No. 98-963

IN THE SUPREME COURT OF THE UNITED STATES

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

v.

SHRINK MISSOURI GOVERNMENT PAC,
ZEV DAVID FREEDMAN, and JOAN BRAY,
Respondents

BRIEF FOR RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC AND ZEV DAVID FREEDMAN

Filed June 7, 1999

QUESTION PRESENTED

Whether the court of appeals held correctly that Missouri "failed to come forward with evidence" that campaign contributions cause any "real problem."

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

BRIEF FOR RESPONDENTS SHRINK MISSOURI GOVERNMENT PAC AND ZEV DAVID FREDMAN

OPINIONS BELOW

The opinion of the court of appeals is reported at 161 F.3d 519 (8th Cir. 1998). Petitioners' Appendix ("Pet. App.") 1a-19a. The court of appeals' order entering an injunction pending appeal is reported at 151 F.3d 763 (8th Cir. 1998). *Id.* at 20a-23a. The opinion of the district court is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998). *Id.* at 24a-41a.

JURISDICTION

The court of appeals entered its judgment on November 30, 1998. Jeremiah W. Nixon, Attorney General of Missouri, *et al.*, filed a petition for writ of certiorari on December 11, 1998, and the Court granted that petition

on January 25, 1999.[1] The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The court of appeals held that Missouri's $275, $525, and $1075 limits on campaign contributions violate the First Amendment. It rejected Missouri's contention "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. Indeed, "the State [was] unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." *Id.* at 7a.

1. Before 1994, Missouri did not limit either political contributions to state and local candidates or candidates' political expenditures. In 1994, Missouri imposed limits on candidates' campaign expenditures and on political contributions in two sets of amendments to its Campaign Finance Disclosure Law. Mo. Rev. Stat. §§ 130.011 *et seq.* (1994 & Supp. 1998). In July 1994, the Missouri legislature enacted Senate Bill 650, which imposed limits on campaign contributions and expenditures. On November 8, 1994, the Missouri electorate approved Proposition A, a ballot initiative that also established campaign finance regulations and expenditure limits. The Missouri Attorney General ruled that Proposition A, which was to become effective immediately, superseded Senate Bill 650 to the extent its provisions were more restrictive and that, otherwise, Senate Bill 650 would become effective on January 1, 1995. 94 Mo. Op. Att'y Gen. 218 (Dec. 6, 1994). The Missouri legislature subsequently authorized candidates in the November 1994 elections to establish campaign debt retirement committees and to accept, through December 31, 1996, contributions in unlimited amounts to pay off outstanding obligations. Mo. Rev. Stat. § 130.037 (Supp. 1995); Missouri Ethics Commission, Op. No. 95.08.137 (Sept. 1, 1995).

In 1995, the Court of Appeals for the Eighth Circuit held that certain campaign expenditure limits imposed by Senate Bill 650 and by Proposition A violated the First Amendment.[2] *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The court of appeals also held that Proposition A's $100, $200, and $300 limits on campaign contributions violated the First Amendment. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996). The *Carver* court held that Missouri had "no evidence as to why the Proposition A limits of $100, $200, and $300 were selected." 72 F.3d at 642-43. The state had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Id.* at 643.

After the invalidation of the contribution limits set by Proposition A, the limits imposed by Senate Bill 650 became effective. Mo. Rev. Stat. § 130.032 (Supp. 1998).

[1] Joan Bray, an intervenor in the court of appeals, filed a second petition on December 15, 1998. The Court has not acted on that petition.

[2] A district court subsequently held that Missouri's prohibition against campaign contributions during legislative sessions violated the First Amendment because the state had no evidence that this type of political activity caused any "real harm." *Shrink Missouri Government PAC v. Maupin*, 922 F. Supp. 1413, 1418-24 (E.D. Mo. 1996) (*Shrink II*)

Senate Bill 650 originally limited campaign contributions to candidates for office in Missouri on a sliding scale from $250 to $500 to $1000. *Id.* § 130.032.1. It also provided that these contribution limits "shall be increased" to take inflation into account, *id.* § 130.032.2, and, in January 1998, the Missouri Ethics Commission increased the contribution limits. J.A. 37.

Missouri statutes now prohibit contributions of more than $275 to candidates for state representative or for offices in districts with a population of under 100,000, Mo. Rev. Stat. § 130.032.1(3), (4) (Supp. 1998); contributions of more than $525 to candidates for state senate or for any office in electoral districts with a population between 100,000 and 250,000, *id.* § 130.032.1(2), (5); and contributions of more than $1075 to candidates for governor, lieutenant governor, secretary of state, state treasurer, state auditor, and attorney general, as well as to candidates in districts with a population of at least 250,000, *id.* § 130.032.1(1), (6). J.A. 37. Contributors and candidates who violate these limits are subject to criminal penalties and to substantial civil sanctions. *Id.* §§ 130.081, 130.032.7 (1994 & Supp. 1998).

2. On March 2, 1998, Shrink Missouri Government PAC and Zev David Fredman filed a complaint in the United States District Court for the Eastern District of Missouri and challenged the constitutionality of Missouri statutes limiting political contributions to candidates for state and local office. J.A. 1.

a. Shrink Missouri Government PAC (Shrink) is a political action committee organized under the laws of Missouri. *Id.* at 16, 40. It made contributions to candidates for state office in the 1994, 1996, and 1997 elections, and it continues to operate for the purpose of making similar contributions in the future. *Id.* at 9, 16. On June 23, 1997, Shrink made a contribution of $1025 to "Fredman for Auditor," a candidate committee, and it

contributed an additional $50 on February 25, 1998. *Id.* at 9. Shrink believed that Fredman's candidacy for state auditor would promote its political views and the goals of its contributors. *Id.* at 17. Shrink would have contributed more than $1075 to "Fredman for Auditor," as well as more than $275 and $525 to other candidates, but for Missouri's limits on campaign contributions. *Id.* at 9.

These contribution limits severely burdened Shrink's ability to promote its political views and to express support for candidates through campaign contributions. *Id.* at 17. Fredman needed seed money immediately in order to compete effectively in the Republican primary campaign, and his ability to attract other contributions was a function of his ability to raise seed money. *Id.* The contribution limits were so low that they prevented Fredman from amassing resources necessary for effective political advocacy, and, if Fredman's primary candidacy failed, Shrink and its contributors would be left without a candidate who would advocate their political views in the November 1998 general election. *Id.* at 10, 17, 40-45.

b. Fredman was a candidate for Missouri Auditor in the 1998 Republican primary. *Id.* at 9. He formed a candidate committee ("Fredman for Auditor"), filed for office, and paid the filing fee. *Id.* at 9, 38. He could not run an effective primary campaign unless his committee could accept immediately contributions in excess of $1075 from Shrink and other contributors. *Id.* at 10, 12-14. The $1075 contribution limit was so low that he could not amass the resources necessary to mount an effective campaign, and it severely burdened both his ability to deliver his political message and political dialogue on the issues to be raised in the campaign for state auditor. *Id.* at 10, 12. Fredman decided, as his campaign strategy, to raise a large amount of seed money and to make an appeal to Republican party leaders for support. *Id.* at

12-13. The $1075 contribution limit imposed a substantial burden on Fredman because he was not a professional politician, and, as a first-time candidate for statewide political office, he did not have either a vast network of political contacts or a well-established base of contributors. *Id.* at 14, 59. Instead, he had to manage his business while mounting a campaign for state auditor. *Id.* at 14. He did not have the time to raise the seed money necessary for his statewide campaign by asking a large number of contributors for small contributions; instead, he had to depend on contributions of more than $1075 from Shrink and others. *Id.* at 14.

3. On May 12, 1998, the district court, on cross-motions for summary judgment, upheld Missouri's campaign contribution limits. Pet. App. 24a-41a. It found that "[t]he issue is purely legal: do Missouri's limits on campaign contributions violate the first amendment?" and that "regulation of first amendment rights" is subject to " 'strict scrutiny.' " *Id.* at 30a. The court did not decide whether Missouri "must demonstrate that campaign contributions in excess of the statutory limits cause some 'real harm,' i.e., that such contributions cause either corruption or the appearance of corruption." *Id.* Instead, the court held that "[i]f a showing of 'real harm' is required (the state claims it is not), . . . defendants here have made that showing." *Id.*

The district court relied on "evidence in the form of an affidavit from the state senator who co-chaired the Interim Joint Committee on Campaign Finance Reform at the time of Senate Bill 650's passage." *Id.* at 31a. This senator, Wayne Goode, stated that the committee " 'heard testimony on and discussed the significant issue of balancing the need for campaign contributions versus the potential for buying influence' " and "testified to his belief that contributions in excess of the limits set by Missouri 'have the appearance of buying votes as well as the real potential to buy votes.' " *Id.* (*quoting* Goode's affidavit) (footnote omitted).

The district court also held that the Missouri contribution limits are "narrowly tailored," *id.* at 35a-37a, and that "the effect of inflation since *Buckley* [*Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam)] was decided has not created a 'difference in kind' between a $1,000 contribution in 1976, and a $1,075 contribution in 1988 [1998]." *Id.* at 37a (footnote omitted).

4. On July 23, 1998,[3] the court of appeals entered an order enjoining enforcement of the campaign contribution limits pending the appeal. Pet. App. 20a-23a. The court of appeals based this order on *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 119 S. Ct. 510 (1998), a then very recent June 4, 1998 decision. In *Russell*, the court of appeals had held that Arkansas' $100 and $300 limits on campaign contributions violated the First Amendment because the state "did not prove that the perception of corruption . . . was objectively reasonable." 146 F.3d at 569.

