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 RESPONDENT JOAN BRAY IN SUPPORT OF PETITIONERS

Filed April 9, 1999

QUESTION PRESENTED

Whether the court of appeals erred in declaring that Missouri's $1,075 campaign contribution limit for statewide office, which exceeds the $1,000 limit for national elections expressly approved by this Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), violates the First Amendment.

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Respondent Joan Bray, a Missouri State Representative who participated as an intervenor-appellee in this case in the Court of Appeals for the Eighth Circuit, respectfully submits this brief in support of petitioners.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, filed November 30, 1998, reversing the decision of the district court and enjoining Missouri's contribution limits, is reported at *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519 (8th Cir. 1998). The Court of Appeals' order, dated July 23, 1998, entering an injunction pending appeal, is reported at 151 F.3d 763 (8th Cir. 1998). The opinion of the district court, dated May 12, 1998, granting summary judgment to the state defendants, is reported at 5 F. Supp. 2d 734 (E.D. Mo. 1998).[2]

STATEMENT OF JURISDICTION

The Eighth Circuit entered its judgment on November 30, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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1. Representative Bray is denominated a respondent in this case pursuant to Rule 12.6 of the Supreme Court Rules.

2. The opinions were reproduced in the Appendix to the Petition for Certiorari at pages 1a-41a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Missouri Revised Statutes § 130.32 (1994 & Supp. 1997)

Section 130.32 provides in pertinent part:

1. [T]he amount of contributions made by or accepted from any person other than the candidate in any one election shall not exceed the following:

> (1) To elect an individual to the office of governor, lieutenant governor, secretary of state, state treasurer, state auditor or attorney general, one thousand dollars;
>
> * * *

2. For purposes of this subsection "base year amount" shall be the contribution limits prescribed in this section on January 1, 1995. Such limits shall be increased on the first day of January in each even-numbered year by multiplying the base year amount by the cumulative consumer price index, as defined in section 104.010, and rounded to the nearest twenty-five-dollar amount, for all years since January 1, 1995. [The $1,000 base year amount increased to $1,075 in 1998.]

3. Candidate committees, exploratory committees, campaign committees and continuing committees, other than those continuing committees which are political party committees, shall be subject to the limits prescribed in subsection 1 of this section. The provisions of this subsection shall not limit the amount of contributions which may be accumulated by a candidate committee and used for expenditures to further the nomination or election of the candidate who controls such committee, except as provided in section 130.052.

* * *

7. Any committee which accepts or gives contributions other than those allowed shall be subject to a surcharge of one thousand dollars plus an amount equal to the contribution per nonallowable contribution, to be paid to the ethics commission and which shall be transferred to the director of revenue, upon notification of such nonallowable contribution by the ethics commission, and after the candidate has ten business days after receipt of notice to return the contribution to the contributor. The candidate and the candidate committee treasurer or deputy treasurer owing a surcharge shall be personally liable for the payment of the surcharge or may pay such surcharge only from campaign funds existing on the date of receipt of such notice. Such surcharge shall constitute a debt to the state enforceable under, but not limited to, the provisions of chapter 143, RS Mo.

STATEMENT OF THE CASE

The Eighth Circuit's ruling in this case is the only decision in the history of campaign finance jurisprudence to invalidate a campaign contribution limit higher than the $1,000 federal limit upheld in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and in effect to this day. As the dissenting judge on the sharply divided panel suggested, the appellate decision represents a *sub silentio* refusal to be bound by established Supreme Court precedent. *See Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 528 (8th Cir. 1998) (Gibson, J., dissenting) ("Perhaps members of the Court quarrel not only with the contribution limits at issue today, but with *Buckley* itself, as was made evident during oral argument."). This unspoken but unmistakable repudiation of *Buckley* threatens not only contribution limits in states and localities throughout this country but also the constitutionality of the current federal ceiling.

In striking down Missouri's contribution limits, the court of appeals mechanically applied the highest level of constitutional scrutiny, without regard to uncontested evidence of the law's very limited First Amendment impact. The Eighth Circuit also unilaterally elevated the evidentiary requirements for establishing interests in combating the reality and appearance of corruption to a threshold far above that established in *Buckley*. Because facts of this case relevant to both the standard of review and the evidentiary burden closely track those underlying *Buckley*, and the fundamental principles governing the regulation of contributions to candidates established in that case rest on sound reasoning, the Eighth Circuit's decision should be reversed.

A. Statement of Facts

Like the federal government prior to the 1974 amendments to the Federal Election Campaign Act ("FECA"), Missouri imposed no limit on contributions to candidates, until the state legislature enacted Senate Bill 650 ("S.B. 650") in 1994. In the absence of contribution limits, candidates for public office in Missouri received very large contributions, just as federal candidates did before FECA's amendment. *Compare Carver v. Nixon*, 72 F.3d 633, 642 (8th Cir. 1995) (citing $420,000 in contributions from one political action committee ("PAC") to races in northern Missouri), *and Shrink*, 5 F. Supp. 2d at 738 n.6 (citing press reports and editorials about single contributions in the range of $20,000-$40,000), *with Buckley*, 424 U.S. at 27 n.28 (citing appellate court discussion of contributions as high as $2,000,000 in the 1972 elections). In both instances — state and federal — the large contributions were publicly associated with at least apparent, and possibly real, exchanges of money for political favors. *Compare Shrink*, 5 F. Supp. 2d at 738 n.6 (citing editorial about state treasurer's apparent favoritism in awarding most of Missouri's banking business to a bank that had contributed approximately $20,000 to the treasurer's campaign), *with Buckley*, 424 U.S. at 27 n.28 (citing appellate court discussion of $1.8 million in contributions ascribable, in whole or in part, to 31 persons given ambassadorial appointments).

In Missouri, outrage at the actual or perceived corruption of government officials in the early 1990s generated popular pressure for contribution limits. While the legislature convened an Interim Joint Committee on Campaign Finance Reform (the "Interim Committee") to consider the terms of potential legislation, citizens organized to draft a ballot initiative. In May 1994, the legislature passed S.B. 650, with a $1,000 per election limit on contributions to candidates for state-wide

office and lower limits for candidates running in smaller, less expensive jurisdictions. *See* Mo. Stat. Ann. §§ 130.032.1, 130.032.3. The law also included a biannual adjustment of the ceilings, to account for the effect of inflation. *See id.* § 130.032.2. In November of that year, 74% of the Missouri voting population decided that the legislative limits were still too high "to remedy the corruption caused by large campaign contributions" and passed Proposition A, imposing even lower limits. *See Carver* 72 F.3d at 634, 640, 642. In *Carver*, the Eighth Circuit struck down Proposition A's more stringent limits, *see id.* at 645, leaving those of S.B. 650 in place. (Joint Appendix ("JA") 7-8.)

The limits imposed by S.B. 650 reflected the considered judgment of both houses of the legislature and the Governor as to when a campaign contribution became so large that, in the context of Missouri life, it would pose a risk of real or perceived corruption. As explained in the affidavit of Senator Wayne Goode, co-chair of the legislature's Interim Committee, the committee selected the limits after hearing testimony and considering a "broad spectrum of opinions on the issue of campaign contribution limits." (JA 46.) Senator Goode — a legislator with 22 years of experience in the Missouri House of Representatives and 14 years in the Missouri Senate — also stated under oath that the members of the committee discussed "not only what it cost to run a campaign and deliver a message to the populace, but also at what point there is the potential for contributions to become unduly influential." (JA 46.) Based on their own long personal experience waging House and Senate campaigns in Missouri, and their intimate familiarity with the real and perceived political pressures exerted by large donors on officeholders, the committee members reached a consensus that initial $1,000, $500, and $250 per election limits (for jurisdictions of decreasing size) balanced the need to raise funds for vigorous and effective campaigns with the need to

avoid the appearance that large contributors purchasing undue political influence. (JA 47.) In enacting S.B. 650, the legislature and Governor ratified the Interim Committee's judgment about the appropriate size of the limits.

Experience under S.B. 650 shows that Missouri candidates have in fact been able to run robust campaigns under the state's contribution limits. Indeed, several statewide candidates have raised even more money *under the limits* than candidates for the same offices had raised before the limits were enacted. (JA 24-28.) That fundraising success should come as no surprise, of course, given the 20-year public record of skyrocketing sums raised by members of Congress — including those representing Missouri — under the very same $1,000 limits. (JA 29-30.)

B. Proceedings Below

Plaintiffs in this case are Shrink Missouri Government PAC ("SMGPAC") and Zev David Fredman (JA 6). SMGPAC is a political action committee, which was formed after enactment of S.B. 650 and has since filed three lawsuits challenging Missouri's campaign financing laws. Fredman was a candidate in the 1998 Republican primary for the office of Missouri state auditor. (JA 9.)

