, by limiting the amounts that may be directly contributed to a candidate.[6]

[5] The Court reaffirmed this point in *California Medical Ass'n* v. *FEC*, observing that "[i]f the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee, such as CALPAC, which advocates the views and candidacies of a number of candidates." 453 U.S. at 197.

[6] And even this minimal restriction on an individual's ability to associate is offset by the fact that contribution limits "require candidates and political committees to raise funds from a greater number of persons," *Buckley*, 424 U.S. at 22, and thus indirectly increase associational activities in general. Indeed, this increase in the number of associational ties serves as a partial antidote to the belief of many voters that control over public governance has been sold to an elite group of high bidders.

Because contribution limits have no effect at all on most avenues of association, and do not foreclose any avenue of association, reasonable limits such as Missouri's impose only the most minimal burdens on the constitutional right to associate.

2. *Preservation of Political Dialogue in the Aggregate. Buckley* makes equally clear that limits on direct contributions to candidates for office generally do not have a "severe impact on political dialogue" as a whole. 424 U.S. at 21. Specifically, *Buckley* held that "[t]he overall effect of the . . . contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 21-22.

Missouri's contribution limit has the same effect as the federal limit upheld in *Buckley*. It encourages candidates to communicate with more voters and potentially reengages some of the voters rendered apathetic and disinterested by the perception that the importance of one's views is directly proportional to the size of one's contribution. And again, individual Missouri citizens remain free independently to expend unlimited quantities of money expressing their support for any candidate—independent expenditures that broaden and strengthen, rather than weaken, public debate.

3. *Empirical Evidence Confirms* Buckley's *Holding That a $1,000 Contribution Limit Does Not Infringe First Amendment Rights.* Missouri showed, and the lower court found, that the practical impact of Missouri's law on contributors and candidates is negligible. That showing was not required by *Buckley,* which itself stands for the proposition that a $1,000 contribution limit does not unduly infringe First Amendment rights and places on challengers the burden of demonstrating that their free speech and associational rights have been unduly burdened by a limit. But Missouri's showing is significant because it highlights, and explains, respondents' failure to bring forward evidence that contributors could no longer effectively communicate their support of, or associate with, candidates, or that candidates generally were unable effectively to campaign under Missouri's contribution regime.[7]

First, it is apparent that Missouri's limits could not conceivably be deemed to have had any effect on the overwhelming majority of Missouri citizens, or even on the extremely small subset of citizens who contribute to Missouri candidates. In 1992, fewer than 1% of all Americans contributed $200 or more to candidates in federal elections.[8] That same year, fewer than .3% of all Missouri residents made contributions of more than $100 to

[7] Respondents relied on mere speculation about the effects that inflation has had on a $1,000 contribution. Such speculation, however, cannot serve as a substitute for concrete evidence of constitutional injury. Otherwise, the validity of *Buckley*'s holding will simply float with the consumer price index, generating crippling uncertainty and substantially diminishing the dignity of an adjudication of constitutional rights. *See* Powell, *Stare Decisis and Judicial Restraint,* 1991 Journal of Supreme Court History 13, 16 (1991). *See* Part III, *infra.*

[8] Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections,* 94 Colum. L. Rev. 1160, 1166 n.15 (1994).

any general election candidate in a statewide race.[9] And only a small percentage of these contributors made aggregate contributions in excess of $2,000 to a candidate. For example, in the 1994 state auditor race—the last statewide campaign before limits took effect, and the office for which respondent Fredman later ran—a scant 1,973 persons (0.03% of the State's population) gave more than $100 to general election candidates, and only 2.38% of this already elite group gave more than $2,000. See J.A. 36. Likewise, in another race analogous to Fredman's (in that it involved no elected incumbents), only 1.49% of the 669 named contributors (*i.e.,* those who contributed at least $100 to a single candidate) gave more than $2,000 to the general election candidates for secretary of state in 1992. See J.A. 34-36.[10] Indeed,

[9] Missouri had a population of 5.189 million residents in 1992. Bureau of the Census, U.S. Dep't of Commerce, *Statistical Abstract of the United States 1997,* at 28 (117th ed.). Publicly available records on file with the Missouri Ethics Commission reveal that the combined total of named contributors (*i.e.,* those who contributed $100 or more to a single candidate) for all candidates for governor, lieutenant governor, secretary of state, treasurer, and attorney general was a mere 14,410. This figure, moreover, actually overstates the number of individuals who made political contributions of more than $100 in 1992, because some portion of the named contributors were corporations, proprietorships, and committees, and because some number of the individuals (and entities) listed by one candidate undoubtedly gave to candidates for other offices.

[10] These figures are hardly surprising. In 1995, the national household average for *all* cash contributions—including contributions to all charitable, educational and religious institutions, political contributions and child support and alimony—was just $925. *Statistical Abstract of the United States 1997, supra,* at 461. The national average household income that year was $36,918. *Consumer Expenditure Survey 1995.* Average annual household expenditures that year for food, taxes, housing, utilities, transportation, pensions, insurance, clothing, and health care totaled $32,637. *Statistical Abstract of the United States 1997, supra,* at 461. Thus, after paying for these necessities, the average household had ap-

Shrink PAC itself contributed only $1,800 to multiple candidates in 1994. J.A. 9 (Complaint ¶ 13). Thus, Missouri's contribution limits affect only a minuscule number of Missouri citizens, who remain free to express their support for, and to associate with, candidates in a variety of ways, including the symbolic act of giving money in an amount that exceeds the contributions that the vast majority of contributors, let alone citizens generally, are willing or able to make.