In granting the injunction pending appeal, the court of appeals found that "[a]ll campaign contribution limits restrict political speech, and . . . implicate the First Amendment." Pet. App. 22a. It then held that "it seems likely the state has failed in its burden of proof to show 'that there is real or perceived undue influence or corruption attributable to large political contributions . . . and . . . that [the contribution limits] are narrowly tailored to address that reality or perception.' " *Id.* (*quoting Russell v. Burris*, 146 F.3d at 568). The court also held that "it is likely the state has failed to show 'that a rea-

[3] The opinion of the court of appeals twice states that the injunction was entered on July 27, 1998. Pet. App. 3a, 4a. In fact, the court of appeals entered its order on July 23rd. J.A. 3. It then amended the order by making a grammatical correction on July 27, 1998.

sonable person could perceive, on the basis of the evidence presented at trial, that such contributions make for undue influence or spawn corruption.'" *Id.* (*quoting Russell v. Burris*, 146 F.3d at 569). The court of appeals then noted that the Missouri campaign contribution limits "are, after adjustment for inflation, dramatically lower than the $1,000 limit upheld in *Buckley* . . . and do not appear to be narrowly tailored to address any legitimate interest in avoiding corruption or the appearance of corruption." *Id.*

5. Missouri applied to this Court, on July 30, 1998, for an order staying the injunction pending appeal. J.A. 3. Justice Thomas denied the application on July 31, 1998. *Id.*

6. After the July 23rd Order enjoining enforcement of the contribution limits, W. Bevis Schock, Treasurer of Shrink, worked actively to raise funds for Fredman. *Id.* at 50. He also worked actively to raise funds for Alexander Hasler, a Republican, who, unopposed in the August primary, subsequently became the Republican nominee for State Representative for the 84th District. *Id.* at 50-51. In the November 1998 general election, Hasler challenged a Democrat, the incumbent Representative Joan Bray, who also ran unopposed in the primary and who had intervened as a defendant in this case. *Id.* at 3, 53.

Shrink raised a total of $1625 between July 23rd and the primary election on August 4, 1998. *Id.* at 50-52, 56-58. Shrink had previously contributed $1075 to Fredman's campaign, and, under the shield of the court of appeals' injunction, it made an additional campaign contribution of $1250. *Id.* at 9, 51, 57, 58. Shrink's total contribution to "Fredman for Auditor" in the primary election was $2325.

Fredman was not able to employ his campaign strategy of seeking large contributions from a small number of contributors "until July 23, 1998, just twelve days before the primary election, when the United States Court of Appeals for the Eighth Circuit enjoined enforcement of the state campaign contribution limits." *Id.* at 59. Fredman raised a total of $4750 and spent $3936. *Id.* at 60. He believed that he was not successful in raising more funds "because many donors, at this late stage, had already decided to support [his] opponent Charles Pierce and because at least some of these donors were concerned about public statements that called into question the effectiveness of [the court of appeals'] July 23, 1998 Order as a shield against enforcement of the state contribution limits."[4] *Id.* The St. Louis Post-Dispatch quoted portions of Fredman's basic campaign statement in its VOTERS' GUIDE on August 2, 1998, and he had two interviews on the Missouri Network, a statewide group of radio stations. *Id.* Fredman concentrated his efforts on radio advertisements because "the primary [was] only a few days away and [he had] little money." *Id.* He "ran one spot . . . two times on Friday, July 31, 1998 on the Missouri Network . . . and then again three times on Monday, August 3, 1998 on the same stations." *Id.* On August 3, 1998, he also ran a second, and different, thirty-second political advertisement a total of sixty-one times on seven radio stations across the state. *Id.* at 61.

After the court of appeals' July 23rd Order, Shrink also contributed a total of $325 to Alexander Hasler's primary election campaign for State Representative for the 84th District. *Id.* at 51. Hasler's campaign commit-

[4] Even though Shrink made contributions, and Fredman and Hasler accepted them, under protection of the July 23rd Order, Missouri "declined at oral argument to assure the Court [of Appeals] that no recourse would be taken against those who, like Fredman, accepted contributions in excess of the SB650 limits." Pet. App. 4a.

tee accepted one contribution of $275 from Shrink on July 25, 1998, and, in reliance on the court of appeals' July 23rd Order, it also accepted a second contribution of $50 on that same date. *Id.* at 53-54. Hasler believed that "the court order of July 23 nullifying Missouri's limits on campaign contributions has increased the political dialogue on the issues in the campaign for the State Representative seat for the 84th District" and that he needed "to accept sums larger than $275.00 per contributor" in order "to mount an effective campaign and match [Bray]," who had "a vast and statewide network of political supporters and contributors." *Id.* at 55. The public record shows that in the general election, Shrink contributed an additional $500 to Hasler's campaign committee. Shrink Missouri Government PAC, Committee Disclosure Report to the Missouri Ethics Commission (Oct. 7, 1998). Both Shrink's $325 primary election contribution to Hasler and its $500 general election contribution exceeded the $275 statutory limit. Mo. Rev. Stat. § 130.032.1(3) (Supp. 1998); J.A. 37.

Although Fredman lost the Republican primary election for state auditor on August 4, 1998 to Charles Pierce, he received the support of 19.49% of the voters, which was a total of 40,600 votes. Office of the Secretary of State, Official Election Returns, State of Missouri Primary Election, Tuesday, August 4, 1998. Alexander Hasler ran unopposed in the Republican primary for State Representative in District 84, but he lost the general election in November to the incumbent, intervenor Joan Bray, who had run unopposed in the Democratic party primary. Office of the Secretary of State, Official Election Returns, State of Missouri General Election, Tuesday, November 3, 1998 (reporting that Bray received 5,751 votes and that Hasler received 3,289 votes).

7. On November 30, 1998, the court of appeals reversed the judgment of the district court and held that

the Missouri campaign contribution limits violate the First Amendment. Pet. App. 1a-19a.

a. Chief Judge Bowman, joined by Judge Ross, held that the state had not carried its burden of justifying the $275, $525, and $1075 campaign contribution limits. *Id.* at 5a-7a; 9a-10a (Ross, J., concurring).

The court of appeals first rejected Missouri's attempt to "posit[], citing *Buckley*, that corruption and the perception thereof are inherent in political campaigns where large contributions are made" and "that it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Instead, the court of appeals "required some demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Id.* In imposing this burden on Missouri "to prove its compelling interest," the court of appeals expressly invoked the Court's decisions in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) *(NTEU)* and *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) *(Turner I)*. *Id.* at 6a n.3.

Missouri, however, could not "prove that [it] has a real problem with corruption or a perception thereof as a direct result of large campaign contributions." *Id.* at 6a. The court of appeals refused to "extrapolate" from examples of corruption noted by the *Buckley* Court "that in Missouri at this time there is corruption or a perception of corruption from 'large' campaign contributions, without some evidence that such problems really exist." *Id.* The court refused to "infer that state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago." *Id.*

The state's evidence—Senator Goode's affidavit—did not fill the evidentiary void. The court of appeals found that this senator "pointed to no evidence that 'large' campaign contributions were being made in the days before limits were in place, much less that they resulted in real corruption or the perception thereof." *Id.* at 6a-7a. Although this senator stated "that he and his colleagues believed there was the 'real potential to buy votes' if the limits were not enacted, and that contributions greater than the limits 'have the appearance of buying votes,'" he "did not state that corruption then existed in the system." *Id.* at 7a (*quoting* Goode's affidavit). Moreover, there was no way for the court of appeals to determine "whether this single legislator's perception of corruption is the 'public perception,' whether it is objectively 'reasonable,' and whether it 'derived from the magnitude of . . . contributions' that historically have been made to candidates running for public office in Missouri." *Id.* (*quoting Russell v. Burris*, 146 F.3d at 569).

In short, Missouri "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions." *Id.* In fact, "the State [was] unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." *Id.*

b. Chief Judge Bowman, writing separately,[5] also determined that the $275, $525, and $1075 contribution limits are not "narrowly tailored" because they "are so small that they run afoul of the Constitution by unnecessarily

[5] Judge Ross agreed with Chief Judge Bowman "that the State failed to satisfy its evidentiary burden." Pet. App. 9a-10a (Ross, J., concurring). On the basis of "the reasons stated by Judge Gibson [in dissent]," he did "not join in part III B of Judge Bowman's opinion finding that the contribution limits are different in kind from those approved in *Buckley*." *Id.* at 10a.

restricting protected First Amendment freedoms." *Id.* at 7a, 8a. The Chief Judge found that "[a]fter inflation, limits of $1,075, $525, and $275 cannot compare with the $1,000 limit approved in *Buckley* twenty-two years ago." *Id.* at 8a (footnote omitted). Noting the contention that "$1,075 in 1976 dollars is the equivalent of just $378 in purchasing power today,"[6] *id.* at 8a n.4, Chief Judge Bowman found that "[i]n today's dollars, the SB650 limits appear likely to 'have a severe impact on political dialogue' by preventing many candidates for public office 'from amassing the resources necessary for effective advocacy.'" *Id.* at 8a (*quoting Buckley*, 424 U.S. at 21). Thus, "absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech," the $275, $525, and $1075 contribution limits were "too low to allow meaningful participation in protected political speech and association" and were "not narrowly tailored to serve the alleged interest." *Id.* (internal quotation marks and citation omitted).