Plaintiffs filed their complaint on March 2, 1998, challenging the constitutionality of Missouri's $1,075, $525, and $275 contribution limits. (JA 1, 5-11.) Pursuant to the district court's extremely expedited pre-trial scheduling order, the parties cross-moved for summary judgment barely one month later. (JA 1.) On May 12, finding no disputed issues of fact, the court entered summary judgment for the state. *Shrink*, 5 F. Supp. 2d at 737, 742.

In its decision, the district court did not examine the impact of the contribution limits on the First Amendment interests of either plaintiff. Had the court done so, it would have found that the contribution limits played at most a minor role in plaintiffs' failure to raise funds or to spend them on timely campaign speech.[3] Fredman raised funds from *no one* but SMGPAC for an entire year after forming his candidate committee. *See* Exhibit 1 to Affidavit of Zev David Fredman, sworn to on Aug. 5, 1998 (the "List of Contributions").[4] Moreover, even after the Eighth Circuit enjoined Missouri's contribution caps, and Fredman made his "best possible efforts to raise large contributions," not even one contributor (except the PAC) would give him more than $750 — well under the prior limit. (JA 60); *see* List of Contributions. Had Fredman used his "best possible efforts" earlier, he could have raised additional funds under the $1,075 contribution limit, just as other candidates did.

The First Amendment impact on SMGPAC was equally limited. Again, there is nothing in the record to suggest that SMGPAC made any effort to raise money or to spend it on political speech for the year after Fredman established his campaign committee, except to make the maximum contribution to his campaign. (JA 44.) Nor, during that time, did SMGPAC raise additional funds that could have been given to Fredman when the suit succeeded — or that could have been spent independently in his support had the suit failed. (JA 44).

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3. There is no record evidence of any impact on the speech or associational rights of anyone else.

4. The affidavit, which was submitted with plaintiffs' reply brief on appeal, is reprinted at JA 59-62, but the List of Contributions is included only in the original record.

Notwithstanding the paltry evidence of First Amendment impact, the district court applied strict scrutiny to Missouri's contribution limits. In addition, in examining the state's interests in preventing real or perceived corruption, the court imposed a heightened evidentiary standard recommended by plaintiffs on the theory that *Buckley*'s evidentiary analysis was no longer good law. *See Shrink*, 5 F. Supp. 2d at 737. The court nevertheless determined that Missouri established its compelling interest in "eliminating or at least limiting that perception." *Id.* at 738 (citing affidavit of Senator Goode); *see id.* at 738-39 & nn.6-8 (citing evidence and press reports of contributions ranging from $20,000 to $420,000). The court also found that Missouri's limits were not "different in kind" from the $1,000 limit upheld in *Buckley* and were thus narrowly tailored to serve that interest. *See id.* at 740-41. The court concluded:

> [T]o hold that in the context of contribution limits on state elections, the monetary limits approved of in *Buckley* are invalid would, in the Court's view, constitute an indirect — but still improper — overruling of that decision.

Id. at 741-42.

On appeal, a fractured Eighth Circuit panel reversed and enjoined Missouri's limits. Ruling that strict scrutiny applied automatically to every case involving contribution limits, two judges challenged Senator Goode's credibility, ignored the other evidence cited by the district court, and concluded that Missouri had not even raised a question of fact as to its interest in preventing the appearance of corruption. *See Shrink*, 161 F.3d at 521-22. Noting that *Buckley* was decided "[u]pon a record more slender that the one before [the Eighth Circuit]," the dissenting judge stated: "In rejecting the state's evidence,

the Court sidesteps binding Supreme Court precedent and fails to provide meaningful guidance to those who might hope to craft campaign finance reform legislation that will survive this Court's unprecedented scrutiny." *Id.* at 524, 527.

The Eighth Circuit also considered whether Missouri's limits were narrowly tailored to serve its asserted interest or were, instead, "different in kind" from the $1,000 limit upheld in *Buckley*. Two judges concluded that inflation since *Buckley* was decided could not alone create constitutionally cognizable differences in kind between Missouri's limits and the federal limit in effect for the past 25 years. *See id.* at 523 (Ross, J., concurring); *id.* at 524-25 (Gibson, J., dissenting). Only one judge was willing to rest his constitutional analysis on the pure numerical difference between $1,075 today and $1,000 in 1976 dollars. *See id.* at 523 & n.4.

SUMMARY OF ARGUMENT

The basic principles required to decide this case have been settled law since *Buckley* upheld the constitutionality of $1,000 per election limits on contributions to federal candidates. The record in this case provides no basis for disturbing either that holding or *Buckley*'s analysis of contribution limits. Because the Eighth Circuit decision is directly at odds with the reasoning and conclusions of *Buckley*, this Court should reverse the decision below.

Three basic principles, taken together, require reversal in this case. First, as this Court found in *Buckley*, contribution limits ordinarily do *not* impose a severe burden on First Amendment freedoms and are therefore subject to less than strict scrutiny. *See* 424 U.S. at 20-22, 25. The most exacting review is appropriate only when limits severely interfere with the ability of candidates or organizations to aggregate enough

contributions to conduct effective advocacy, *see id.* at 21-22 , which is manifestly not the case here. Reaffirming this longstanding principle would be consistent with the Court's "flexible" approach to constitutional review of other laws governing the electoral process. There is no reason why the Court should depart from its usual First Amendment jurisprudence and treat contribution limits as a "litmus test" for the standard of review, as the Eighth Circuit did in this case. *See* Point I.

The second principle comes into play when a state defending contribution ceilings seeks to establish its interest in avoiding the reality or appearance of corruption — interests that have been recognized as "compelling," *FEC v. National Conservative Political Action Comm.* ["*NCPAC*"], 470 U.S. 480, 496-97 (1985), and are thus clearly "sufficiently important" to sustain such limits. *See Buckley*, 424 U.S. at 25. Under that principle, such interests do not require extensive empirical verification. Anecdotal evidence of *actual* corruption sufficed in *Buckley*, and the Court regarded the *appearance* of corruption as "inherent" in a system of large monetary limits. *Id.* at 27, 28, 30. Such a pragmatic evidentiary standard is the only one consistent with the undeniable fact that the distortions of the democratic process flowing from large campaign contributions, which may disastrously erode public confidence in government, "can never be reliably ascertained." *Id.* at 27. This Court should therefore reject the elevated evidentiary burden invented by the Eighth Circuit, which effectively makes it impossible for states to control the undue influence of money on their elected officials. *See* Point II.

Finally, *Buckley* appropriately establishes a principle of great deference to legislative judgment about the particular level at which to set contribution limits. No one — and certainly not an appointed judge — is in a better position than

legislators themselves to know the point at which money threatens to subvert political processes or appears to do so. Even when contribution limits are enacted by means of ballot initiatives, the voters are in a better position than courts to ascertain at what level contributions give the appearance of corruption. Courts should therefore exercise great restraint before attempting to fine-tune contribution ceilings that have a limited effect on legitimate First Amendment interests. *See* Point III.

The decision below refuses to acknowledge these basic principles. The majority used an inflexible "litmus test" in applying strict scrutiny to Missouri's $1,075 contribution limit. The court also erected an insuperable evidentiary threshold for proof of the state's interest in combating real or perceived corruption, by requiring "demonstrable proof" of "genuine problems," including proof that the public perception of impropriety was "objectively reasonable." The Chief Judge was even prepared to second-guess the legislature's judgment about the appropriate level of contribution limits, without even asking whether the limit severely limited candidates' ability to amass sufficient funds for effective advocacy. Having begun with the wrong premises, the Eighth Circuit arrived at the wrong conclusion, and its decision should be reversed.

ARGUMENT

I.

Under *Buckley*, and This Court's More Recent Election Law Precedents, Missouri's Contribution Limits Are Subject to, at Most, Intermediate First Amendment Scrutiny.

States have considerable leeway to protect the integrity and reliability of election processes. *See, e.g., Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (noting that "States may, and inevitably must, enact reasonable regulations of . . . elections"); *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . ."). In recognition of that latitude, the Court has refused to apply a "litmus-paper test" in evaluating ballot-access provisions that are alleged to inhibit First Amendment freedoms. *Storer v. Brown*, 415 U.S. 724, 730 (1974). The same reasoning mandates application of a flexible standard when the Court is considering regulations of campaign financing.

In fact, *Buckley*'s analysis of campaign finance regulations represents an early application of the Court's flexible First Amendment jurisprudence. *Buckley* pointedly distinguished between provisions that imposed "little direct restraint" on speech or association and those that had a "severe" impact, 424 U.S. at 21, reserving strict scrutiny only for the latter. Because FECA's $1,000 limit had only a "limited effect on First Amendment freedoms," the Court applied a "rigorous" — but less than "strict" — standard of review to that provision. *Id.* at 29; *see Vannatta v. Keisling*, 151 F.3d 1215, 1220 (9th Cir. 1998) ("[W]hile contribution limits are reviewed under a

rigorous level of scrutiny, they are not reviewed under strict scrutiny.") (internal quotations omitted), *cert. denied*, 119 S. Ct. 870 (1999). The similarly limited effect of Missouri's limits warrants less than strict scrutiny in this case as well.