Second, it is equally apparent that restricting Shrink PAC and others to contributions of $2,150 per election cycle has not prevented Missouri candidates from amassing the funds necessary for political advocacy. In fact, on average, candidates operating under these limits amassed larger sums of money than candidates who ran for the same offices before the State adopted the limits, and spending in most contested races increased notwithstanding the statewide contribution limits. In four of five statewide races, average candidate expenditures *increased* between 1992 (the last election for most offices before the limits) and 1996 (after the limits took effect).[11] Indeed, in the race for secretary of state, average candidate expenditures increased more than six-fold, and in the race for lieutenant governor, they more than tripled. See note 11, *supra*. In addition, the amount of money spent

proximately $4,281 to spend on *all* charitable and political donations. For the average household, therefore, a $2,000 contribution would be 47% of all truly disposable income.

11 Average candidate expenditures for the five races for which the State collected data are listed below. *See* J.A. 24-28.

	1992	1996
Governor	$1,721,414	$2,050,356
Lt. Governor	329,011	1,001,219
Secretary of State	92,392	557,184
Treasurer	218,316	234,642
Attorney General	685,920	472,811

by candidates in the general elections increased in three of the five races between 1992 and 1996.[12] Finally, the data reveal that total spending (on both primary and general elections) increased in two of the five races, and that the decrease in overall spending in the other three races was almost entirely attributable to the lack of competition in, and thus reduced spending on, party primaries.[13]

Plainly, notwithstanding Missouri's contribution limits, candidates are able to accumulate immense sums—sums more than adequate for "effective advocacy." *Buckley*, 424 U.S. at 21. Missouri's experience with contribution limits, moreover, mirrors the nation's experience under the $1,000 federal contribution limit. Notwithstanding that unadjusted limit, spending on federal elections has increased at a rate that exceeds the pace of inflation.[14]

12 Between 1992 and 1996, total general election expenditures increased 76% in the race for lieutenant governor (from $1,008,047 to $1,777,872), 390% in the race for secretary of state (from $316,162 to $1,576,472), and 89% in the race for treasurer (from $193,088 to $365,486). *See* J.A. 24-28. Between 1992 and 1996, general election expenditures decreased 25% in the race for governor (from $4,278,870 to $3,224,959) and 51% in the race for attorney general (from $1,553,893 to $767,007), but enormous sums of money were nonetheless spent. *Id.*

13 In the governor's race, for example, 89% of the decrease in total spending was attributable to the fact that eight candidates spent $9,492,442 on the 1992 primaries, whereas two unopposed primary candidates spent only $875,753 on the 1996 primaries. Similarly, 75% of the reduction in spending on the 1996 race for attorney general was attributable to the fact that six candidates spent $2,561,627 on the 1992 primaries, whereas two unopposed candidates spent just $178,615 on the 1996 primaries. And *all* of the decline in total spending for treasurer was attributable to the fact that five candidates spent $898,491 on the 1992 primary, whereas the two candidates who ran unopposed for their party's nomination in 1996 spent only $103,797. *See* J.A. 24, 27-28.

14 According to respondents, the value of a 1976 dollar increased 284% between 1976 and 1997. Brief of Appellants at 41 n.25. Spending in United States Senate races, by contrast, increased more than

Again, Missouri is *not* required under *Buckley* to show that contributions are virtually unaffected or that campaign expenditures are rising in order to satisfy the test of constitutional validity. Instead, to establish a violation of their First Amendment rights, *respondents* were required to show that contributors are unable to communicate their support for, or to associate with, a candidate, and that candidates are unable to raise sufficient funds to engage in effective political advocacy. 424 U.S. at 21.[15] Respondents, of course, made neither showing below, and the historical experience recited above amply demonstrates why: Missouri's limits (which henceforward increase with the rate of inflation) do not now, and in the future likely will not, restrain contributors' speech or have a "severe impact on political dialogue." *Id.*[16]

* * * *

500% between the 1976 and 1992 election cycles, from $38.1 to $210.8 million. *See* F. Wertheimer & S. Manes, *Campaign Finance Reform: Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994) (citing Federal Election Commission statistics). Spending in United States House of Representative campaigns likewise increased more than 500% during this same period, from $60.9 million to $326.9 million. *Id.*

[15] Others have made such showings. In *National Black Police Association* v. *District of Columbia Board of Elections*, 924 F. Supp. 270, 275-76 (D.D.C. 1996), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997), for example, the plaintiffs demonstrated that limits of less than $100 prevented effective political advocacy.