The Chief Judge specifically disclaimed any attempt to "'fine tun[e]' the work of the Missouri legislature" or to exercise "authority that is not ours." *Id.* (*quoting Buckley*, 424 U.S. at 30). He concluded that "the difference between these limits of $1,075, $525, and $275, and larger dollar limits that might be constitutionally sound . . . are not 'distinctions in degree' but 'differences in kind.'" *Id.* at 8a-9a (*quoting Buckley*, 424 U.S. at 30). He "remind[ed] the State that it has the burden of showing that any limits it places on campaign contributions are narrowly tailored to serve the State's compelling in-

[6] Chief Judge Bowman rejected Missouri's contention that the Consumer Price Index (CPI) should not be used "to calculate the effects of inflation on dollars spent for campaign contributions" and noted that the state itself uses the CPI to account for the effects of inflation after the date (1994) when the contribution limits were enacted. Pet. App. 8a n.4 (*citing* Mo. Rev. Stat. § 130.032.2 (Supp. 1997)).

terest in addressing proven 'real or perceived undue influence or corruption attributable to large political contributions.' " *Id.* at 9a (*quoting Russell v. Burris,* 146 F.3d at 568). Any "problem of judicial line-drawing can be expected largely to disappear" if "those who would regulate and limit constitutionally protected political speech satisfy their heavy burden of proof." *Id.*

c. Judge Gibson, in dissent, would have upheld Missouri's $275, $525, and $1075 contribution limits because he "[could] not distinguish *Buckley.*" *Id.* at 10a.

Judge Gibson found that there was no "difference in kind" between Missouri's $1075 limit and the "$1,000 [limit] upheld by *Buckley.*" *Id.* at 11a. He rejected Chief Judge Bowman's "argument . . . that inflation has dissipated the similarity between the limits in this case and those approved in *Buckley*"; in his view, "[i]nflation has not undermined *Buckley*'s precedential weight or modified its holding." *Id.* at 13a.

Judge Gibson also concluded that "the State has adequately justified the contribution limits at issue." *Id.* at 14a; *see id.* at 14a-18a. Missouri, "by the Goode affidavit, [had] demonstrated . . . the dangers posed by unlimited campaign contributions." *Id.* at 17a. Judge Gibson could not "reconcile the short shrift given the Goode affidavit . . . with the Supreme Court's approach in *Buckley,* which cited no actual evidence that large contributions might give rise to the appearance of political corruption and which deferred to what Congress could have reasonably concluded." *Id.* (footnote omitted).

SUMMARY OF ARGUMENT

The court of appeals held correctly that Missouri's $1075 limit on campaign contributions violates the First Amendment. This judgment rests on the simple, but fundamental proposition that conjectural harms do not justify

restrictions on speech and on the state's failure to "come forward with evidence" that campaign contributions cause any "real problem." Pet. App. 6a, 7a.

Missouri contends that "it is unnecessary" under *Buckley* "to demonstrate that [corruption and the appearance of corruption] are actual problems in Missouri's electoral system." *Id.* at 5a. Corruption and the appearance of corruption, however, are not a talisman that the state can invoke to dispel the First Amendment. Limits on campaign contributions "implicate fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, and the state has the burden of justifying limits on speech. *Edenfield v. Fane,* 507 U.S. 761, 770 (1993). To carry its burden, the state must prove that the harms that it recites are "real, not merely conjectural" and that, at a minimum, the regulation "will in fact alleviate these harms in a direct and material way." *See NTEU*, 513 U.S. at 475 (*quoting Turner I*, 512 U.S. at 664 (plurality opinion of Kennedy, J.)) (internal quotation marks omitted). Thus, just as this Court has required proof that regulations of commercial speech, *Edenfield*, 507 U.S. 761, of government employees' speech, *NTEU*, 513 U.S. 454, of cable television programming, *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*), and of independent expenditures by political parties, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), address a "real harm," the court of appeals required Missouri to demonstrate "that there were genuine problems that resulted from contributions in amounts greater than the limits in place." Pet. App. 5a.

Missouri, however, did not "adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. *Id.* at 7a. The state does not argue that there is actual corruption attributable to campaign contributions; it presented no evi-

dence that "[e]lected officials [have ever been] influenced to act contrary to their obligations of office by . . . infusions of money into their campaigns." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) (*NCPAC*). Missouri, instead, would limit campaign contributions solely on the basis of "the appearance of corruption that arises from a regime of large campaign contributions." Pet. Br. 26.

The state's only evidence of any appearance of corruption, however, is one state legislator's belief that "contributions over [the Missouri] limits have the appearance of buying votes." J.A. 47. An appearance of corruption —which may arise whenever a legislator votes or takes actions that are consistent with the positions of contributors—may be "unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *McCormick v. United States,* 500 U.S. 257, 272 (1991). Given the problems inherent in the amorphous concept of an appearance of corruption, the court of appeals correctly rejected the legislator's recollections about the enactment of the contribution limit because there was no way to determine "whether [his] perception of corruption is the 'public perception,' whether it is objectively 'reasonable,' and whether it 'derived from the magnitude of . . . contributions' that historically have been made to candidates running for public office in Missouri." Pet. App. 7a (*quoting Russell v. Burris,* 146 F.3d at 569).

Instead of trying to fill the evidentiary void, Missouri asks the Court to take "judicial notice" of the appearance of corruption and to accept its "common sense" proposition that "the public believes that recipients of large contributions are beholden to their paymasters." Pet. Br. 33, 36. Any public perception of corruption, however, is most probably mistaken: "campaign contributions are made to support politicians with the 'right' beliefs . . .

[not to] buy politicians' votes." Stephen G. Bronars & John R. Lott, Jr., *Do Campaign Donations Alter How A Politician Votes? Or, Do Donors Support Candidates Who Value The Same Things That They Do?*, 40 J. L. & Econ. 317, 346 (1997).

Missouri's argument boils down to the assertion that its purpose is benign and that restrictions on First Amendment interests should be dismissed as "modest." *See* Pet. Br. 10-13. As the court of appeals found, however, the burdens on First Amendment interests are far from modest. Pet. App. 4a, 22a-23a. The purpose of the contribution limit, moreover, is both less clear and more complex than the state suggests. If, for example, "common sense" suggests a public perception of corruption, "common sense" also suggests that legislators, acting on the basis of self-interest, would establish a system of contribution limits, like Missouri's, that favors incumbents and members of major parties. Similarly, given Missouri's concern that $1000 contributions are a high percentage of the average American household's disposable income, the contribution limit may well be more a response to perceptions of economic inequality than to perceptions of corruption. Pet. Br. 42; *see Buckley,* 424 U.S. at 48-49 (the state cannot "restrict the speech of some elements of our society in order to enhance the relative voice of others").

In a different case where a state, unlike Missouri, had some evidence that a particular campaign finance practice caused some real harm, difficult questions about the appropriate degree of deference to legislative judgments might arise. In this case, however, there is no basis for finding, even under a low level of scrutiny, that the state has "drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 195 (*quoting Turner I*, 512 U.S. at 666 (plurality opinion of Kennedy, J.)) (internal quotation marks omitted). Missouri "failed to come forward with evidence" of any "real problem"; it was

"unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest." Pet. App., 6a, 7a.

ARGUMENT

I. MISSOURI MUST DEMONSTRATE THAT THE HARMS IT RECITES, CORRUPTION AND THE APPEARANCE OF CORRUPTION, ARE "REAL, NOT MERELY CONJECTURAL"

The court of appeals correctly rejected Missouri's contention that, under *Buckley*, "it is unnecessary for the State to demonstrate that [corruption or the appearance of corruption] are actual problems in Missouri's electoral system." Pet. App. 5a. Although *Buckley* upheld a $1000 limit on campaign contributions to candidates for federal office, Missouri's simplistic analogy between that federal limit and its $1075 limit does not end all First Amendment analysis. The Court, in a long line of post-*Buckley* cases, has held consistently that in order to defend a regulation of speech, government must offer more "than mere speculation about serious harms." *NTEU*, 513 U.S. at 475. Government, instead, "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (internal quotation marks and citation omitted).

A. The State Has The Burden Of Justifying Limits On Political Speech

In an effort to avoid its duty to demonstrate that corruption or the appearance of corruption are "actual problems in Missouri's electoral system" (Pet. App. 5a), Missouri asserts that the "burden of proof is squarely on those who seek to invalidate a contribution limit." Pet. Br. 13. The state's argument stands the First Amendment on its head. Campaign contribution limits, and other restrictions on political speech, are not presumptively

valid. The rule in our constitutional system is that "limits on political activity [are] contrary to the First Amendment." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 296-97 (1981). Although *Buckley* recognized "a single narrow exception" to this rule, *Citizens Against Rent Control*, 454 U.S. at 297, the Court imposed the burden of justification on the government. 424 U.S. at 25 (contribution limits "may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms").

Missouri is wrong. Shrink and Fredman have no duty to show that the campaign contribution limit "cripples or negates" their interests in political speech. Pet. Br. 40, 41, 43. The state has the burden of justifying limits on First Amendment interests. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). It is, for example, well-settled that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *E.g., Edenfield*, 507 U.S. at 770 (internal quotation marks and citation omitted). Missouri has not identified any reason why it should not shoulder the same burden of justifying limits on political speech.

B. The State Is Not Excused From Justifying Limits On Political Speech Under Its Novel "Undue Burden" Standard

Missouri claims that *Buckley* establishes a balancing test, Pet. Br. 14, 24, 25, and that campaign contribution limits are valid unless contributors and candidates can show that these limits "unduly burden" their First Amendment interests. *Id.* at 18, 37. It then concludes that the $1075 limit is valid because it allegedly imposes only "modest burdens" on First Amendment rights. *Id.* at 25-26. Like the attempt to shift the burden of justification, the other components of Missouri's proposed "undue burden" standard are mistaken: *Buckley* does not estab-

lish a balancing test, and the contribution limit in fact imposes substantial burdens on fundamental First Amendment interests.