A. This Court's Flexible Standard for Reviewing Regulations of the Electoral Process Also Applies to Laws Regulating the Size of Contributions to Candidates.

In recent years, this Court has firmly rejected a *per se* rule for evaluating First Amendment challenges of electoral regulations. *See Buckley v. American Constitutional Law Found.* ["*ACLF*"], 119 S. Ct. 636, 642 (1999); *Timmons*, 520 U.S. at 358. Even when contested provisions have affected core political speech, as they did in *ACLF*, the Court has not mechanically invoked strict scrutiny. *See ACLF*, 119 S. Ct. at 639-40. Instead, the Court has made "'hard judgments'" about the "'character and magnitude'" of First Amendment impact and has varied the standard of review accordingly. *Id.* at 642 (quoting *Storer*, 415 U.S. at 730); *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

Under the Court's impact-sensitive approach:

> Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.

Timmons, 520 U.S. at 358 (internal quotations omitted). This "flexible standard" ensures that courts do not "tie the hands of States" seeking to protect the integrity of their electoral

processes. *ACLF*, 119 S. Ct. at 654 (O'Connor and Breyer, JJ., concurring in the judgment in part and dissenting in part); *Burdick*, 504 U.S. at 433.

The flexible standard has been applied in a wide range of cases involving electoral regulations. The *Timmons* Court determined that the First Amendment burdens imposed by a ban on "fusion" candidacies for elected office were not "severe" and thus that "the State's asserted regulatory interests need only be 'sufficiently weighty to justify the limitation.'"[5] 520 U.S. at 363-64 (quoting *Norman v. Reed*, 502 U.S. 279, 288-89 (1992)). The Court has also found that the burden on associational rights imposed by a ban on write-in voting was "reasonable," not severe, and therefore within the state's regulatory power. *Burdick*, 504 U.S. at 440 n.10. By contrast, the Court recently struck down a law requiring petition circulators to wear name tags, after finding that the requirement imposed a "severe" restraint on speech. *ACLF*, 119 S. Ct. at 645. The use of the flexible standard in these very different contexts shows how the Court guards against "undue hindrances to political conversations and the exchange of ideas," *id.* at 642, without resorting to a "bright line [that] separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms." *Timmons*, 520 U.S. at 359.

The policy supporting use of a flexible standard in the ballot access cases justifies the same impact-sensitive approach when courts review challenges of campaign finance regulations. Indeed, the states' need for "leeway" when protecting the

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5. Whether the *Timmons* Court properly assessed the burden imposed by the fusion ban is open to question; that the Court selected the standard of review based on that assessment is not.

integrity of their electoral processes is even more pressing when "money is paid to, or for, candidates" than when citizens circulate petitions for ballot initiatives. *ACLF*, 119 S. Ct. at 642, 648. After all, large campaign contributions carry an "inherent" risk of real or perceived corruption, *Buckley*, 424 U.S. at 27, rather than the more "remote" danger that attends the ballot initiative process. *Meyer v. Grant*, 486 U.S. 414, 427 (1988); *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."). A blunderbuss approach that applies strict scrutiny to every campaign finance regulation, irrespective of its actual impact on First Amendment freedoms, thus makes no sense as a matter of logic or policy. Nor is it consistent with *Buckley*, the leading campaign finance precedent.

B. Under the Flexible Standard, Adumbrated in *Buckley*, Missouri's Contributions Limits Are Subject to Less Than Strict Scrutiny.

Buckley recognized a distinction between a $1,000 contribution ceiling with a "limited effect upon First Amendment freedoms," 424 U.S. at 29, and a hypothetical cap that would impose a "severe" burden on speech and association by "prevent[ing] candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21. Based on that distinction, and the difference generally between campaign finance regulations that had a severe First Amendment impact and those that did not, *Buckley* in turn adopted a flexible standard of review. The Eighth Circuit ignored that distinction in concluding that strict scrutiny applies to *all* campaign finance provisions, including contribution limits, irrespective of their effect on speech or association. Because the record in this case demonstrates that Missouri's

limits had a negligible effect on First Amendment freedoms, the limits should have been subject to less than strict scrutiny.

1. *Buckley* Applied a Flexible Standard When Evaluating Contribution Limits.

Buckley's analysis of contribution limits is consistent with the Court's approach to electoral regulations in other contexts. In its introductory discussion, *Buckley* discarded three proposed litmus tests for determining the applicable standard of review. The Court rejected the plaintiffs' claim that "contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct." 424 U.S. at 15; *see id.* at 21 ("A limitation on the amount of money a person may give to a candidate or campaign organization . . . involves little direct restraint on his political communication . . . ."). But the Court also rebuffed the government's arguments that the limitations should be categorized merely as conduct — or as time, place, and manner regulations — which would automatically trigger lesser constitutional scrutiny. *See id.* at 16-18. Instead, *Buckley* adopted a nuanced approach — one that required assessment of the impact of such limits on legitimate First Amendment interests — and assigned the standard of review accordingly.

In evaluating FECA's contribution limits, *Buckley* expressly contrasted the $1,000 limit, which entailed "only a marginal restriction upon the contributor's ability to engage in free communication," with a hypothetical limit that "could have a severe impact on political dialogue." *Id.* at 20-21. The $1,000 limit involved "little direct restraint" because the mere act of contributing does not communicate the donor's reason for giving, and the size of the contribution is, at best, "a very rough index of the intensity of the contributor's support." *Id.* After

all, $100 may mean much to a person of moderate means, who only rarely can afford to make contributions, while wealthy donors regard the sum as a signal of the most reluctant assistance. The ceiling thus allowed contributors to use money as a signal of general support for a candidate and did not otherwise affect their ability to discuss candidates and issues. *See id.* at 21.

FECA's $1,000 contribution limit therefore contrasts starkly with the restrictions on petition circulators recently struck down in *ACLF*. A "circulator must endeavor to persuade electors to sign the petition," and that endeavor "'of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *ACLF*, 119 S. Ct. at 646 (quoting *Meyer v. Grant*, 486 U.S. at 421). But the sending of a check to a candidate does not involve the one-on-one "interactive communication concerning political change" issue that so concerned the *ACLF* Court. *Id.* at 639 (internal quotations omitted). Indeed, a campaign contributor who uses a big check to buy access to candidates or to pressure them to change their positions is engaged in illegitimate influence buying — a threat to democracy that contribution limits properly seek to prevent. *See Buckley*, 424 U.S. at 26-27. The $1,000 ceiling thus does not severely burden expression but rather "primarily target[s] the electoral process, imposing only indirect and less substantial burdens on communication." *ACLF*, 119 S. Ct. at 654 (O'Connor and Breyer, JJ., concurring in the judgment in part and dissenting in part).

The *Buckley* Court comfortably concluded that the $1,000 limit would not have a severe speech impact because there was nothing in the record to suggest that the cap would have "any dramatic effect on the funding of campaigns and political associations." 424 U.S. at 21. The Court noted that the ceiling would affect only 5% of the contributions raised in the most

recent election. *See id.* at 22 n.23. The basic effect of the contribution cap would therefore be merely to require candidates to raise funds from more people and to require donors who would otherwise give more than the limit to use their surplus funds for another form of political expression. *See id.* at 22.

The Court's analysis of the associational impact of contribution limits replayed the same themes. The Court noted that the $1,000 limit allowed contributors to align themselves with a candidate and "to pool their resources in furtherance of common political goals." *Id.* The cap did limit "one important means" of associating with a candidate or committee. *Id.* But the First Amendment burden was not severe because other avenues for political association remained open, and "the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy." *Id.* After 25 years under the $1,000 limit, we now know that the Court's assessment was correct, because PACs and candidates have in fact been able to amass huge sums for federal campaigns. (JA 29-30.)[6]

In sum, *Buckley* recognized that a $1,000 contribution limit imposes only an indirect and limited burden on legitimate First Amendment interests. *See Buckley*, 424 U.S. at 29; *id.* at 59 ("The contribution ceilings thus serve the basic governmental interest in safeguarding the integrity of the electoral process without directly impinging on the rights of individual citizens and candidates to engage in political debate

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6. The Federal Election Commission reports that in 1998 the 132 Senate candidates raised more than $244 million, and the 1,154 House candidates raised more than $420 million. *See* <http://www.fec.gov/press/cn30981.htm> (visited Apr. 5, 1999).

and discussion."). The ceiling imposes no direct or substantial burden on contributors' interests in political expression or association with a candidate, because those interests can be satisfied with a $1,000 contribution, and other avenues for signaling approval of or alignment with a candidate remain open.[7] *See id.* at 21-22. Nor is there any direct or substantial adverse impact on the interest of contributors and candidates in amassing enough funds for effective advocacy, because very large sums can be aggregated under the $1,000 limit.