[16] In an argument properly rejected by the court of appeals, respondents asserted that Missouri's contribution limits unduly infringe candidates' speech whenever a single candidate, unwilling to spend the time necessary to gather reasonable amounts from many contributors, cannot instead accept a few, large donations. But, as demonstrated in text, viable candidates are able to raise increasing amounts of money and to purchase space and time in the media to speak, despite the presence of limits, and *Buckley* upholds limits in such circumstances. *See* 424 U.S. at 22 (holding that candidates do not have a constitutional right to gather funds in large lump sums). Indeed, respondent Fredman's speech was restricted not by Missouri's limits, but by his own conscious choices to procrastinate instead of raising funds and to eschew spending the funds he did raise.

Missouri's law mandating limits on contributions to candidates for government office has only a "narrow" and "limited" impact on First Amendment rights. What the Court said in 1976 applies equally today in Missouri:

> The Act's $1,0[75] contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties. *Buckley*, 424 U.S. at 28-29 (footnote omitted).

Missouri's law imposes only a "limited" burden on First Amendment rights. It does not undermine robust and effective political debate, and thus is not subject to strict scrutiny.[17]

[17] *Buckley* is hardly unique in this approach to determining the proper level of judicial scrutiny. This Court has repeatedly employed a flexible analysis that upholds laws that minimally burden First Amendment rights while promoting fair elections. Thus, *Buckley*'s analysis of contribution limits is analogous to this Court's treatment of restrictions on ballot access, which likewise generally are not subject to strict scrutiny because they only marginally affect First Amendment rights. For example, in *Timmons* v. *Twin Cities*

B. *Buckley* Expressly Eschewed The "Narrow Tailoring" And "Least Restrictive Means" Tests Of Strict Scrutiny.

Once the *Buckley* Court concluded that the $1,000 contribution limit only minimally affected First Amendment rights, it applied a balancing test in evaluating the constitutionality of that limit. This Court's rejection of strict scrutiny is made clear by its application of that balancing test to the law, but it is most evident in the Court's explicit refusal to conduct a narrow tailoring or least restrictive alternative analysis.

In *Buckley*, this Court firmly rejected the plaintiffs' demand that the government prove and the Court find an "exact" fit (a least restrictive alternative analysis) between

Area New Party, 520 U.S. 351, 362-363 (1997), this Court held that state laws precluding the candidate of one party from appearing on the ballot as the candidate for another party "limit, slightly, the party's ability to send a message to the voters and to its preferred candidates," in part because a party "retains great latitude in its ability to communicate ideas to voters and candidates through its participation in the campaign, and party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party's candidate." *See also Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992) ("when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions") (citation omitted); *Storer* v. *Brown*, 415 U.S. 724, 746 (1974) (upholding denial of ballot position to independent candidate if that candidate voted in the preceding primary or registered a party affiliation within the year proceeding); *American Party* v. *White*, 415 U.S. 767, 785-86 (1974) (upholding ballot access rules that reasonably serve important state interests). *Cf. Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 335 (1985) (upholding a limit on attorneys' fees for certain proceedings, set in 1864, against a First Amendment claim that it unduly burdened the right to associate with the attorney of one's choosing, because "the process allows a claimant to make a meaningful presentation" and because "such a First Amendment interest would attach only in the absence of a 'meaningful' alternative").

the contribution limit and the elimination of the evil of perceived corruption. The Court did not require the government to put forth any evidence that the $1,000 limit matched the evidence of actual or perceived corruption, and it held that courts shall not fine tune the legislatively chosen limit by asking "whether, say, a $2,000 ceiling might not serve as well as $1,000." 424 U.S. at 30.

The Court also rejected a specific argument that there was a better, less restrictive alternative for the prevention of corruption, *i.e.*, that "bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with proven and suspected *quid pro quo* arrangements." *Id.* at 27. The Court explained that such laws were laudable, but insufficient:

> [L]aws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action. And while disclosure requirements serve . . . many salutary purposes . . ., Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system of permitting unlimited financial contributions. *Id.* at 27-28.

Buckley's analysis of the propriety of the federal limit is thus wholly inconsistent with the lower court's determination that contribution limits are subject to strict scrutiny. Instead, *Buckley* employed a balancing test to evaluate the constitutionality of contribution limits that impose only modest burdens on protected activities, and placed squarely upon respondents the burden of demonstrating that a particular contribution limit imposes an undue restraint on First Amendment rights. What we

have already said suffices to show that Missouri's laws impose no such restraint and should therefore be affirmed under *Buckley*.

II. ALTHOUGH NOT SUBJECT TO STRICT SCRUTINY, MISSOURI'S CONTRIBUTION LIMITS SERVE COMPELLING STATE INTERESTS.

Because contribution limits are not subject to strict scrutiny, Missouri need not demonstrate that its limits serve a compelling state interest. Nevertheless, as this Court has repeatedly held, contribution limits like Missouri's do in fact serve such an interest.

A. The States Have A Compelling Interest In Eliminating Or Reducing The Appearance Of Corruption That Arises From A Regime Of Large Campaign Contributions.