1. Buckley *Did Not Establish a Balancing Test*

Missouri misreads *Buckley* and misstates the level of judicial scrutiny appropriate for limits on campaign contributions. *Buckley* held that both "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities"—"[d]iscussion of public issues and debate on the qualifications of candidates"—and that "[t]he First Amendment affords the broadest protection to such political expression." 424 U.S. at 14. Although *Buckley* also distinguished contribution and expenditure limits and held that expenditure limits impose "significantly more severe restrictions" than contribution limits, it did not apply a balancing test to contribution limits or adopt any "undue burden" standard. *Id.* at 23; *see id.* at 14-38. The Court in fact held that contribution limits are subject to a "rigorous standard of review." [7] *Id.* at 29.

There is, at bottom, little purpose to Missouri's argument that the court of appeals erred in applying strict scrutiny and to the state's attempt to substitute its novel

[7] Missouri and the government would lower the level of scrutiny applicable to campaign contribution limits by reading *Buckley* through the lens of the Court's ballot access cases. Pet. Br. 23 n.17; U.S. Br. 26-27. The purported analogy to ballot access cases, like *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), however, is not well-taken. Campaign contribution limits implicate "fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, but regulation of the "mechanics of the electoral process" does not affect the core political activity protected by the First Amendment. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345-46 (1995). Moreover, state regulation of campaign contributions, like public financing of Presidential elections, "lacks the same sort of mandate of necessity as does a State's regulation of ballot access." *Buckley*, 424 U.S. at 293 (Rehnquist, J., concurring in part and dissenting in part).

"undue burden" standard. Under any level of scrutiny appropriate for restrictions on "fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, a state, as the court of appeals held, must have some evidence of "real harm." Even under Missouri's balancing test, some evidence of "real harm"—some evidence of corruption or of the appearance of corruption—would still be necessary or else the state's entirely speculative interest would easily be outweighed by First Amendment interests.

2. *Missouri's Campaign Contribution Limit Imposes Substantial Burdens On Contributors and Candidates*

The court of appeals held that Missouri "cannot make a persuasive argument that SMG [Shrink] and Fredman are not and have not been harmed by the limits imposed on campaign contributions." [8] Pet. App. 4a. It found, before enjoining enforcement of the contribution limit on July 23, 1998, that Shrink had made, and Fredman had accepted, the maximum $1075 contribution permitted by Missouri law. Pet. App. 23a. The contribution limit "restrict[ed] SMG in the promotion of its political viewpoints and in its expression of support for candidates who share its political goals." *Id.* It "restrict[ed] Fredman from garnering the sums necessary to promote his campaign for state auditor and to deliver his political message." *Id.*

Moreover, in the short twelve-day period after the court of appeals enjoined enforcement of the contribution limit and before the August 4th primary election, Shrink contributed, and Fredman accepted, an additional $1250. J.A. 51, 57, 58. Fredman used these additional funds to wage a vigorous campaign, and he obtained the

[8] Missouri asserts that the court of appeals "rejected" Fredman's claim that he was harmed by the contribution limit. Pet. Br. 22, n.16. This unsupported assertion is at odds with the court of appeals' holding.

support of approximately twenty percent of the voters and more than 40,000 votes. *Id.* at 59-62. Fredman's campaign promoted the free speech goals of the First Amendment: his opponent in the Republican primary reportedly increased his advertising "out of concern about Fredman." Appellants' Reply Br. (Aug. 10, 1998) App. 26.

Ignoring the effects of the contribution limits on Shrink and Fredman, Missouri argues that the contribution limit has only a "negligible" effect because Shrink and Fredman did not show that the contribution limit has an adverse effect on other contributors and candidates.[9] Pet. Br. 18. More particularly, Missouri, again attempting to avoid its burden of justification, argues that Shrink and Fredman cannot prove that the contribution limit "unduly burdens" their First Amendment rights because it "affect[s] only a minuscule number of Missouri" contributors and does "not prevent[] Missouri candidates from amassing the funds necessary for political advocacy." *Id.* at 20; *see id.* at 18-21. Missouri's argument, however, just like its claim that *Buckley* establishes a balancing test, is mistaken. The mere fact that some contributors and candidates may not be affected adversely by the Missouri contribution limit does not negate the fact that the contribution limit has a dramatic, severe effect on other contributors, like Shrink, and candidates, like Fredman.

Missouri, for example, examines two elections held before limits on campaign contributions were imposed in

[9] Missouri claims that Fredman was not, in its word, a "viable" candidate because he did not choose to raise funds in small amounts and that his "procrastination" caused his injury. Pet. Br. 22 n.16. Respondent Bray also disparages Fredman's candidacy and Shrink's small financial resources. Resp. Bray Br. 8, 25-26. Shrink and Fredman explained their campaign and financial strategies in detail, J.A. 12-14, 16-17, 38-39, 40-45, 50-52, 56-58, 59-62, and the court of appeals correctly rejected all assertions that their injuries were contrived or conjectural. Pet. App. 4a.

1994 and argues that only a small percentage of contributors ("2.38%" and "1.49%") in these elections made contributions that would have been barred by the $1075 contribution limit. *Id.* at 18-20. Far from illustrating the allegedly "modest" effects of the contribution limit, Missouri's argument demonstrates a fundamental First Amendment problem—contribution limits favor particular types of candidates. As the intervenor, incumbent State Representative Bray, candidly admitted: "for every plaintiff Fredman who may be harmed if the contribution limits are upheld, there is another candidate who may be harmed if the limits are invalidated."[10] Memorandum of Law In Support Of Motion To Intervene 5-6 (May 1, 1998). Some candidates, like Fredman's opponent in the August 1998 primary election, do not have to rely on individual contributions of $1075 or less because they have the support of a political party.[11] Other candidates, like Fredman,

[10] Representative Bray's counsel explained that she has competed successfully under Missouri's regime of contribution limits and that she might not be able to retain her public office in a regime permitting larger or unlimited contributions. *See* Memorandum of Law in Support of Motion to Intervene 5-6 (May 1, 1998).

[11] Fredman's opponent in the Republican primary, Charles Pierce, had the party's favor. *See* J.A. 13-14, 43-44. State law provides that each political party shall have a state committee, congressional district committees, judicial district committees, state senatorial district committees, legislative district committees, and county committees. Mo. Rev. Stat. § 115.603 (1994). Each of these committees can establish a "political party committee, *id.* §§ 130.011(24), (25) (Supp. 1998), and in 1998, each "political party committee" could contribute $10,750 to a candidate for statewide office, like state auditor, in a contested primary election. *Id.* § 130.032.4; *see Missouri Republican Party v. Lamb*, 31 F. Supp. 2d 1161, 1162 (E.D. Mo. 1999) (the $10,000 statutory limit on contributions made by a "political party committee" has been adjusted to $10,750 to account for inflation). Thus, Fredman's opponent could have accepted contributions up to $10,750 from numerous committees of the Republican Party, as well as individual contributions, but Fredman, the outsider, was restricted to contributions of $1075 or less.

who are less well-established than incumbents like Bray, or who are not the nominee of a major party, need campaign contributions of more than $1075 as seed money and are dependent on the contributions prohibited by the Missouri statute.[12]

Missouri's only other argument—that the amounts spent in 1996 elections, after enactment of contribution limits, and in 1992 elections, before adoption of contribution limits, were similar or higher—also falls far short of proving the state's contention that the contribution limit imposes only "modest" burdens. Pet. Br. at 20-21. The pattern of spending in the 1992 and 1996 elections discussed by the state may suggest, for example, only that some candidates were particularly successful in raising funds in 1996 from other unregulated or less restricted sources. In fact, it was widely reported that contributions to political parties in the 1996 elections were used as a device to circumvent the limits on individual campaign contributions. Pl. Mem. In Support Of Motion For Summary Judgment (Apr. 13, 1998) (Exh. B—Jo Mannies, *Laws Shift Flow Of Money To Political Parties,* St. Louis Post-Dispatch, Aug. 1, 1996, at 5B). Moreover, whatever the effect of the contribution limit may have been

[12] Fredman had a "special opportunity to participate successfully in the Republican primary for state auditor" after the incumbent, a fellow Republican, decided not to run for re-election and after another prominent Republican decided not to participate in the primary. J.A. 12-13. Fredman's "window of opportunity," however, was "small" because the incumbent Republican auditor was in the process of anointing her successor. *Id.* at 13. He needed "a large amount of seed money immediately" in order to take advantage of this "special opportunity." *Id.* at 13-14. *Buckley* noted claims about the importance of seed money, but it left open the question of the effects of the $1000 contribution limit on efforts to "launch campaigns." 424 U.S. at 34 n.40; *see id.* at 242 n.5 (" 'seed money' can be essential, and the inability to obtain it may effectively end some candidacies before they begin") (Burger, C.J., concurring in part and dissenting in part).

on some candidates and contributors in 1996, there is no question, as the court of appeals found, that it harmed both Shrink and Fredman in the 1998 Republican primary election.

C. The State Must Have Substantial Evidence Of "Real Harm"

Buckley, of course, is the *alpha* of First Amendment analysis of Missouri's campaign contribution limit. It is not, however, the *omega.* It is now settled that government must have substantial evidence of real harm to regulate speech.