Because FECA's $1,000 contribution limit did not impose a severe burden on speech or associational rights, the Court did not require a demonstration that the cap was "narrowly tailored" to serve a "compelling state interest." Nor did the Court apply a "least restrictive means" test when assessing the constitutionality of the contribution limit.[8] Rather, the Court looked for a "sufficiently important interest" to justify the ceiling and asked that the limit be "closely drawn" to further that end. *Id.* at 25. *Buckley* concluded that "weighty interests" in real and apparent electoral integrity were "sufficient to justify the limited effect upon First Amendment freedoms

7. In fact, *Buckley* upheld a complete ban on private contributions in the context of FECA's voluntary public funding scheme for major party presidential candidates in general elections. *See* 424 U.S. at 95 n.129; *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 286-87 (S.D.N.Y.), *aff'd mem.*, 445 U.S. 955 (1980). Contributors thus have no cognizable First Amendment complaint, even when the opportunity to make contributions is withdrawn completely, as long as the system continues to fuel candidates' campaigns, and the law "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.* at 21.

8. Indeed, the Court upheld the $1,000 ceiling in spite of the fact that disclosure requirements (rather than contribution limits) "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68.

caused by the $1,000 contribution ceiling." *Id.* at 29. In other words, without saying so explicitly, *Buckley* applied an intermediate level of First Amendment scrutiny to FECA's $1,000 contribution limit.[9] *Cf., e.g., Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (describing intermediate standard of review as one in which regulations "need only be tailored in a reasonable manner to serve a substantial state interest").

Buckley's failure to articulate the standard of review explicitly generated some early controversy on the Court. In *California Medical Association v. FEC*, the plurality clearly concluded that contribution limits were not entitled to the highest level of constitutional scrutiny. *See* 453 U.S. 182, 196 (1981) ("[T]he 'speech by proxy' that [plaintiff] seeks to achieve through its contributions . . . is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection."). On the other hand, Justice Blackmun argued that *Buckley* applied a single "rigorous" standard, which he appeared to identify with strict scrutiny. *See id.* at 202 (Blackmun, J., concurring in part and concurring in the judgment). In Justice Blackmun's view, FECA's limits on contributions to candidates had survived such scrutiny in

9. The difference between strict scrutiny and *Buckley*'s "rigorous" but less searching level of review is generally associated with the Court's distinction between expenditures and contributions, rather than a distinction among contribution limits with different kinds of First Amendment impact. *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending."); *see also ACLF*, 119 S. Ct. at 653 n.7 (Thomas, J., concurring in the judgment) (asserting that *Buckley* purported to apply strict scrutiny to all of FECA's restrictions but that the Court "seemed more forgiving in its review of the contribution provisions than it was with respect to the expenditure rules"). The distinction between contributions and expenditures is not at issue in this case.

Buckley, and the Act's limits on contributions to political committees would do so as well. *Id.* at 202-03. More recent campaign finance cases have resolved that debate, however, by confirming *Buckley*'s adoption of a flexible standard. *See, e.g.*, *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (citing cases in which the Court "weighed" affected interests in free speech and association against the state's interests in electoral integrity and legitimacy).[10]

By using a flexible standard, the *Buckley* Court was able to accommodate both the plaintiffs' First Amendment rights and the government's weighty interests. Because the *Buckley* plaintiffs could not establish that contribution limits had a severe burden on speech or association, the Court appropriately reduced the level of constitutional scrutiny and deferred to legislative judgments about the design of the limits. On the other hand, *Buckley* recognized the possibility that contribution limits could place a "severe" burden on speech and association if the limits had a "dramatic adverse effect" on the ability of candidates and committees to aggregate the funds necessary for effective advocacy. 424 U.S. at 21, 22. The Court did not specify the level of scrutiny that would be appropriate under those circumstance, because the $1,000 limit had only a limited

10. Lower federal courts — outside the Eighth Circuit — have generally recognized that *Buckley* applied less than strict scrutiny to provisions with a limited First Amendment impact. *See Vannatta*, 151 F.3d at 1220; *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 650 (6th Cir. 1997) ("[W]hen core First Amendment rights are not significantly affected, the regulated speech is not entitled to full First Amendment protection."); *Driver v. DiStefano*, 914 F. Supp. 797, 801 (D.R.I. 1996) ("[I]f a statute limiting political contributions serves an important state interest, it is not rendered unconstitutional merely because it burdens First Amendment rights when the burden imposed is a relatively slight one.").

effect, but the structure of the opinion suggests that strict scrutiny of the limits would then be justified. *See id.*

The Eighth Circuit disregarded both *Buckley* and this Court's recent First Amendment jurisprudence in mechanically applying strict scrutiny to Missouri's contribution limits. The circuit's ruling cannot accommodate *Buckley*'s distinction between a $1,000 contribution limit that had only a "limited effect" on First Amendment freedoms and a hypothetical cap that might have a "severe impact." That distinction makes sense only if *Buckley* were seeking to contrast the levels of scrutiny appropriate for two contribution limits that differed in kind. *See id.* at 30. In contemporary terms, the distinction makes sense only if *Buckley* were seeking to show how a flexible standard of review applies to contribution limits with qualitatively different First Amendment impacts. By ignoring that distinction, and refusing to analyze the First Amendment burden actually imposed by Missouri's contribution limits, the Eighth Circuit unilaterally created a special exception from the flexible standard of review otherwise applicable to electoral regulations.

There is no principled basis for the Eighth Circuit's idiosyncratic treatment of contribution limits. Indeed, as is explained above, the policy supporting flexible judicial review may be at its most urgent in this context. *See supra* Point I(A). This Court should therefore clearly and unequivocally reaffirm *Buckley*'s flexible approach to judicial review of campaign finance provisions. Specifically, the Court should confirm that such provisions, including contribution limits, are subject to less than strict scrutiny under *Buckley*, unless plaintiffs can demonstrate that the challenged restrictions will have a severe constitutional impact.

2. Missouri's Limits Do Not Trigger Strict Scrutiny Because They Do Not Have a Dramatic Adverse Effect on the Funding of Campaigns.

In 1995, Missouri enacted a $1,000 per election limit on contributions to statewide candidates, a limit identical in size to the limit that then governed, and still governs, candidates for the federal Senate and House of Representatives. Missouri's $1,000 limit has since been raised to $1,075 per election — the amount that the plaintiff candidate collected from its sole contributor (plaintiff SMGPAC) before the Eighth Circuit invalidated the state's contribution ceilings. The record in this case demonstrates beyond question that the challenged limits had at most a negligible effect on the ability of candidates to aggregate funds for effective advocacy. Accordingly, under the flexible standard presaged in *Buckley* and endorsed in this Court's more recent precedents, Missouri's limits should have been reviewed under less than strict scrutiny.

Having filed a facial constitutional challenge in this case, plaintiffs "confront a heavy burden in advancing their claim" that Missouri's contribution limits violated the First Amendment.[11] *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2175 (1998) (internal quotation omitted); *see Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (noting that

11. Arguably, because plaintiffs filed a *facial* challenge, they were required to prove that Missouri's limits burdened the rights of a substantial number of contributors and candidates, not merely their own rights. *See, e.g., Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992) (statute that burdens constitutional right in "a large fraction of cases" is unconstitutional on its face); *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 459, 460 (11th Cir. 1996) (finding that the challenged statute would not operate unconstitutionally in most cases and therefore was not invalid on its face).

facial invalidation "is, manifestly, strong medicine" that "has been employed by the Court sparingly and only as a last resort"). The only evidence they introduced to this effect showed that the law's impact on speech and association was minor at best. They offered no proof of serious fundraising efforts that were thwarted by the ceilings. To the contrary, by their own admission, they made no fundraising efforts at all (except with each other) until the Eighth Circuit struck down Missouri's law.

Plaintiffs attempt to magnify the impact of the contribution limit by suggesting that, without the ceiling, Fredman could have solicited large donations soon after forming his committee and thereafter mounted a serious campaign. That strategy fails for two reasons. First, Fredman's claim is purely speculative. There are no affidavits from Fredman's supporters to suggest that even one contributor (other than SMGPAC) would *ever* have made contributions to Fredman in excess of the $1,075 limit. Moreover, the record shows that SMGPAC did not have the funds, and had never during its entire existence raised sufficient funds, to finance Fredman's campaign singlehandedly. (JA 44, 53-58.)[12] Second, *Buckley* explicitly acknowledged that contribution limits would "require candidates to raise funds from a greater number of persons" and expressly declined to regard that fact

12. Excerpts from Campaign Disclosure Reports filed by SMGPAC were annexed as Exhibit G to the State Defendants' Suggestions in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of State Defendants' Motion for Summary Judgment, filed Apr. 3, 1998. Those reports show no disclosures prior to the 1994 general election, when SMGPAC made six contributions for a total of $1,800. None of the reported contributions was larger than $400. SMGPAC reported no contributions in 1995. In 1996, SMGPAC reported four contributions for a total of $750, the largest of which was $250.

as evidence of a severe First Amendment burden. 424 U.S. at 22. Thus even if Fredman's assertions were accepted at face value, they would establish only a minor burden on his rights.[13]

To counter plaintiffs' paltry evidence of constitutional impact, the state compiled data about candidate fundraising under $1,000 ceilings. The statistics show that Missouri state candidates were able to raise substantial sums under the limits — often more than they did before the enactment of S.B. 650. (JA 24-28.) Those data are consistent with the experience of members of Congress, including those representing Missouri, who have conducted robust campaigns while raising funds under $1,000 per election limits. (JA 29-30.) The state also calculated the percentage of contributions made in excess of $2,000 (the maximum total individual contribution for the primary and general elections) in the two pre-ceiling campaigns most analogous to Fredman's. That evidence demonstrated that only about 2% of contributions were affected by Missouri's limits. (JA 34-36.) Plaintiffs offered nothing whatsoever to rebut the state's statistics.