In *Burson* v. *Freeman*, 504 U.S. 191 (1992), this Court explained that the State " 'indisputably has a compelling interest in preserving the integrity of its election process.' " *Id.* at 199 (citation omitted). Most recently, in *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604 (1996), the lead opinion, in a passage questioned in none of the three other opinions, characterized as " 'compelling' " the government's "interest in assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption." *Id.* at 609. See also *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 682 (1990) (Scalia, J., dissenting) ("a substantial risk of corruption which constitutes a compelling need for the regulation of speech . . . plainly exists when the wealth is given directly to the political candidate, to be used under his direction and control").

Democracies must fight the corruption of elected officials. "Corruption is a subversion of the political process.

Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985). When they do so, "the integrity of our system of representative democracy is undermined." *Buckley*, 424 U.S. at 26.[18] See also *First National Bank of Boston* v. *Bellotti*, 436 U.S. at 765, 788 n.26 (1978); *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 207 (1982).

But to protect the integrity of our election and governmental systems, States must also attack a problem "[o]f almost equal concern": "the impact of the *appearance* of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 27 (emphasis supplied). See also *FEC* v. *National Right to Work Committee*, 459 U.S. at 210 ("we accept Congress' judgment that it is the *potential* for such influence that demands regulation") (emphasis supplied). A system that permits unlimited, direct contributions to candidates creates a public perception that both the election process and the decisions of elected officials are corrupt. Elected officials are perceived to be in debt to large contributors, and to make decisions, either consciously or unconsciously, based on that indebtedness rather than the public interest

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[18] The "payment of money to bias the judgment or sway the loyalty of persons holding positions of public trust is a practice whose condemnation is deeply rooted in our most ancient heritage." D. Lowenstein, *On Campaign Finance Reform: The Root of All Evil is Deeply Rooted*, 18 Hofstra L. Rev. 301, 302 (1989). Elected officials should not be tempted to bypass the deliberative process esssential to government by the prospect of personal gain. *See* D. Thompson, *Ethics in Congress: From Individual to Institutional Corruption* 28 (The Brookings Institution, ed., 1995) (discussed in T. Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 140 (1997)).

they are sworn to promote. The purse strings held by an elite group of wealthy contributors appear to voters as puppet strings, providing ultimate control and virtual invisibility. See *Buckley*, 424 U.S. at 25 ("corruption and the appearance of corruption [are] spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office").

In addition, a regime of unlimited contributions creates a public belief that access to an elected official and control over the public agenda are for sale, and available for a price that only a few can pay. Indeed, the public reasonably believes that "granting or denying access to an elected official's time based on levels of contributions" is " 'unavoidable so long as election campaigns are financed by private contributions.' " *United States* v. *Carpenter*, 961 F.2d 824, 827 (9th Cir. 1991) (quoting *McCormick* v. *United States*, 500 U.S. 257, 272 (1991)).

Finally, the appearance of corruption is inextricably tied to confidence not just in individual officials, but in all of government. Indeed, "the avoidance of the appearance of improper influence 'is critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.' " *Buckley*, 424 U.S. at 27 (quoting *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973)). See also *United States* v. *Automobile Workers*, 352 U.S. 567, 575 (1957); *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 799 (Burger, C.J., concurring). Thus, it is beyond dispute that the interest of the State in preserving confidence in government by eliminating corruption and the appearance of corruption is compelling.[19]

[19] Indeed, the governmental interests served by limiting contributions are so weighty that they may be protected by additional, *prophylactic* measures which burden the First Amendment rights of particular groups and individuals. For example, in *Buckley*, the Court approved the FECA provisions setting requirements for the establishment of "political committees," which, in turn, may contribute $5,000 to any candidate with respect to any election for federal office, stating that "the basic provision enhances the opportunity of bona fide groups to participate in the election process, and the registration, contribution, and candidate conditions serve the permissible purpose of preventing individuals from evading the applicable contribution limitations by labeling themselves committees." 424 U.S. at 35-36. *See also id.* at 37 (treating certain volunteer expenses as contributions "forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign"); *id.* at 38 (upholding the aggregate limitation of $25,000 on individual contributions during any calendar year "to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"); *California Medical Ass'n* v. *FEC*, 453 U.S. at 198-99 (upholding limits on contributions to multi-candidate political committees as "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*").

B. Missouri Is Not Required To Offer Empirical Proof That There Is An Appearance Of Corruption In A Regime Allowing Large Contributions.

The State's interest in attacking the appearance of corruption is so compelling that this Court in *Buckley* found it "unnecessary to look beyond the [Federal Election Campaign] Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation" upheld in *Buckley*, 424 U.S. at 26. The court of appeals, however, held that to enact a $1,075 contribution limit, Missouri had to present demonstrable evidence that its citizens in fact perceived the Missouri system of unlimited contributions as corrupt. In so

doing, the court entirely misunderstood *Buckley* and its progeny and, in any event, ignored the record in the district court.