Buckley defined a "large" political contribution in terms of its capacity to create corruption or the appearance of corruption, and it upheld the national government's power to limit "large" political contributions that caused either corruption or the appearance of corruption. 424 U.S. at 26, 28. *Buckley* did not hold that all campaign contributions create a risk of corruption. Instead, the Court recognized that "the integrity of our system of representative democracy is undermined" by "*large* contributions . . . given to secure a political *quid pro quo* from current and potential office holders." *Id.* at 26-27 (emphasis added). As the Court noted subsequently, all limits on campaign contributions, regardless of amount, are not *per se* constitutional: "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment" and that "exception relates to the perception of undue influence of *large* contributors to a candidate." *Citizens Against Rent Control,* 454 U.S. at 296-97 (emphasis added).

To come within the "single narrow exception" recognized in *Buckley,* a state must show that the prohibited contributions are "large" in the sense of causing corruption or the appearance of corruption. Missouri's reliance on *Buckley* for the proposition that it does not have to

demonstrate that these harms are real is misplaced. *Buckley*, as Missouri argues, may have upheld a particular contribution limit—a $1000 limit on individual contributions to candidates in federal elections—on the basis of relatively little evidence that campaign contributions caused corruption or the appearance of corruption. *See* Pet. Br. 29-30. The Court, however, has supplemented *Buckley* over the next twenty-three years with a requirement that

> [w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

NTEU, 513 U.S. at 475 (internal quotation marks and citation omitted).

1. *Evidence Of "Real Harm" In Campaign Finance Cases:* Buckley *To* Colorado Republican

Buckley, as Missouri argues (Pet. Br. 30), proceeded largely on the premise that corruption is "inherent in a system permitting unlimited financial contributions." 424 U.S. at 28. The Court's deference to Congress' judgment about the need for contribution ceilings, however, is easily overstated.[13] *Buckley* in fact noted that "the deeply disturbing examples [of large contributions given to secure a political *quid pro quo*] surfacing after the 1972 election demonstrate that the problem is not an illusory one," and it cited the court of appeals' opinion, which had "discussed a number of the abuses uncovered after the 1972 elections." *Id.* at 26-27 & n.28. The court of appeals had found that "[t]he record before Congress was replete with specific examples of improper attempts to obtain governmental favor in return for large campaign contributions."[14] *Buckley v. Valeo*, 519 F.2d 821, 839 n.37 (D.C. Cir. 1975) (per curiam).

Although one early post-*Buckley* decision deferred broadly to Congress, other more recent cases have rejected reliance on speculation or a mere "hypothetical possibility" of problems. *Compare FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) (refusing to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared") *with NCPAC*, 470 U.S. at 498-500 (finding that a "hypothetical possibility" of an exchange of political favors for uncoordinated expenditures was not enough to justify an expenditure limit). Indeed, the Court, in its most recent campaign finance decision, invoked and applied the same "real harm" standard as the court of appeals. *Colorado Republican*, 518 U.S. 604; *see Buckley v. American Constitutional Law Foundation, Inc.*, 119 S. Ct. 636, 651 (1999) (Thomas, J., concurring in the judgment) (noting that "the State ha[d] failed to satisfy its burden of demonstrating that fraud is a real, rather than a conjectural, problem").

In *Colorado Republican*, the Court held that limits on "independent" expenditures by political parties in national elections violate the First Amendment. The Court, however, did more than simply reaffirm and apply *Buck-*

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[13] *Buckley* showed little deference to Congress' judgments about the need for expenditure limits. The Court, for example, rejected Congress' judgment about the potential for corruption inherent in independent expenditures. *See* 424 U.S. at 45-48.

[14] The court of appeals had also noted a contribution of two million dollars from the dairy industry to President Nixon's 1972 re-election campaign, contributions of three million dollars from persons seeking ambassadorial appointments, and a contribution of $100,000 from an ambassador seeking a more prestigious posting. 519 F.2d at 839-40 & nn.36-38.

ley's holding that limits on an individual's "independent" expenditures are unconstitutional, 424 U.S. at 39-51; it looked for some demonstration that independent expenditures by political parties cause some harm or problem. Six members of the Court invoked Justice Kennedy's plurality statement in *Turner I* of the government's duty to demonstrate that regulations of speech address a real harm. *Colorado Republican*, 518 U.S. at 618 (opinion of Breyer, J.) (*quoting Turner I*, 512 U.S. at 664); *id.* at 647 (opinion of Thomas, J.) (same).

Neither Congress, nor the government's lawyers at trial, however, had any evidence that independent expenditures by political parties caused any problem of corruption. *Id.* at 618 (opinion of Breyer, J.) ("[t]he Government does not point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures"); *id.* at 647 (opinion of Thomas, J.) ("the Government . . . has identified no more proof of the corrupting dangers of coordinated expenditures than it has of independent expenditures"). Thus, *Colorado Republican* confirms the court of appeals' decision to require Missouri to demonstrate that contribution limits address a "real harm." [15] Pet. App. 6a n.3.

2. *Evidence Of "Real Harm": A Prerequisite To Regulation Of Commercial Speech*

Colorado Republican does not stand alone. The Court has held consistently that a state cannot carry its burden

[15] Although the government notes correctly that *Colorado Republican* continues to distinguish expenditures and contributions, it ignores the fact that six members of the Court invoked and applied the real harm standard. *See* U.S. Br. 24-25. Any suggestion that the *Colorado Republican* "real harm" requirement applies only to laws restricting expenditures, as opposed to laws limiting contributions, would seem to be misplaced. The real harm standard also applies to commercial speech regulations that, unlike limits on campaign contributions and expenditures, do not "implicate fundamental First Amendment interests." *Buckley*, 424 U.S. at 23.

of justifying a restriction on commercial speech "by mere speculation or conjecture"; a state "must demonstrate that the harms it recites are real." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995) (*quoting Edenfield*, 507 U.S. at 770-71) (internal quotation marks omitted); *Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy*, 512 U.S. 136, 143 (1994) (same); *Edenfield v. Fane*, 507 U.S. at 770-71.

For example, in *Edenfield*, the Court held that a state Board of Accountancy's regulation barring in-person solicitation by certified public accountants violated the First Amendment where the only evidence of any harm was an affidavit (submitted by a former chairman of the state board) "contain[ing] nothing more than a series of conclusory statements." 507 U.S. at 771; *see id.* at 764. Similarly, in *Zauderer v. Office of Disciplinary Counsel*, the Court rejected a state's argument that a ban on illustrations in attorney advertisements could be justified by abstract claims that the public would be misled, manipulated, or confused. 471 U.S. 626, 647-49 (1985). The Court found that "the State's arguments amount[ed] to little more than unsupported assertions," and the state had failed to offer "any evidence or authority of any kind" to support its contentions. *Id.* at 648.

3. *Evidence Of "Real Harm": A Key Component Of Intermediate Scrutiny*

The "real harm" standard, which the Court applies in commercial speech cases, is also a key component of intermediate scrutiny in other contexts. The Court has held that regulation of government employees' nonpolitical speech requires "a justification far stronger than mere speculation about serious harms." *NTEU*, 513 U.S. at 475. The Court has also given particularly close consideration to the real harm standard in two recent decisions

addressing certain "must-carry" provisions of a federal statute requiring cable television systems to dedicate some of their channels to local broadcast stations. *Turner II*, 520 U.S. 180; *Turner I*, 512 U.S. 622.

In *National Treasury Employees Union*, the Court found that the government's interest "that federal officers not misuse or appear to misuse power by accepting compensation for their unofficial and nonpolitical writing and speaking activities" was "undeniably powerful." 513 U.S. at 472. Nonetheless, a prohibition against federal employees accepting honoraria for making appearances, giving speeches, or writing articles violated the First Amendment: the government could not demonstrate that the acceptance of honoraria by low-level federal employees caused any real harm.

The government had "no evidence of misconduct related to honoraria in the vast rank and file of [low-level] federal employees," and it had only "limited evidence of actual or apparent impropriety by legislators and high-level executives." *Id.* at 472. Congress did not have any evidence that acceptance of honoraria by low-level federal employees was a problem.[16] *Id.* at 485 (O'Connor, J., concurring in the judgment in part and dissenting in part) (no "showing that Congress considered empirical or anecdotal data pertaining to abuses by lower echelon Executive Branch employees"). The government's lawyers had cited an official 1992 report, made three years after the ban on honoraria was imposed, but the Court found that "[i]ts 112 pages contain not one mention of

[16] Although the Court commented that Congress could assume that payments of honoraria to "judges or high-ranking officials in the Executive Branch" might generate an appearance of corruption, the comment was not necessary to the decision of the case, which involved only low-level federal employees. 513 U.S. at 473, 477-80.

any real or apparent impropriety related to a lower level employee." *Id.* at 472 n.18. The Court refused to defer to the government's speculation about the problems caused by payment of honoraria to low-level federal employees. *Id.* at 467 n.11; *see id.* at 475-76 n.21.

In the first of the two cable television cases, the Court held that the "must-carry" provisions were subject to intermediate scrutiny under the First Amendment.[17] *Turner I*, 512 U.S. at 662. A plurality, invoking the Court's *Edenfield* statement of the "real harm" test, determined that the government must "demonstrate" both that the harms that the statute recited were "real, not merely conjectural" and that the regulation would "in fact alleviate these harms in a direct and material way." *Id.* at 664. After a remand to develop the record, the Court held that the must-carry provisions did not violate the First Amendment. *Turner II*, 520 U.S. 180.