13. Fredman's record of spending confirms the limited effect of the contribution caps. He admits that he purchased 61 30-second radio spots throughout the state for only $1,034.12. *See* Exhibit 2 to Affidavit of Zev David Fredman, sworn to on Aug. 5, 1998 (annexed to plaintiffs' Reply Brief on appeal). Moreover, he had the funds for more than 50 by June 25, 1997, but did not run his first radio advertisement until July 31, 1998. *See id.*; JA 60. In other words, he did not spend a dime to advertise his candidacy until less than one month before the primary — even though the money that sat in his coffers for more than a year would have financed dozens of radio spots. Had he been a serious candidate, he could have used his existing funds to get out his message and to solicit additional support. That Fredman made no effort to communicate with the voters for more than a year, even though he unquestionably could have done so, can hardly be blamed on the contribution limits.

The facts of this case thus establish beyond doubt the very minimal First Amendment impact of Missouri's contribution limits on contributors, candidates, and political associations. Contributors could and did make monetary contributions to Missouri candidates, and in the 1994 auditor's race, about 98% of the amounts donated were unaffected by the limits.[14] In view of the large sums aggregated under the limits, plaintiffs were in no position to argue that the ceilings prevented candidates from amassing the funds necessary for effective advocacy. And the few contributors who would have contributed more than $1,000 per election, including political associations with substantial pooled resources, remained free to use the surplus amounts to support their favored candidates directly. *See Buckley*, 424 U.S. at 21-22 (identifying the expression of general support by

14. The very small percentage of affected contributions shows that Missouri's limits could not have had a dramatic impact on First Amendment freedoms. But even a contribution cap that affected a large percentage of contributions would not necessarily impose a severe burden. As experience under the federal limit shows, candidates can generally compensate for the effect of contribution ceilings by expanding their pool of contributors. Plaintiffs filing facial constitutional challenges to contribution limits before those limits have gone into effect therefore cannot carry their burden merely by showing that half or two-thirds of contributions would be affected. Plaintiffs have the burden of proving that substitute funds will be unavailable, by showing for example that the required number of new contributors is prohibitively high. Where the limits have already been implemented for at least one election cycle, as Missouri's were, plaintiffs have the burden of proving a dramatic adverse effect on a substantial number of candidates. *See, e.g., National Black Police Ass'n v. District of Columbia Bd. of Elections & Ethics*, 924 F. Supp. 270, 277-81 (D.D.C. 1996) (looking beyond percentage of affected contributions to impact on amounts actually raised and effects on candidates' ability to communicate with voters, before finding that $100 and $50 contribution caps "severely limit[ed] candidates' right to speak freely in the political campaign arena"), *vacated as moot*, 108 F.3d 346 (D.C. Cir. 1997). Plaintiffs in this case have not come close to making that showing.

means of a contribution, the availability of substantial funds for advocacy, the opportunity to pool resources, and the option of direct spending as evidence of the minor First Amendment impact of contribution limits).

In sum, neither the factual record nor the applicable legal precedents supports the application of strict scrutiny in this case. The undisputed evidence shows that Missouri's contribution limits have had only a minimal impact on rights of speech and association.[15] This Court's cases from *Buckley* through *ACLF* demonstrate that it is inappropriate to apply strict scrutiny to a provision with such a limited effect on First Amendment freedoms. The Eighth Circuit's mechanical application of strict scrutiny is therefore clear error.

15. Although this discussion has focused primarily on Missouri's limit for statewide candidates, the analysis applies equally to the state's $525 and $275 per election limits governing races in smaller jurisdictions. The Eighth Circuit applied strict scrutiny to those limits, even though plaintiffs offered no evidence that the limits would have a severe impact on First Amendment freedoms. An affidavit from Albert Hasler, who was unopposed in the Republican primary for Missouri State Representative for the 84th District, states only that he would find fundraising easier if he could accept contributions larger than $275 per election. (JA 55.) Because *Buckley* plainly ruled that such a concern did not demonstrate a severe impact on political dialogue, *see* 424 U.S. at 21-22, the $525 and $275 limits should also have been subject to less than strict scrutiny.

II.

The State Satisfied Its Burden of Proving Substantial — Indeed Compelling — State Interests in Preventing Actual or Apparent Corruption Caused by Large Contributions.

Buckley used common sense and pragmatism in assessing the sufficiency of the government's interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." 424 U.S. at 25. Under that approach, the compelling importance of those interests cannot be questioned, unless the state has no basis whatsoever for stating that the threat presented by such contributions is real rather than "illusory."[16] *Id.* at 27. Since *Buckley*, this Court has consistently reaffirmed that standard, as it must if states are to have the leeway they need to protect "the integrity of our system of representative government" and public "confidence in the system." *Id.* at 26-27 (internal quotation omitted).

The Eighth Circuit has unilaterally elevated the state's evidentiary burden to the point where it effectively precludes regulation of campaign contributions. Under the standard established by *Buckley*, by contrast, the evidence in this case is more than adequate to carry the state's burden. The Eighth Circuit decision should therefore be reversed, and the injunction against enforcement of Missouri's contribution limits should be vacated.

16. Thus, even if *Buckley* is interpreted to apply strict scrutiny to contribution limits, the Eighth Circuit committed reversible error by imposing a legally indefensible evidentiary burden on the state. Irrespective of the applicable standard of review, Missouri easily carried its burden of showing a compelling interest in preventing real and perceived corruption.

A. Under *Buckley* and Its Progeny, the Government's Interest in Preventing the Reality or Appearance of Corruption Cannot Be Questioned As Long As the Problem Is Not "Illusory."

In *Buckley*, the Supreme Court found it "unnecessary to look beyond the Act's primary purpose — to limit the actuality and appearance of corruption resulting from large individual financial contributions — in order to find a constitutionally sufficient justification for the $1,000 contribution limitation" established under FECA. *Id.* at 26. The Court also established a pragmatic evidentiary standard for demonstrating the state's interests in preventing such real or perceived corruption. Under *Buckley*, the government carries its burden of proving weighty interests in addressing those problems, as long as the problems are not "illusory." *Id.* at 27.

Buckley articulated this standard in evaluating the asserted federal interest in eliminating actual corruption. The Court found that "the deeply disturbing examples [of large contributions given to secure political favors] surfacing after the 1972 elections" provided adequate evidence of that interest. *Id.* at 27 & n.28. Although the record did not establish the scope of the corruption, *Buckley* concluded that isolated examples sufficed to demonstrate that "the problem is not an illusory one." *Id.* at 27. The Court realized that mere anecdotal evidence had to be enough to fulfill the government's evidentiary burden, because corrupt politicians will take great pains to conceal the exchange of influence for money, and therefore "the scope of such pernicious practices can never be reliably ascertained." *Id.*; *see Burson v. Freeman*, 504 U.S. 191, 208 (1992) (rejecting need for empirical proof of an interest in preventing voter intimidation and election fraud and noting that such practices "are successful precisely because they are difficult to detect").

The government's burden of proof when it seeks to prevent the *appearance* of corruption is, if anything, even less demanding. According to *Buckley*, "*opportunities* for abuse *inherent* in a regime of large individual financial contributions" create an appearance of impropriety. 424 U.S. at 27 (emphasis added). Because that appearance can disastrously erode public confidence in representative government, "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical.'" *Id.* (quoting *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973)). The mere "opportunity for abuse inherent in the process of raising large monetary contributions" was all the proof needed to demonstrate a weighty governmental interest in "safeguarding against the appearance of impropriety." 424 U.S. at 30. A "system permitting unlimited financial contributions," carried a self-evident threat to public confidence. *Id.* at 28; *cf. Blount v. SEC*, 61 F.3d 938, 944 (D.C. Cir. 1995) (finding that "underwriters' campaign contributions self-evidently create a conflict of interest in . . . officials who have power over municipal securities contracts").