1. *Buckley*'s premise is that "opportunities for abuse [are] *inherent* in a regime of large individual contributions" and that "public awareness" of these opportunities creates a damaging appearance of corruption that the government has a compelling need to address. 424 U.S. at 27 (emphasis supplied). See *id.* at 30 ("the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse *inherent* in the process of raising large monetary contributions be eliminated" (emphasis supplied)). Like all citizens of the United States, Missouri citizens are members of the public to whom a "regime of large individual contributions" appears corrupt, and whose confidence in representative government is consequently eroded. Indeed, human nature uniformly perceives a conflict of interest when a public servant makes decisions of interest to large donors, who in turn can dramatically affect that official's prospects for financial gain and future political success. Missouri certainly is permitted to rely upon common sense and accepted tenets of human behavior in adopting rules governing its elections.

The fundamental realities that government officers who receive money or items of value appear to be in debt to the giver, and that this appearance erodes public confidence in government, are the basis of laws that limit campaign contributions and otherwise regulate campaign finance generally. They are also embedded in federal and state conflict of interest laws. See, *e.g.*, 5 U.S.C. § 7353(a)(1), (a)(2) (forbidding government employees to solicit or accept anything of value from persons "seeking official action from, doing business with, or . . . conducting

activities regulated by, the individual's employing entity" or "whose interests may be substantially affected by the performance or nonperformance of the individual's official duties"); 18 U.S.C. § 208 (forbidding government employees to participate in government action in which they, their spouses, or other specified persons have a financial interest); Mo. Rev. Stat. §§ 105.450-105.464 (1994 and Supp. 1998) (restricting circumstances in which public officials can do business with public bodies and prohibiting public officials from, *inter alia*, favorably acting on matters designed to provide a special monetary benefit to such official, his or her spouse, or dependent).[20]

The Court may take judicial notice of these laws which constitute, at a minimum, substantial support for reasonable legislative findings that a system of unrestricted financial contributions to candidates for government office creates an appearance of conflict of interest, and hence corruption. Cf. *United States* v. *National Treasury Employees Union*, 513 U.S. at 473 ("Congress reasonably could assume that payment of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence"); *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947) (upholding prohibitions of the Hatch Act because "Congress may have concluded" that partisan political activity by federal employees would undermine the efficiency and integrity of

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[20] *Cf. United States* v. *National Treasury Employees Union*, 513 U.S. 454, 472 n.18 (1995) (invalidating statute banning honoraria for low-level government employees, because the government's evidence did not relate to such employees "or to any employee engaged in writing or speaking or in any conduct *unrelated to his or her Government job*") (emphasis supplied); *id.* at 474 ("[a]bsent such a nexus [to government employment], no corrupt bargain or even appearance of impropriety appears likely"); Model Code of Judicial Conduct Canon 5 (1990) (restricting giving or acceptance of campaign contributions by judges).

public servants); *Ex Parte Curtis,* 106 U.S. 371, 373 (1882) (upholding a law forbidding federal employees to receive or give money to other federal employees for political purposes in order "to promote efficiency and integrity in the discharge of official duties").

In these areas, legislatures often make common sense findings that the public's compelling interest in preventing the appearance and reality of corruption is served by regulation of financial transactions involving current or prospective public officials. In *Buckley*, this Court expressly approved the use of such findings in support of legislative enactment of campaign contribution limits.

2. It is plainly improper to require, as the lower court did, proof that unregulated donations create the perception of corruption. *Buckley* makes clear that neither the federal government nor the State is required to wait until a regime of unlimited campaign contributions in fact has seriously damaged public confidence in our system of representative government before it can legislate to prevent this evil. Legislatures must be able to attack anticipated harms, not just past or current ills.

In an analogous context—state regulation of election ballots—this Court observed: "We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access." *Munro* v. *Socialist Workers Party,* 479 U.S. 189, 194-95 (1986) (citing *Jenness* v. *Fortson,* 403 U.S. 431 (1971), *American Party* v. *White,* and *Storer* v. *Brown*). In words directly applicable here, the Court rejected any requirement that a State must make an evidentiary showing of actual voter confusion:

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the "evidence" marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights. 479 U.S. at 195-96.

Turner Broadcasting System, Inc. v. *FCC,* 512 U.S. 622 (1994), relied on by respondents below, is not to the contrary. There the Court agreed that the government had an important interest at stake, but required the government to show "that the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry"—*i.e.*, that "the recited harms are real." *Id.* at 644-65. That conclusion, however, is easily harmonized with *Buckley, Munro, National Treasury Employees Union* and like cases.

The level of "proof" the Court requires naturally varies with the nature of the proposition to be proved. Of some facts, the Court takes judicial notice. Some facts (*e.g.*, the appearance of corruption created by a system allowing unlimited contributions or payments of honoraria to judges and high-level officials or voter confusion caused by ballot clutter) the Court finds "inherent" or so well established that little or no proof is required. Other facts, those that are neither inherent nor historically established, must be "adequately shown." But even then, a legislature's predictive judgment is still entitled to sub-

stantial deference. *Turner Broadcasting System, Inc.*, 512 U.S. at 664, 665, 669 (Blackmun, J., concurring), 670 (Stevens, J., concurring). In light of the nature of the fact at issue, the Missouri legislature could reasonably make exactly the same determination that Congress made in 1974: that a system of unlimited direct contributions to candidates necessarily creates a public perception of corruption, and that limiting the size of contributions to candidates will ameliorate that ill. Missouri's determination is entitled to deference.