Although the Court was divided, there appears to be broad agreement on two fundamental points. First, the Court agreed that the government, under an intermediate standard of review, had a duty to demonstrate both that the must-carry provisions addressed a "real harm" and that the regulations would alleviate the harms in a material way. *Compare id.* at 195 ("[t]he expanded record now permits us to consider whether the must-carry provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way") *with id.* at 258 (O'Connor, J., dissenting) ("impossible to discern whether Congress was addressing a problem that is 'real, not merely conjectural,' and whether must-carry addresses the problem in a 'direct and material way' ") (*quoting Turner I*, 512 U.S. at 664 (plurality

[17] Four members of the Court would have applied strict scrutiny. *Turner I*, 512 U.S. at 675-82 (O'Connor, J., concurring in part and dissenting in part); *see Turner II*, 520 U.S. at 230-35 (O'Connor, J., dissenting).

opinion)). Second, the Court recognized that careful review of the evidence was necessary to implement this standard. *Compare id.* at 196-221 (reviewing the evidence before Congress and the evidence developed at trial) *with id.* at 236-52 (same).

The Court was divided on the question whether the government had substantial evidence to support Congress' determinations. This division, in turn, rested on a disagreement about the degree of deference to be accorded to Congress. On the one hand, the majority, recognizing that courts must "accord substantial deference to the predictive judgments of Congress," held that "its sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* at 195 (internal quotation marks and citations omitted). On the other hand, four members of the Court, while recognizing that the Court "owe[s] deference to Congress' predictive judgments," argued that the Court has "an independent duty to identify with care the Government interests supporting the scheme, to inquire into the reasonableness of congressional findings regarding its necessity, and to examine the fit between its goals and its consequences." *Id.* at 229 (O'Connor, J., dissenting). In their view, the majority had given too much deference to Congress.[18] *Id.* at 258 (O'Connor, J., dissenting) (criticizing the principal opinion for "a willingness to substitute untested assumptions for evidence").

[18] The majority's statement of the deference to be accorded to Congress appears to be limited to its context—intermediate scrutiny of content-neutral speech regulations. *See* 520 U.S. at 225 (Stevens, J., concurring) ("[i]f [the] statute regulated the content of speech rather than the structure of the market, our task would be quite different"). Otherwise, it appears to be well-settled that the Court must exercise independent judgment to protect First Amendment rights. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 875-76 (1997); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978).

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The government argues that the Court would have to "overrule *Buckley*'s analysis of contribution limits" in order to uphold the court of appeals' ruling. U.S. Br. 10. This argument, however, is mistaken. Far from overruling *Buckley*, it is necessary to recognize only that subsequent cases have supplemented *Buckley* and imposed a duty to demonstrate that speech regulations, including campaign finance regulations, address some real harm. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 531 (1996) (O'Connor, J., concurring in the judgment) (noting that the Court's deference to legislative presumptions in one case had been qualified by decisions in five subsequent cases that "declined to accept at face value the proffered justification for the State's regulation").

II. MISSOURI HAS NOT SHOWN THAT CAMPAIGN CONTRIBUTIONS CAUSE ANY "REAL HARM"

The court of appeals correctly held that Missouri "failed to come forward with evidence to prove a compelling interest that would be served by the restrictions SB650 imposes on campaign contributions" and that "the State [was] unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest [in avoiding corruption and the appearance of corruption]." Pet. App. 7a. The legislature in 1994 did little more than copy the $1000 campaign contribution limit upheld by *Buckley* eighteen years earlier. The state's only evidence—a state senator's unsupported, conclusory statements—falls far short of the showing of real harm required to sustain regulation of either commercial speech or programming on cable television systems. *Edenfield*, 507 U.S. 761; *Turner II*, 520 U.S. 180.

A judicial determination that the state, at a minimum, has "drawn reasonable inferences based on substantial evidence" is necessary to protect the "fundamental First Amendment interests" that are implicated by contribution limits. *Turner II*, 520 U.S. at 195 (internal quotation marks and citation omitted); *Buckley*, 424 U.S. at 23. The court of appeals' requirement that the state must have some evidence of a "real problem"—and more particularly, some "objectively reasonable" evidence of an appearance of corruption—guards against the risk that the purpose or effect of the contribution limit is to redress perceptions of economic inequality or to protect incumbents.

A. The State Has No "Objectively Reasonable" Evidence Of Any Appearance Of Corruption

Missouri does not argue that it has any problem with, much less any evidence of, actual corruption caused by campaign contributions. *See* Pet. Br. 26. Absent any evidence connecting corruption to campaign contributions, it is hard to understand how any reasonable perception of corruption can arise.[19] The state, nonetheless, invokes general dissatisfaction with politics and politicians, headlines that "reveal . . . a widespread perception of abuse and corruption in campaign financing," and undifferentiated fears that "money is harmfully distorting the nation's political process."[20] *Id.* at 2. It then argues that "a 'regime of large individual contributions' appears corrupt" to "Missouri citizens" and that this "inherent" appearance of corruption warrants limits on campaign contributions. *Id.* at 30; *see id.* at 12, 26-28. In the state's view, an appearance of corruption, sufficient to limit campaign contributions, arises simply because "government officers who receive money appear to be in debt to the donor"; "human nature uniformly perceives a conflict of interest when a public servant makes decisions of interest to large donors." *Id.* at 12, 30.

In arguing that an "appearance of corruption" arises when candidates, who may or may not also be "government officers" or "public servants,"[21] make "decisions of interest" to their contributors, Missouri has arrived at an absurd result. As the court of appeals observed in another case, if a presumption of corruption arises from the mere fact that a public official votes in a way that pleases contributors, then "legislatures could constitutionally ban all contributions except those from [an] official's opponents, a patent absurdity." *Russell v. Burris*, 146 F.3d at 569. Moreover, if Missouri is right that an appearance of corruption, which the state defines to include "access to an elected official's time based on levels of contributions,"[22] is "unavoidable so long as election campaigns

[19] In *Buckley*, Congress in fact had some evidence of corruption from which a perception of corruption could arise. *See* note 14 *supra* and accompanying text.

[20] If there is a widespread perception of corruption, it is probably more a function of very large, unregulated "soft-money" contributions made to political parties than of much smaller $1000 or $1075 contributions made directly to federal or Missouri candidates. *See* Common Cause Br. 11-13 ($300,000 and $1,000,000 contributions to political parties). Missouri and the *amici* do not offer any examples of $1000 or $1075 contributions made directly to candidates that give rise to a perception of corruption.

[21] Government officials and public servants should not accept outside compensation, or otherwise benefit personally, for the performance of their official responsibilities, and the conflict of interest laws cited by Missouri address this concern. Pet. Br. 30-31. Candidates, however, have an interest protected by the First Amendment in accepting campaign contributions. There is, contrary to Missouri's tacit suggestion, no analogy between individuals, in their capacity as candidates, accepting campaign contributions, and individuals, in their capacity as government officials, accepting gratuities or bribes for the performance of their official duties. *See McCormick v. United States*, 500 U.S. at 272-73 (distinguishing extortion and campaign contributions).

[22] This definition is surely too broad. *See McCormick v. United States*, 500 U.S. at 272 ("[s]erving constituents and supporting

are financed by private contributions," then public financing would be the only appropriate legislative response. *See* Pet. Br. 28 (internal quotation marks and citations omitted).

As Missouri's arguments demonstrate, the "appearance of corruption" is an amorphous, and dangerous, standard for regulating political speech. Appearances are in the eye of the beholder, and an appearance of corruption may arise whenever an official votes or takes other actions that are consistent with the position of a contributor. To find an "appearance of corruption" when legislators "act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries" would subject to regulation "conduct that . . . is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation." *McCormick v. United States*, 500 U.S. at 272. The court of appeals' requirement that an appearance of corruption must be "objectively reasonable," which follows readily from the Court's requirement that a state must "demonstrate" some real harm, *Edenfield*, 507 U.S. at 771, avoids these problems.

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legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator"). Access—the opportunity to present one's case—is not bought; instead, individuals and groups contribute to candidates who have similar policy preferences, and candidates meet with, and obtain information from, supporters who share their political goals and beliefs. David Austen-Smith, *Campaign Contributions and Access*, 89 Am. Pol. Sci. Rev. 566 (1995); Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19-20 (1989).

1. *The Court Of Appeals Correctly Gave "Short Shrift" To Senator Goode's Affidavit*

Missouri has no evidence of any problems associated with campaign contributions. In fact, Missouri's own data strongly suggest that contributions in excess of the limits set by the legislature in 1994 do not cause any harm. Missouri, examining two pre-1994 elections, argues that only a small percentage of contributors ("2.38%" and "1.49%") in these elections would have been affected by the $1075 limit on contributions, Pet. Br. 19, and it also argued in the district court that the contributions that would have been prohibited would have constituted only a very small percentage (".02%" and ".5%") of statewide candidates' total campaign expenditures. State Def. Opposition to Plaintiffs' Motion For Preliminary Injunction 24 (April 3, 1998). The state has no explanation how such a small number of contributions, covering only a very small portion of candidates' campaign expenditures, could cause any "real harm."

In his affidavit, Senator Goode, nevertheless, stated his "belief" that contributions larger than the Missouri limits "have the appearance of buying votes." J.A. 47. This affidavit, however, does not provide any evidence that campaign contributions were a real problem in Missouri. As the court of appeals found, the senator did not point to any "evidence that 'large' campaign contributions were being made" before the limits were enacted in 1994, "much less that they resulted in real corruption or the perception thereof." Pet. App. 6a-7a.