Buckley thus forecloses any doubt about the sufficiency of the government's interest in limiting the appearance or reality of corruption, unless those problems are wholly "illusory." Only if there is no evidence of the problems, if they are plainly speculative or "merely conjectural," may the government's interest in preventing them be questioned. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see NCPAC*, 470 U.S. at 498 (invalidating independent expenditure limit for PACs where, on the record presented, corruption "remain[ed] a hypothetical possibility and nothing more"). But if there is *any* evidence of actual or perceived corruption, or if the potential for abuse is inherent or self-evident, the government has carried its burden of proving compelling state interests in limiting large contributions. *See Buckley*, 424 U.S. at 27, 28, 30; *Blount*, 61

F.3d at 945 ("Although the record contains only allegations, no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth is great, and the legislative purpose prophylactic.").

This threshold has not changed since *Buckley*. To the contrary, this Court has repeatedly reaffirmed the need for judicial deference to legislative judgments about the need for contribution limits. *See NCPAC*, 470 U.S. at 500 (recognizing "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *FEC v. National Right to Work Comm.* ["*NRWC*"], 459 U.S. 197, 210 (1982) ("Nor will [the Court] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.").

Other cases involving regulation of campaigns and elections confirm that this Court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons*, 520 U.S. at 364. Nor does the Court require "demonstrable evidence" of "genuine problems," *Shrink*, 161 F.3d at 521, before it can act to prevent injury to democratic institutions.

> To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the evidence marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action.

Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986) (internal quotations omitted). As the Court has explained: "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Id.* at 195-96; *see Turner*, 512 U.S. at 665 ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable.").

The same reasoning applies to at least as great an extent when states seek to establish an interest in combating the reality and appearance of corruption. Where, as here, plaintiffs cannot show that contribution ceilings will have a severe First Amendment impact, courts should not become embroiled in endless battles over the sufficiency of the state's evidence. Because plaintiffs did not make that showing in this case, the Eighth Circuit committed a second fatal mistake in disregarding this Court's deferential standard for establishing an interest in preventing real or perceived corruption.

B. The Eighth Circuit's Insurmountable Evidentiary Threshold Is Unsupported by Law or Policy.

The decision below asserts that states seeking to justify contribution limits must show "demonstrable evidence that there were genuine problems that resulted from contributions in amounts greater than the limits in place." *Shrink*, 161 F.3d at 521. Moreover, to carry that burden, the state must additionally prove that any perceived corruption is "objectively 'reasonable.'" *Id.* at 522 (quoting *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 510 (1998) & 119 S. Ct. 1040 (1999)). Needless to say, no evidence

presented to the Eighth Circuit has ever been sufficient to satisfy that test. *See Shrink*, 161 F.3d at 522; *Russell*, 146 F.3d at 569-70. The Eighth Circuit's standard obliterates the difference between real and perceived corruption, has no legal support, and should be unequivocally repudiated.

The Eighth Circuit first established its idiosyncratic evidentiary standard last year in *Russell v. Burriss*, which struck down contribution limits for Arkansas candidates.[17] In construing its requirement, the *Russell* court repeatedly complained of Arkansas' failure to show that any legislator had changed his vote in exchange for campaign contributions, violated the pre-existing contribution limits, or illegally concealed the source of his contributions. *See* 146 F.3d at 569-70. The Eighth Circuit thus construed its evidentiary test to require that any perception of corruption be based on actual *quid pro quo* exchanges of money for votes or on other patently unlawful conduct. So understood, the Eighth Circuit's "objective reasonableness" test, introduced in *Russell* and applied in this case, obliterates the distinction between the appearance and reality of corruption.

As the district court in this case recognized, however: "A perception of influence peddling is a 'real harm' regardless of whether such peddling is actually afoot." *Shrink*, 5 F. Supp. 2d at 738. The "real harm of perceived corruption" (actual public distrust of candidates and elected officials who accept large contributions) should not be confused with "real corruption" (actual improper influence of candidates and officials by

17. There does not appear to be any other court in the country, state or federal, that has refused to uphold contribution limits on the ground that the perception of corruption caused by large contribution limits was not shown to be "objectively reasonable."

monied interests). Maintaining the distinction means rejecting the Eighth Circuit's evidentiary test.

The Eighth Circuit's only attempt to defend its insurmountable threshold appears in a footnote, *see* 161 F.3d at 522 n.3, where the court quotes from *United States v. National Treasury Employees Union*, ["*NTEU*"], 513 U.S. 454 (1994). In *NTEU*, this Court stated:

> [W]hen the Government defends a regulation on speech . . . 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, . . . and that the regulation will in fact alleviate these harms in a direct and material way.

Id. at 475 (internal quotations omitted). But that passage provides no support for the extremely onerous Eighth Circuit test. The "real" harm referred to in *NTEU* is an just alternative term for harm that is not "illusory" under *Buckley*.

NTEU involved a challenge to a ban on honoraria given to federal executive branch employees below grade GS-16 for activities having nothing to do with their jobs. The mean salary of affected class members was no more than $36,123 in 1993. But the government had only "limited evidence of actual or apparent impropriety by legislators and high-level executives" and concerns for administrative convenience to justify the ban. *Id.* at 472. The *NTEU* Court agreed that "Congress could reasonably *assume* that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence." *Id.* at 473 (emphasis added). But the Court refused to extend the assumption to low-level federal employees "with negligible power to confer favors on those who might pay to hear them speak or read their

articles." *Id.* *But see id.* at 494 (Rehnquist, C.J., dissenting) (supporting deference to the government's determination that the appearance of impropriety required a ban on honoraria for all employees).

Under this reasoning, if honoraria to high-level officials had been at stake in *NTEU*, the government could have established its interest with nothing more than "limited evidence of actual or apparent impropriety." *Id.* at 472. Indeed, the *NTEU* Court was prepared to have Congress *assume* that honoraria paid to such officials would generate an appearance of improper influence. *See id.* at 473. *NTEU* thus does not impose a new standard for establishing an interest in preventing actual or apparent corruption of legislators and other elected officials — the harm that is at issue in the case before this Court. To the contrary, *NTEU* reaffirms that Congress may regulate payments to such officials on the basis of anecdotal evidence or self-evident assumptions about how such payments will be perceived. When those officials are concerned, what counts as evidence of "real harm" from actual or apparent impropriety under *NTEU* is precisely what counts as evidence that real or perceived corruption is not an "illusory" problem under *Buckley*.

The *NTEU* Court's treatment of honoraria paid to low-level employees also confirms the time-honored standard established in *Buckley*. The *NTEU* Court struck down the honoraria ban as applied to such workers, because there was "*no evidence* of misconduct related to honoraria in the vast rank and file of federal employees below grade GS-16." *Id.* at 472 (emphasis added); *see id.* at 485 (O'Connor, J., concurring in the judgment in part and dissenting in part) (rejecting a "bare assertion" of interest made "*without any showing* that Congress considered empirical or anecdotal data pertaining to abuses by lower-echelon executive employees") (emphasis added). Only

when the posited harms were matters of "mere speculation," with *no* evidence whatsoever to support them, was the Court prepared to find that the government had not carried its burden. *Id.* at 475.[18] The Eighth Circuit's requirement that states produce "demonstrable evidence" of an "objectively reasonable" perception of corruption thus finds no support in *NTEU*.

Not only is the Eighth Circuit's evidentiary standard legally unsupported but it is also indefensible as a matter of policy. Courts should not be required to leave common sense at the door when states assert interests in preventing real and perceived corruption. *Cf. Burson*, 504 U.S. at 211 (relying on "a substantial consensus, and simple common sense" in finding a need for regulation); *Turner*, 512 U.S. at 665-66 (suggesting that courts may accept "sound reasoning" in support of regulatory measures when "complete empirical support" is not available) (internal quotations omitted). When there are absolutely no limits on the amounts of permissible campaign contributions, as was the case in Missouri before enactment of S.B. 650 and is the case now, the potential for abuse is incontrovertable. When contributors are in fact donating large sums to persons who, if elected to office, will have the power to grant special favors, a state should not have to prove more before it is authorized to take reasonable steps — steps that are non-discriminatory and do not have a severe First Amendment impact — to eliminate the risk of real or perceived corruption.

This Court should therefore reaffirm clearly the minimal burden of proof established in *Buckley*. As long as there is

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18. *Cf. Edenfeld*, 507 U.S. at 771 (rejecting the asserted justification for regulation because the record did not disclose "any anecdotal evidence" in its support).

some basis for finding actual or apparent corruption — whether anecdotal evidence, common sense, or sound reasoning — the government has carried its burden of showing weighty, indeed compelling, interests in preventing real or apparent corruption. *See, e.g., NRWC*, 459 U.S. at 210 ("[W]e accept Congress' judgment that it is the potential for such influence that demands regulation."). That proof suffices to show that the posited harms are "real," and courts may not legitimately demand more.

C. The Evidence Amply Demonstrates the State's Compelling Interest in Eliminating the Appearance of Corruption Caused by Large Contributions.