3. In any event, if Missouri were required to present evidence that its citizens actually and reasonably perceived corruption in a system in which unlimited contributions to candidates for public office were lawful, Missouri carried that burden, as the district court found. The district court's common-sense conclusion is amply supported by a record at least as telling as that relied on in *Buckley*.[21]

First, the district court could and did take judicial notice of the fact that Missouri citizens had, through their elected representatives and through Proposition A, sought to enact contribution limits. Indeed, Proposition A's contribution limits, which are much lower than those enacted by the legislature, commanded 74% of the electorate, a fact that, by itself, manifests the public perception that creation of political debts in candidates for state and local office endangers the integrity of the electoral and governance processes. See *California ProLife Council Political Action Committee* v. *Scully*, 989 F. Supp. 1282,

[21] Observing that "the scope of such pernicious practices [could] never be reliably ascertained," the Court in *Buckley* considered the limited number of examples of corruption cited by the court of appeals sufficient to show that the problem was not "illusory." 424 U.S. at 27 & n.28 (citing 519 F.2d at 839-40 & nn. 36-38). Given the nature of the legal standards that properly govern this case, no greater showing would be sensible.

1295 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) (finding evidence of the appearance of corruption, *inter alia*, in "the persistence of the California electorate in seeking to enact contribution limits"). The district court also properly took notice that initiative supporters described and promoted it as an effort to "temper the influence of special interests" and to reform a "money-influenced" political system and make it a citizen-influenced system. App. 32a n.7 (internal quotations omitted).

Second, the district court had before it an affidavit from Missouri State Senator Wayne Goode, who had served for a total of 35 years in the state legislature. J.A. 46-47. That affidavit filled the "void" created by Missouri's practice of not maintaining legislative histories and thus not providing direct access to its legislators' purposes in passing laws. Senator Goode was co-chair of the committee that conducted hearings and debated and proposed the limits in Senate Bill 650 to the full legislature. He stated that the committee considered both the costs of campaigning and the point at which contributions could become unduly influential and that, balancing those interests, the committee arrived at the limits ultimately enacted. *Id.* His account confirms what is clear on the face of the law—the contribution limits were enacted to address a public perception that legislative votes or executive actions were being purchased with campaign contributions. It provides a record that is fully the equal of the record available to the Court in *Buckley*.

Senator Goode's description of the legislature's purpose was confirmed by other sources. Specifically, the district court relied on newspaper articles and editorials published immediately prior to the enactment of Senate Bill 650, providing additional evidence that the public

perceived the political process as corrupted by influence buying and that the legislature was addressing this public perception in enacting contribution limits. See note 3 and accompanying text, *supra*.[22]

The district court also recognized, see *supra*, at 7, that only a few individuals are willing and able to contribute more than the amount Missouri permits. That explains why most citizens would be suspicious about the likely influence those few who can contribute more would have upon a candidate, if elected. It is simply unrealistic to expect the 99.7% of citizens who do not contribute even $100 to believe that they have access and influence that is even remotely equivalent to that of the elite portion of the remaining .3% who can and will contribute more than $2,000 to any individual candidate.

In light of this Court's decision in *Buckley* and the common sense nature of the inquiry—whether the public believes that recipients of large contributions are beholden to their paymasters in a way that affects, either consciously or unconsciously, the performance of their public duties—the district court's findings were not necessary, but surely were sufficient to demonstrate that Missouri has a compelling interest in preventing the appearance of corruption in the election and goverance processes.

III. MISSOURI'S CONTRIBUTION LIMITS DIRECTLY, REASONABLY, AND CONSTITUTIONALLY SERVE THE STATE'S PURPOSE.

Because contribution limits such as Missouri's are not subject to strict scrutiny, the State need not demonstrate that the precise limit adopted—in this case $1,075—is

[22] In an astounding leap, the court of appeals jumped over this evidence in the district court, finding that it was not enough even to create a genuine issue of fact sufficient to preclude summary judgment for the plaintiffs.

the lowest amount that would serve the State's compelling interests. *Buckley* expressly refused to engage in "narrow tailoring" or "least restrictive alternative" analysis, and instead applied a balancing test that requires deference to a legislature's reasonable judgment concerning limits absent evidence that First Amendment rights are unduly burdened. See *supra*, Part II.B. Respondents proffered no such evidence here.

A. Under *Buckley*, Legislatures May Enact Reasonable Contribution Limits That Do Not Unduly Burden Constitutional Rights.