It would have been difficult, if not impossible, for the court of appeals to conclude that this single legislator's perception was "objectively reasonable."[23] The senator,

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[23] Judge Gibson's concern that the majority inappropriately assessed Senator Goode's credibility is misplaced. Pet. App. 15a n.6. The majority simply found that, absent some examples or other support, it could not determine from the affidavit standing alone

for example, would have been hard put to explain why a contribution of $1000 to a candidate for state senate (prohibited by Mo. Rev. Stat. § 130.032.1(2) (Supp. 1998), which limits contributions as adjusted for inflation to $525) would create an appearance of corruption, but a contribution of $1000 to a candidate for statewide office (permitted by *id.* § 130.032.1(1), which limits contributions as adjusted for inflation to $1075) would not create an appearance of corruption. Moreover, Senator Goode's statement that he "believed in 1993 and . . . today [1998] that contributions over [the Missouri] limits have the appearance of buying votes" (J.A. 47) seems at odds with his May 1995 vote in favor of a measure authorizing individuals who were candidates in elections held on or before November 1994 to accept, through December 31, 1996, contributions in unlimited amounts to pay off outstanding obligations.[24] Mo. Rev. Stat. § 130.037 (Supp. 1995).

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whether there was an "objectively reasonable" public perception of corruption arising from campaign contributions. Indeed, in another case, a district court discounted a similar affidavit submitted by Senator Goode on precisely the same ground—the absence of any factual support. In that case, Senator Goode claimed in his affidavit that "the acceptance of contributions during the general assembly's regular session leads to the appearance of corruption." *Shrink II*, 922 F. Supp. at 1421; *see id.* at 1414-15. The court found that the senator's affidavit did not establish an appearance of corruption. Senator Goode had expressed his "personal opinion[]," but he had "fail[ed] to provide any factual basis for [his] opinion[]." *Id.* at 1421. He "cite[d] no examples or incidents of actual corruption linked to such contributions nor incidents wherein 'innocent' contributions were perceived by the public as being given and accepted for a corruptive intent." *Id.* He did not "relate any incidents wherein [his] constituents voiced displeasure . . . regarding the acceptance of contributions during the general assembly's regular session." *Id.*

[24] Senator Goode was the senate "handler" of House Bill 484, which included the provisions for debt retirement subsequently codified at Mo. Rev. Stat. § 130.037 (Supp. 1995). Current Bill Summary, HB 484 (88th Gen. Ass., 1st Reg. Sess. 1995). The Missouri Senate voted unanimously in favor of HB 484. Mo. Sen. J. 1270-71 (88th Gen. Ass., 1st Reg. Sess. 1995). The legislature's decision to prevent application of the contribution limits adopted by the electorate in November 1994 to campaign debt incurred before that date is understandable, but it does suggest an implicit judgment that the need to pay off outstanding debt outweighed any risk of the appearance of corruption that would arise from accepting unlimited contributions.

If Senator Goode had opined after the fact that a majority of the members of the Missouri legislature thought that personal solicitations by certified public accountants caused some harm, his unsupported belief would not justify limits on accountants' commercial speech. *See Edenfield*, 507 U.S. at 771. It is then entirely anomalous to argue, as Missouri does, that the senator's affidavit is enough to support a restriction on political speech.

It is a fair inference that the state has no other—and certainly no better—evidence than Senator Goode's conclusory statements. Missouri has never suggested that it has any objectively reasonable evidence, and it continues to deny any duty to demonstrate that the contribution limit addresses some "real harm." Pet. Br. 29. Indeed, when asked at argument in the court of appeals to identify any additional evidence, Missouri's counsel could suggest only that the state would "put 200 members of the legislature . . . into the courtroom" and "one by one have them come in and testify as to what they heard and what they knew at the time they voted." [25] Argument, Aug. 21, 1998.

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[25] Although the state's counsel conceded that these legislators would not testify that they were "corruptible," he predicted that the legislators would say that if they accepted more than $1000 their constituents might believe that they were subject to corruption. *See* Argument, Aug. 21, 1998. This prediction was, perhaps, hazardous; many of the legislators who had voted to impose contribution limits in 1994 also voted, less than one year later, to permit unlimited contributions to retire campaign debt. See note 24 *supra*.

The district court's speculation about the evils of campaign contributions, which Missouri repeats, does not fill the void left by Senator Goode's affidavit. Pet. Br. 6 n.3, 8, 34-36. The district court noted that "[n]ewspaper stories and editorials . . . tend to support the senator's statements" and that the voters' approval of Proposition A's $100, $200, and $300 contribution limits "might be viewed as . . . a poll" demonstrating "that the integrity of a state's election process is facing a perceived threat." Pet. App. 31a n.6, 32a & n.7. The voters' approval of the Proposition A contribution limits, which the court of appeals held violated the First Amendment, *Carver*, 72 F.3d 633, speaks as much to an attempt to redress perceptions of economic inequality as it does to any public perception of corruption. There is no evidence that Proposition A was a response to any appearance of corruption in the Missouri electoral process, *see Carver*, 72 F.3d 644-45, and the newspaper discussion of Proposition A quoted by the district court strongly suggests that the purpose of the initiative was to level the playing field and to limit the influence of particular groups, pejoratively labeled "special interests." *See* Pet. App. 32a n.7.

The district court also speculated that the "average Missourian," with a median household income of $31,046, would consider a political contribution of more than $1075 to be "large." *Id.* at 40a. It may well be true that the average Missourian would have viewed $1075 as a large amount in 1998, and it is certainly true that this hypothetical citizen would have viewed $1075 as a much larger amount in 1976 than in 1998. The district court, however, had no evidence that the average Missourian viewed this sum as large in the sense that *Buckley* employed this term—as creating corruption or the appearance of corruption.

It is hardly surprising that Missouri has no evidence that campaign contributions cause corruption or an objectively reasonable appearance of corruption. Most "studies have found little or no connection between campaign contributions and legislative voting records." Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L. J. 45, 58 (1997). Although these studies rejecting the commonplace assumption that "campaign contributions are the dominant influence on policymaking" may seem counterintuitive, other factors including "party affiliation, ideology, and constituent views and needs" are the dominant forces in legislative behavior. Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049, 1067-68 (1995).

Having no objectively reasonable evidence of any appearance of corruption attributable to campaign contributions, Missouri claims that it can rely on a common sense proposition that "money corrupts." *See* Pet. Br. 36 (referring to "the common sense nature of the inquiry—whether the public believes that recipients of large contributions are beholden to their paymasters"). It is, however, equally a matter of "common sense" that legislators, acting on the basis of self-interest, would establish a system of contribution limits that protects incumbents. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance*, 73 Cal. L. Rev. 1045, 1076, 1080 (1985). Contribution limits are widely understood as favoring incumbents. *E.g.*, Smith, 105 Yale L. J. at 1072-75. Competing "common sense" propositions—appearance of corruption or incumbent protection—should not be the basis either for sustaining or invalidating Missouri's contribution limits. It is precisely the office of judicial review, and more particularly the requirement that Missouri demonstrate that the appearance of corruption is a "real harm," to ensure that the state has a constitutionally adequate justification for imposing sig-

nificant burdens on "fundamental First Amendment interests." *Buckley*, 424 U.S. at 23.

Missouri's "common sense" is troubling on an additional count. Common sense, as is the case here, may well be wrong. The cynical assumption that "money corrupts" ignores the reality that "campaign contributions are made to support those politicians who already value the same positions as their donors" and that "[j]ust like voters, contributors appear able to sort into office politicians who intrinsically value the same things that they do." Bronars & Lott, 40 J. L. & Econ. at 319, 347. Mistaken perceptions are a doubtful warrant for regulating important constitutionally protected interests. *See e.g., Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (mistaken perceptions about mentally retarded persons). Thus, the court of appeals' standard—which would permit a state to regulate on the basis of a mistaken perception of corruption as long as there was some objectively reasonable evidence of that perception—probably provides too little protection for fundamental First Amendment interests.

Missouri, nonetheless, suggests that the Court should take "judicial notice" of "the appearance of corruption" and excuse the state from any responsibility to show that the appearance of corruption is a "real harm." Pet. Br. 33. Ignoring all but one of the Court's cases requiring the government and the states to demonstrate that speech regulations address some "real harm," Missouri suggests that a failure to require any objectively reasonable evidence of real harm in this case can be "harmonized" with the "real harm" requirement in *Turner I*, 512 U.S. 622. *Id.*

Missouri would distinguish *Turner I* on the ground that the harm in that case was not obvious. However, given the fact that most campaign contributions are made

for purposes protected by the First Amendment, the harm, if any, caused by campaign contributions would not seem to be any more or less obvious than the harms caused by the decision of a cable television system not to carry a local broadcast station. Even though common sense might suggest that a broadcast station would lose audience and advertising revenues if not carried on cable, the Court required the government to prove that the "must-carry" regulation addressed a real harm. *Turner II*, 520 U.S. at 195, 197-213. If the government must show that cable television regulations address a real harm, there is no reason why Missouri should not have to make the same showing.

2. *Missouri's Anti-Corruption Rationale Masks Additional Purposes*

The problem, if any, in Missouri elections is not corruption, or even some appearance of corruption. Missouri simply has no evidence that "[e]lected officials [have been] influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns"; it has no evidence of any "financial *quid pro quo:* dollars for political favors." *NCPAC*, 470 U.S. at 497. Missouri's problem, instead, appears to be public perceptions of economic inequality in the political process. *See* Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. Davis L. Rev. 663, 678-82 (1997) (arguments for contribution limits are often arguments to level the playing field for competing political interests).