Under the standard established by this Court's precedents, the state unquestionably demonstrated an interest in eliminating the appearance of corruption. Because Missouri imposed no limit whatsoever on contributions until it passed S.B. 650, the potential for corruption was inherent in the system. But even if this Court demands more than the common sense argument accepted in *Buckley* and *NTEU*, the record amply establishes that perceived corruption was a problem in Missouri before its legislature enacted the challenged contribution limits.

1. Prior to Senate Bill 650, the Appearance of Corruption Was Inherent in Missouri's Regime of Unlimited Contributions.

The key fact about this case that brings it squarely within the reasoning of *Buckley* is that S.B. 650 replaced a system permitting completely unlimited campaign contributions. *Buckley* expressly recognized that opportunities for abuse were "inherent" in such a system and that those opportunities created an appearance of corruption. 424 U.S. at 27, 30. When a system sets *no* limits on the amount of contributions that may be made — as did the federal system before *Buckley* and

Missouri's system before enactment of the limits challenged here — the potential for corruption is self-evident. This Court can therefore find as a matter of law that Missouri has established its interest in avoiding the appearance of corruption.[19]

2. The Documented Facts Further Demonstrate That the Campaign Finance System That Existed Before Missouri Enacted Contribution Limits Created an Appearance of Corruption.

Even if proof of more than self-evident opportunities for abuse were required, there is substantial record evidence to support the state's interest in reducing the appearance of corruption. First, Missouri had repeatedly sought to enact contribution limits, not only in S.B. 650, but also in Proposition A. The fact that S.B. 650's contribution limits commanded a majority of the legislature, and that Proposition A's even lower limits commanded 74% of the electorate, suffices "to demonstrate that there is at least an appearance of corruption that must be addressed." *California ProLife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1295 (E.D. Cal. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999); *see Shrink*, 5 F. Supp. 2d at 738 & n.7 (noting that the enactment of Proposition A could be regarded as a sort of "poll" on the existence of a perceived threat to the state's election process). The fact that proponents of the initiative publicly described it as an effort to

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19. The question whether the specific contribution limits established by S.B. 650 were closely drawn to prevent the harm inherent in a system of unlimited contributions is a separate question discussed in Point III. Two judges on the Eighth Circuit panel opined that the limits did not differ in kind from the $1,000 limit upheld in *Buckley*, *see Shrink*, 161 F.3d at 523 (Ross, J., concurring), *id.* at 524 (Gibson, J., dissenting), which was precisely focused on the problem of large contributions, *see* 424 U.S. at 28.

"temper the influence of special interests" and to end a "money-influenced" political system, is further evidence of perceived corruption. *Shrink*, 5 F. Supp. 2d at 738 n.7.

Newspaper articles and editorials published shortly before the enactment of S.B. 650 provide yet more evidence of the appearance of corruption in Missouri at the relevant time. *See id.* at 738 nn. 6-7.[20] The press reported that Missouri candidates and elected officials were receiving contributions in amounts as high as $20,000 and $40,000 and suggested that suspicious correlations between the payments and acts in office made the "central issue" one of "trust." *Id.* at 738 n.6 (quoting Editorial, *The Central Issue Is Trust*, St. Louis Post-Dispatch, Dec. 31, 1993, at 6C (reporting that the state's treasurer had awarded state business to a bank that had contributed $20,000 to his campaign), and citing Jo Mannies, *Auditor Race May Get Too Noisy to Be Ignored*, St. Louis Post Dispatch, Sept. 11, 1994, at 4B (reporting that a candidate for auditor had received a $40,000 contribution from a brewery and a $20,000 contribution from a bank)). Missouri Governor Carnahan's support for contribution limits also reflected concern about the apparent undue influence of big money on politics. *See id.* (citing John A. Dvorak, *Election Reform Backed Lid on Contributions to Campaigns Wins Carnahan's Support*, Kansas City Star, Nov. 14, 1993, at B1 (quoting the Governor as stating, "We need a system that will make sure that our democratic institutions care as much about John Doe and Jane

20. The district court in this case was entitled to take judicial notice of these publications. *See In re Petition of Lauer*, 788 F.2d 135, 137 (8th Cir. 1985) ("[T]his court takes judicial notice of numerous letters appearing in metropolitan newspapers . . . ."); *see also Peters v. Delaware River Port Auth.*, 16 F.3d 1346, 1356 n.12 (3d Cir. 1994) ("We take judicial notice of newspaper accounts . . . .").

Doe as they do about any big company or any wealthy individual.")).

Reports about $20,000 and $40,000 contributions are probative of the state's interest in comabting perceived corruption. In *Buckley*, the Court considered a $2,000,000 contribution from the dairy industry and contributions from six individuals totaling $3,000,000 evidence that the risk of corruption was not illusory. *See* 424 U.S. at 27 & n.28 (referring to examples discussed by the Court of Appeals, *Buckley*, 519 F.2d 821, 839-40 & nn.36-38 (D.C. Cir. 1975)). Even though those contributions far exceeded FECA's $1,000 limit, the Court flatly rejected the claim that the limit was "unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or officeholder." 424 U.S. at 30. *Buckley* thus makes it clear that the state does not need to show that contributions immediately over the limit would create the appearance of corruption. Far larger contributions may establish the state's interest in eliminating that appearance.

In addition to the foregoing evidence, the record contains an affidavit from Missouri State Senator Wayne Goode, who had served for a total of 35 years in the state legislature, first in the House and then in the Senate. (JA 46-47.) Senator Goode stated that he was a co-chair of the Interim Joint Committee on Campaign Finance Reform, which recommended adoption of the contribution limits in Senate Bill 650. (JA 46.) He represented that, before recommending those limits, the committee conducted hearings and internal discussions on both the costs of campaigning and the point at which contributions could become unduly influential. (JA 46.) The consensus of the committee was that the contribution limits challenged here were necessary to balance the need to run an effective campaign

with the need to avoid the appearance of buying legislative votes. (JA 47.)[21]

Senator Goode also opined that both the appearance of corruption and the potential for actual corruption had decreased since implementation of the limits. *See id.* He was joined in that view by John W. Maupin, former Missouri Ethics Commission member and chair. *See id.* at 48-49. The affidavits of Senator Goode and Mr. Maupin, together with all of the foregoing evidence, unquestionably demonstrate Missouri's compelling interest in eliminating the appearance of corruption created by contributions over the current limits.

The Eighth Circuit either ignored or improperly discounted the evidence of the state's interest. The court appears to have forgotten its own prior decision in *Carver*, where it acknowledged that "an overwhelming 74 percent of Missouri voters 'determined that contribution limits are necessary to combat corruption and the appearance thereof'" and admitted that this fact "may address the desirability of campaign contribution limits." 72 F.3d at 640 (quoting *Carver*, 882 F. Supp. 901, 905 (W.D. Mo. 1995)). The court also ignored the press reports cited by the district court in this case.[22]

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21. *Cf. Friedman v. Rogers*, 440 U.S. 1, 12 (1979) ("The concerns of the Texas Legislature about the deceptive and misleading uses of optometrical trade names were not speculative or hypothetical, but were based on experience in Texas with which the legislature was familiar . . . ."). In *Friedman*, references to a prior court decision, which in turn cited only anecdotal evidence of misleading practices, sufficed to prove the state's interest in adopting the challenged regulation.

22. The court's disregard of this evidence is especially egregious in view of its complaint that Senator Goode "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." *Shrink*, 161 F.3d at 522. That evidence appeared in the court's own opinion in *Carver*, which mentioned a $420,000 contribution and the subsequent passage of Proposition A. *See* 72 F.3d at 640, 642. The *Carver* court could not deny the "desirability" of contribution limits, so it complained that the limits were the lowest in the nation. *See id.* at 642. Of course, when the Eighth Circuit faced a $1,075 limit, *Carver*'s approach was not an option. So in its hostility to *Buckley*, and campaign contribution limits in general, the court instead ignored the evidence of desirability.

The Eighth Circuit could not ignore the affidavit of Senator Goode. The court therefore dismissed it as self-serving, citing "the senator's vested interest in having the courts sustain the law that emerged from his committee."[23] *Shrink*, 161 F.3d at 522. But the Eighth Circuit could not properly rule on the credibility of witnesses when reviewing a decision on summary judgment. *See Oldham v. West*, 47 F.3d 985, 989 (8th Cir. 1995) ("[A] credibility determination is inappropriate in ruling on a motion for summary judgment.") (internal quotations omitted). Indeed, because plaintiffs did not contest either the substance of the Senator's allegations or his credibility as a witness, the court should have concluded as a matter of law that Missouri established its interest in limiting perceived corruption. *See Lundeen v. Cordner*, 354 F.2d 401,

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23. The Eighth Circuit also complained that it had no way of knowing whether the public shared Senator Goode's perception of corruption or whether the perception "derived from the magnitude of . . . contributions that historically have been made to candidates running for public office in Missouri." *Shrink*, 161 F.3d at 522 (internal quotations omitted). That criticism is hardly credible, given that the Interim Committee, a majority of the legislature, and 74% of Missouri voters supported the limits. Moreover, there would be no reason for the citizens and their representatives to enact contribution ceilings if their perception of corruption did not derive from knowledge that large contributions were being made to Missouri candidates.