In *Buckley*, this Court found that a "$1,000 contribution limitation focuse[d] precisely on the problem of *large* contributions—the narrow apect of political association where the actuality and potential for corruption have been identified." 424 U.S. at 28 (emphasis added). The Court accepted as reasonable Congress' judgment that $1,000 is a number that carries with it potentially corrupting influence, and refused to second-guess that legislative judgment by asking "whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30. The Court explained that even such a 100 percent difference would not matter, for "[s]uch distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.*

Buckley's analysis is dispositive here, and its deferential approach is the only one that comports with common sense. The government cannot demonstrate that any given contribution limit is no larger than absolutely necessary to ameliorate a public perception of corruption. The point at which an individual candidate will be corrupted or an individual member of the Missouri public will perceive corruption varies dramatically, and thus no *single* contribution limit is demonstrably necessary. Cf. *Browning-Ferris Indus. of Vermont, Inc.* v. *Kelco Disposal,*

Inc., 492 U.S. 257, 300 (1989) (" '[W]hat is ruin to one man's fortune, may be a matter of indifference to another's' ") (O'Connor, J., opinion) (quoting 4 W. Blackstone, Commentaries * 371). Accordingly, an exact fit requirement would effectively disable government from combating the fundamental evils associated with private political influence, "evil[s] which endanger[] the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern." *Crandon* v. *United States*, 494 U.S. 152, 165 n.20 (1990) (quoting *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (quotations omitted)).

Thus, where, as here, " 'it is seen that a line or point there must be, and that *there is no mathematical or logical way of fixing it precisely*, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.' " *Buckley*, 424 U.S. at 83 (quoting *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (emphasis supplied)).[23] Absent such a demonstration, the legislature's judgment about the necessity of a particular limit should be upheld, as *Buckley* commands. See also *Munro* v. *Socialist Workers Party*, 479 U.S. at 196 (where some restriction is necessary to further the State's compelling interest, the legislature's choice will be upheld if its " 'response is reasonable and does not *significantly impinge* on constitutionally protected rights" (emphasis supplied)); *California Medical Ass'n* v. *FEC*, 453 U.S. at 199 n.20 ("[b]ecause we conclude that the challenged limitation does not restrict the ability of individuals to engage in protected political advocacy, Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme"); *United Public Workers* v. *Mitchell*, 330 U.S. at 101 (upholding Hatch Act prohibitions against First Amendment claim and stating that it is not necessary that such restraints be "indispensable").

[23] The experience of a single candidate or a single PAC should almost never be sufficient to state a valid claim that a contribution limit is invalid. Limits do not seriously restrain political communication simply because they hinder the campaign of a single, marginal candidate.

B. Missouri's Limits Are Reasonable And Hence Constitutional.

1. There is ample evidence that Missouri's statewide contribution limits reflect a reasonable legislative judgment about what constitutes a "large" and potentially corrupting contribution and thus serves the State's compelling interest in preventing the appearance of such corruption. As is detailed *supra*, at 18-19, only a minuscule percentage of Americans generally, and Missouri citizens more particularly, give more than one or two hundred dollars to an election campaign. Indeed, before limits were enacted, only about .3% of Missourians contributed more than $100 to any one candidate, and even among those who contributed at least $100, only a small percentage gave more than $2,000 before limits went into effect. In addition, in 1994, 74% of all voters approved a referendum imposing a $300 limit per election cycle on contributions to statewide offices, strongly suggesting that per election contribution limits at the substantially higher level of $1,075 are considered "large." In these circumstances, the Missouri legislature reasonably determined that contributions of $1,075 per election and $2,150 per election cycle are very "large" contributions indeed.

2. Although this Court had in 1976 upheld a contribution limit of $1,000 in federal elections, respondents argued and one judge below concluded, that the Missouri contribution limit of $1,075 was unduly restrictive simply

because that limit amounts to $378 in 1976 dollars, according to the consumer price index, App. 8a & n.4, and thus "appear[ed] likely" to preclude many candidates from amassing the resources necessary for effective advocacy. *Id.* 8a. *Buckley* forbade precisely this type of analysis.

The Missouri legislature made a judgment about the contribution limits that would protect and serve its compelling interests. A court is not empowered to fine tune the number chosen or to decide whether a less restrictive number would serve the legislature's purpose equally well. Instead, a court should inquire whether, in all the circumstances, the contribution limit is "different in kind" than the contribution limit approved in *Buckley*. And differences in kind are not mere numerical differences, but rather those which operate to cripple or negate the First Amendment rights in question.[24] See *Burson* v. *Freeman*,

[24] In stating its "differen[ce] in kind" test, the Court cited its decisions in *Kusper* v. *Pontikes*, 414 U.S. 51 (1973), and *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973), both involving state rules governing who could vote in party primaries. In *Rosario*, the Court upheld New York's requirement that a voter register with a party eight months prior to the party's presidential primary, whereas in *Kusper*, the Court invalidated an Illinois rule prohibiting anyone who voted in one party's primary in the preceding 23 months from voting in the primary of another party. But the Court did not simply rely on the comparative lengths of the delays that the enrollment rules caused to distinguish the constitutionality of the two rules. To the contrary, the Court explained that Illinois' enrollment rule was unconstitutional because it "*absolutely precluded* [persons subject to it] from participating in the . . . primary." *Id.* at 60 (emphasis supplied). By contrast, New York's constitutionally permissible rule "did not have the consequence of 'locking' a voter into an unwanted party affiliation from one election to the next; any such confinement was merely the result of the elector's voluntary failure to take timely measures to enroll." *Id.* It was this difference in the *preclusive* effects of the two requirements, not the comparative length of the delays they caused, that determined the constitutionality of the two rules.