Missouri, for example, argues that a total primary and general election contribution of $2000 would have been forty-seven percent of the disposable income of the average American household in 1995. Pet. Br. 19 n.10, 42. The state's argument that the average family cannot afford to make a $1000 contribution strongly suggests a

concern that others, who can afford such contributions, have disproportionate influence in the political system. The contribution limit, then, appears to be an attempt, albeit crude, to level the political playing field for competing interests. The Secretary of State of Missouri, as well as the chief election officers and campaign finance supervisors of fourteen other states, also focuses on disparities in disposable income and argues openly that contribution limits are necessary to "check" the influence of "wealthy contributors." Secretary of State of Arkansas *et al.* Br. 8; *see id.* at 9 (if contribution "limits are gauged to allow the contribution of sums far beyond the means of an overwhelming majority of citizens, then [that majority] will naturally perceive that contributors who can approach the limits exert a disproportionate influence over the officials they support").

Ironically, individuals who can afford to make contributions larger than $1075 and who support political party candidates can easily circumvent Missouri's $1075 direct contribution limit by making contributions to "political party committees." Missouri law does not limit the amount that an individual can contribute to a political party or to "political party committees," and each party, *see* note 11 *supra*, can establish a multitude of committees. *See* Mo. Rev. Stat. § 130.032 (Supp. 1998). An individual, for example, who wanted to contribute $54,825 to a statewide candidate of a political party could make a direct contribution of $1075 to the candidate and write five checks in the amount of $10,750 payable to five different "political party committees"—the party's state committee, one of its congressional district committees, one of its state senatorial district committees, one of its state representative district committees, and one of its county committees. Although the contributor could not require anyone of these five committees to make a contribution to a particular candidate, each committee

could contribute up to $10,750 to the candidate who inspired the contribution.

Thus, to the extent that incumbent legislators are members of a political party, they have done little more than pander to public fears of "big money" by barring direct contributions of more than $1075 and permitting indirect contributions of much larger sums to themselves and other members of political parties. This pandering, however, comes at a high cost to political outsiders, like Fredman, who lack the advantages of incumbency and party endorsement, and to small political action committees, like Shrink, which work outside mainstream party politics to promote their political goals and to promote the election of candidates committed to these goals.

B. The Campaign Contribution Limit Does Not Alleviate Any Harm "In A Direct And Material Way"

Just as a state must demonstrate that a contribution limit addresses some real harm, it must also demonstrate that the limit will in fact alleviate that harm "in a direct and material way." *NTEU*, 513 U.S. at 475 (internal quotation marks and citation omitted). Absent any evidence that campaign contributions cause corruption or the appearance of corruption, there is, of course, no need for any contribution limit, and there is no way that Missouri could demonstrate, even at a minimum, that the $1075 limit alleviates any harm in a "direct and material way." Thus, Chief Judge Bowman, consistent with the higher level of scrutiny applied to restrictions on "fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, correctly found that "absent the State's having proven the actual necessity for such a heavy-handed restriction of protected speech," the contribution limit was "not narrowly tailored to serve the alleged interest." Pet. App. 8a (internal quotation marks and citation omitted).

A comparison of Missouri's $1075 limit, enacted in 1994, and the $1000 limit approved by *Buckley* in 1976 demonstrates that the state imposed a "heavy-handed restriction of protected speech." Taking inflation into account, a campaign contribution of $1075 in 1997 was the equivalent of only $378 in 1976 dollars—that is—$1075 bought only the same amount of goods and services that $378 purchased in 1976.[26] Missouri's $1075 limit on campaign contributions applies to contributions made by political action committees like Shrink, as well as to contributions made by individuals,[27] and it also must be compared to the $5000 federal limit on contributions by political committees upheld in *Buckley*.[28] 424 U.S. at 35-36. This comparison is important because *Buckley* upheld the $1000 limit on individual contributions at least in part because the limit on contributions by political committees was five times higher ($5000) and these committees could fill the fund raising gap created by the $1000 limit on individual contributions. *See* 424 U.S. at

[26] The same figures, showing the effects of inflation as of 1997, were presented to the courts below.

[27] The $1075 limit applies to "any person other than the candidate," and the term "person" is defined broadly to include an "individual," as well as a "committee." Mo. Rev. Stat. §§ 130.011(22), 130.032.1 (Supp. 1998).

[28] There are differences between the federal "political committees" at issue in *Buckley* and state "continuing committees," like Shrink. Federal law, for example, regulated both the number of contributors and the number of candidates to whom contributions were made. *Buckley*, 424 U.S. at 35. Although Missouri law does not impose analogous restrictions on "continuing committees," *see* Mo. Rev. Stat. § 130.011(10) (Supp. 1998), differences between federal and state committees do not justify different contribution limits unless the state can make some showing that these differences are related to preventing corruption or the appearance of corruption. *See NCPAC*, 470 U.S. at 496-97 ("preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

28 n.31, 35-36. The "heavy-handed" effect of Missouri's $1075 limit on political committee contributions is readily apparent: a campaign contribution of $1075 in 1997 was the equivalent of only $378 in 1976 dollars, or only 7.56% of the $5000 limit upheld by *Buckley*.

It does not take a "scalpel," *Buckley*, 424 U.S. at 30, to probe the differences between the Missouri contribution limit and the $1000 limit upheld by *Buckley* in 1976. *Buckley*'s $1000 contribution limit would have been $2840 in 1997 when adjusted for inflation; that is, it would have taken $2840 to buy the same amount of goods that $1000 bought in 1976. Similarly, *Buckley*'s $5000 limit on political committee contributions would have been $14,200 in 1997 when corrected for inflation; that is, it would have taken $14,200 to buy the same amount of goods that $5000 bought in 1976. Chief Judge Bowman found correctly that Missouri's $1075 limit "cannot compare with the $1,000 limit approved in *Buckley*." Pet. App. 8a.

C. Protection Of First Amendment Rights Requires Assurance That The State Has Evidence Of Some "Real Harm"

The requirement that government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree" is "critical." *Rubin*, 514 U.S. at 487 (internal quotation marks and citation omitted). Absent some evidence of real harm, " 'a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.' " *Id.* (*quoting Edenfield*, 507 U.S. at 771). Similarly, absent some evidence that corruption or the appearance of corruption is a real harm, Missouri "could with ease restrict [political] speech in the service of other objectives"—leveling the playing field, protecting incumbents, or merely pandering to popular fears—"that could not themselves justify a burden on [political] expression." The real harm

requirement "smoke[s] out" the risk that Missouri has burdened political speech for unconstitutional purposes. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). The real harm requirement also provides a basis for ensuring that there is at least some rough proportionality between the alleged harm and the burdens imposed on speech.

The court of appeals' requirement that the state prove that corruption or the appearance of corruption is a "real problem," Pet. App. 6a, does not establish an "insurmountable evidentiary threshold." Resp. Bray Br. 33. The court of appeals did not require the state to produce "elaborate, empirical verification," *id.* at 32 (*quoting Timmons*, 520 U.S. at 364); it did not impose "an exact fit requirement." Pet. Br. 38. The holding is in reality quite limited: the contribution limit violates the First Amendment because Missouri, on cross motions for summary judgment, was "unable to adduce sufficient evidence even to show that there exists a genuine issue of material fact regarding its alleged interest" in preventing corruption or the appearance of corruption. Pet. App. 7a.

Government must have some evidence of "real harm" to regulate speech on cable television or to restrict commercial speech. *Turner II*, 520 U.S. at 195; *Edenfield*, 507 U.S. at 770-71. As a prerequisite to approving contribution limits that "implicate fundamental First Amendment interests," *Buckley*, 424 U.S. at 23, the court of appeals did not ask for too much when it required Missouri to demonstrate that there were "genuine problems." Pet. App. 5a. The state, however, has never made any effort to determine whether campaign contributions cause any real harm,[29] and it persists in the view that "it is unnecessary . . . to demonstrate that [corruption and the appearance of corruption] are actual problems in Missouri's electoral system." *Id.*; *see* Pet. Br. 29. If the state had demonstrated that there were "genuine problems," Chief Judge Bowman made clear that the court of appeals would have deferred to the state's judgment about where the line should have been drawn. Pet. App. 5a; *see id.* at 9a.

[29] The Missouri legislature enacted the contribution limits at issue in this case in 1994. The court of appeals then held in 1995 that another set of Missouri contribution limits, adopted in a 1994 initiative, violated the First Amendment because Missouri had "no evidence to demonstrate that the limits were narrowly tailored to combat corruption or the appearance of corruption associated with large campaign contributions." *Carver v. Nixon*, 72 F.3d at 643. Missouri did not make any effort to respond to this decision and to find evidence that would be sufficient to meet the court of appeals' standard. In fact, when the legislature amended the campaign finance statutes in 1997, it set the contribution limits in exactly the same amounts originally enacted by the legislature in 1994. *Compare* Mo. Rev. Stat. § 130.032.1 (1994) *with* Mo. Rev. Stat. § 130.032.1 (Supp. 1998).

Challenges to campaign contribution limits, like challenges to restrictions on the distribution of the franchise, are challenges to the basic "assumption that the institutions of state government are structured so as to represent fairly all the people." *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 628 (1969). The courts have a special responsibility when they review rules that "cook up the representative body in the first place." Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 328; *see United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). The court of appeals correctly exercised this responsibility by holding that Missouri must demonstrate that campaign contributions cause some "real problem." Pet. App. 6a.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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