504 U.S. at 208, 210 (upholding state law banning electioneering within 100 feet of polling place and stating that "[r]educing the boundary to 25 feet is a difference only in degree, not a less restrictive alternative in kind"). See also *Buckley*, 424 U.S. at 83 (upholding disclosure level of $100, despite Congress' failure to "focus[] carefully on the appropriate level" because "the line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion"); *id.* at 103-04 (upholding 5% threshold for public financing of general election campaign and stating that "the choice of the percentage requirement that best accommodates the competing interests involved was for Congress to make" and "[w]e cannot say that Congress' choice falls without the permissible range").

Here, respondents did not show, and indeed, could not have shown, that Missouri's statewide contribution limit significantly affected, let alone crippled or negated, the exercise of their First Amendment rights. See *supra*, at 18-20 (detailing contribution and expenditure evidence). In the absence of such a showing, the lower court's determination that Missouri's limits were "different in kind" from those upheld in *Buckley* is a naked act of judicial second-guessing in an area where, as this Court has made clear, courts should defer to legislative judgments.[25]

[25] Compounding its error, the court of appeals refused to identify what limits would serve the State's compelling interests, and instead simply asserted tautologically that once States satisfy their (undefined) burden of proof, the problem of determining where the line between constitutionally permissible and impermissible limits "can be expected largely to disappear." App. 9a. In effect, the lower court simply announced that the State had erred and sent it back to "try again," with no guidance as to how it might satisfy the standards of strict scrutiny. This course of conduct is at war with *Buckley*'s recognition that courts lack the tools necessary to assess the relative efficacy of contribution limits. 424 U.S. at 30.

In addition, pure inflation-based arguments are unduly simplistic and highly misleading. In 1973, the year before Congress enacted the federal limit of $1,000 (and the only year during the 1970s that a Consumer Expenditure Survey was conducted), the average American household had $2,100 in disposable income (*i.e.*, income left after taxes and payments for food, housing, utilities, transportation, pensions, insurance, clothing and health care).[26] Under respondents' logic, average disposable household income should have increased 225%, or $4,725, as a result of the rate of inflation that prevailed between December 1973 and January 1995 (when the Missouri limits went into effect).[27] In fact, however, average disposable household income increased only 100%, or $2,181, during this 22-year period.[28] And it is growth in disposable income, rather than the far more dramatic growth in inflation, that drives charitable giving: during the same 22-year period that disposable income rose 100%, average household cash contributions rose 82%, from $508[29] to $925, not the 225% that the inflation rate would suggest.[30]

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[26] *See* Bureau of Labor Statistics, *Consumer Expenditure Survey 1972-73*, Table 1.

[27] Dividing the January 1995 Consumer Price Index ("CPI") of 150.3 by the December 1973 CPI of 46.2, yields an inflation adjustment factor of 3.25. $2,100 × 3.25=$6,825, an increase of $4,725. The monthly CPI for these years is available at <http://stats.bls.gov/cpihome.htm>.

[28] *See* note 10, *supra* (noting that average household disposable income in 1995 was $4,281).

[29] *See Consumer Expenditure Survey 1972-73, supra*, Table 1.

[30] Inflation-based arguments also ignore the significantly different context in which Missouri's limits, as opposed to the federal limits, operate. *See* W.J. Connolly, *How Low Can You Go? State Contribution Limits and the First Amendment*, 76 B.U. L. Rev. 483, 532 (1996) ("a court should be sensitive to several important differences between national, state, and local elections, differences that compensate for the effects of lower contribution limits").

Finally, as the district court suggested, the impact of inflation on avenues of communication is not a simplistic calculation. The impact of technological advances on candidates' ability to communicate their messages less expensively must be factored into any assessment of the effects of inflation. See App. 39a.

It is the impact of a contribution limit on First Amendment rights, and not the impact of inflation on a contribution limit, that determines the constitutionality of the limit at issue. Missouri's limits are constitutional simply because they impose no undue burden on First Amendment rights.

* * * *

The fundamental error of the court of appeals is its cavalier treatment of *Buckley*. The lower court's decision diminishes the dignity of a constitutional holding and undermines the public interest in some measure of certainty. In *Buckley*, this Court established a constitutional framework for the analysis of campaign contributions and applied that framework to uphold a federally-enacted contribution limit of $1,000. Both the Court's holding and its analysis govern federal and state courts' analysis of contribution limits. States and cities have relied on that holding and analysis as a safe harbor from constitutional violations in developing their legislative programs. The judgment that $1,000 passes the constitutional test established in *Buckley* should not be invalidated by an inflating consumer price index (or, less realistically, be reinstated by deflation).

An extraordinary burden falls on those who would invalidate *Buckley*'s constitutional holding—at a minimum, a burden to show that the $1,000 limit approved in *Buckley* cripples or negates First Amendment rights as

applied in Missouri.[31] Respondents entirely failed to make such a showing.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[31] In an analogous context, this Court has instructed that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini* v. *Felton*, 521 U.S. 203, 237 (internal quotations and citations omitted).