409 (8th Cir. 1966) (requiring production of specific facts to put credibility in issue and thereby defeat summary judgment).

The Eighth Circuit's assertion that the state failed even to create an issue of fact as to its interest in enacting contribution limits rests on legal error and a refusal to acknowledge the undisputed evidence. Under the standard established in *Buckley* and its progeny, the Court of Appeals had more than enough proof of Missouri's interest in reducing the appearance of corruption. In addition, a majority of the panel recognized that Missouri's limits were no different in kind from the $1,000 limit upheld in *Buckley*, so this Court need not address the question whether the legislature set the limits at the proper levels. Rather, this Court should reverse the Eighth Circuit decision and vacate the injunction against enforcement of Missouri's contribution ceilings.

III.

Missouri's Limits Did Not Differ in Kind from the $1,000 Limit Upheld in *Buckley*.

The foregoing analysis demonstrates that there are no genuine issues of material fact regarding the impact of Missouri's contribution limits or the state's interest in alleviating the harm of perceived corruption. The undisputed evidence shows that the impact on First Amendment rights is minimal and that the harm to public confidence is real. As a matter of law, this Court may therefore defer to legislative judgment about the levels of the limits and reverse the decision of the Court of Appeals — without further discussion. In that event, one issue that divided the Eighth Circuit panel will remain unresolved: how courts should interpret *Buckley*'s admonition to avoid "fine tuning" contribution limits, unless they are "differen[t] in kind" from the $1,000 federal limit. *See*

424 U.S. at 30. This Court could eliminate the confusion about that question by explaining clearly that differences in kind exist between FECA's contribution limit and other contribution caps, when the latter impose the severe burdens on First Amendment freedoms not imposed by the $1,000 federal ceiling.

A. Contribution Limits Do Not Differ in Kind from the $1,000 Limit Upheld in *Buckley*, Unless They Have Dramatic Adverse Effects on Candidates' Ability to Aggregate the Funds Necessary for Effective Advocacy.

Under *Buckley* and its progeny, a contribution limit satisfies First Amendment scrutiny when:

> [it] focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

424 U.S. at 28. Under those circumstances, the limit is sufficiently tailored to the state's weighty interests in preventing the reality or appearance of corruption, even if the limit is not the least restrictive means of addressing those harms. *See id.* at 27 (expressly rejecting least restrictive means analysis); *see also California Med. Ass'n*, 453 U.S. at 199 n.20 (same); *cf. Colorado Republican*, 518 U.S. at 615 (plurality opinion) ("[R]easonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors."). Indeed, as long as

> some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind. *Compare Kusper v. Pontikes*, 414 U.S. 51 (1973), *with Rosario v. Rockefeller*, 410 U.S. 752 (1973).

424 U.S. at 30 (internal quotation and citation omitted).

Although the *Buckley* Court did not further refine what it meant by "differences in kind," its citation to *Kusper* and *Rosario* is illuminating. *Kusper* and *Rosario* involved statutes that imposed party registration deadlines for those seeking to vote in a party's primary election. In *Rosario*, the Court upheld a New York law that prevented a change of party affiliation within 11 months before a primary election. *See* 410 U.S. at 762. In *Kusper*, the Court invalidated an Illinois statute that prohibited voters from switching parties within 23 months before a primary election. *See* 414 U.S. at 61. In invalidating the Illinois statute, the *Kusper* Court distinguished *Rosario* by pointing to the markedly different effects of the two laws: the New York statute allowed a voter to vote in a different party primary every year, *id.* at 60, whereas the Illinois law would force a voter to forgo voting in *any* primary for a period of almost two years in order to switch parties, *id.* at 60-61. Thus, the constitutional difference between the two statutes was not a quantitative difference in the *time* involved, but rather a qualitative difference in the *effect* on First Amendment rights. The New York statute did not altogether preclude voters from associating with the political party of their choice, whereas the Illinois statute did.

The Court's decision in *Burson* further confirms that a difference in kind is a qualitative difference in the First

Amendment effect of two restrictions. In upholding Tennessee's 100-foot "campaign-free zone" around polling places as narrowly tailored to serve the compelling state interests in preventing voter intimidation and election fraud, the *Burson* Court commented: "Reducing the boundary to 25 feet, as suggested by the Tennessee Supreme Court . . . is a difference only in degree, not . . . in kind." 504 U.S. at 210 (citation omitted). According to the *Burson* Court, increasing the size of the buffer zone would create a difference in kind only if it imposed a burden comparable to the absolute ban on vote solicitation in *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating absolute prohibition of election-day newspaper endorsements of candidates). *See* 504 U.S. at 210. *Burson* thus illuminates *Buckley*'s distinction between *Kusper* and *Rosario*: a difference in degree grows to the point where it becomes a difference in kind only when the effect of the challenged law is to foreclose constitutionally protected activity.

This interpretation of *Buckley*'s allusion to "differences in kind" is consistent with the Court's earlier distinction between contribution limits that impose only marginal restrictions on First Amendment rights and those that severely burden free speech or association. The interpretation is also compatible with the Court's recent flexible approach to review of electoral regulations. Thus, when a contribution cap has only a limited effect on First Amendment freedoms, "a court has no scalpel to probe" whether the state has perfectly crafted the law, but must instead defer to legislative judgments about precisely where the ceiling should be set. On the other hand, if challengers of a contribution limit demonstrate that it imposes a severe burden on free speech or association, because of dramatic adverse effects on fundraising, the limit is constitutionally "different in kind" from the $1,000 limit upheld in *Buckley* and is legitimately subjected to stricter scrutiny. *See California ProLife Council PAC*, 989 F. Supp. at 1298 (finding a

difference in kind only after finding that California's limits "will *prevent* the marshaling of assets sufficient to conduct a meaningful campaign") (emphasis added).

This approach would allow courts to guard against "undue hindrances to political conversations and the exchange of ideas," *ACLF*, 119 S. Ct. at 642, without having to micro-manage every jurisdiction's campaign financing system. States and localities would generally remain free to design limits that fit the particularities of their jurisdiction, including, the number of voters, the percentage of the electorate that makes contributions, the role of political parties, the varying media appropriate for different markets, the costs of campaigning in different geographical areas, the number of competitive districts, the economic status of the electorate, the existence or absence of term limits, and so on. Courts would not become involved with those minutiae, as long as the selected limits did not have a "dramatic adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21.

Under this analysis, a quantitative difference in the amount of contribution limits, without more, is of no constitutional significance. A contribution limit that seemed low on its face might well be permissible in a small jurisdiction or in a jurisdiction where a tax credit scheme encouraged large numbers of donors to make small contributions. Moreover, any evaluation of the effect of inflation must take into account not only the demand side of the equation (candidate spending) but also the supply side (contributors' ability to give). The supply side is *positively* affected by inflation, because $1,000 means less to a contributor in 1999 than it did in 1974.[24] A

24. This fact may in part explain why congressional candidate spending more than *quintupled* between 1976 and 1992, *see* Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to*

constitutionally cognizable "difference in kind" would therefore arise only when a proposed limit had a qualitatively different First Amendment impact. *See* William J. Connolly, Note, *How Low Can You Go? State Campaign Contribution Limits and the First Amendment*, 76 B.U. L. Rev. 483, 531 (1996) ("Differences in degree may take on constitutional dimension and become differences in kind, but the distinction should not rest on mathematical comparison alone.").

B. Plaintiffs Failed to Carry Their Burden of Proving a Difference in Kind.

Plaintiffs offered no evidence that Missouri's contribution ceilings had a dramatic adverse effect on campaign fundraising. In fact, plaintiffs' affidavits attested to their ability to raise funds under Missouri's limits, once they made an effort to do so. (JA 51, 57-58.)[25] The state's evidence further confirmed the possibility of aggregating substantial pools of funds under $1,000 per election limits. (JA 24-30.) Missouri's limits therefore did not "differ in kind" from the $1,000 limit upheld in *Buckley* and should not be subject to this Court's "scalpel."

The fact that inflation has eroded the value of $1,000 since 1976 is therefore of no *constitutional* importance. Federal candidates remain able to raise the funds necessary for effective advocacy under the $1,000 limit, and Missouri candidates have

Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1132 (1994), notwithstanding the effect of inflation.

25. With the exception of the contributions from SMGPAC (which included a $250 and a $500 contribution funneled through the PAC for Fredman, (JA 57-58)), none of the contributions made to Fredman's committee exceeded $750. *See* List of Contributions.

been able to do so as well. Candidates might find it easier to raise money in larger increments, but the balancing of fundraising convenience against the potential for real and perceived corruption is a policy judgment that legislatures, not courts, should make — as long as ceilings do not have a severe impact on First Amendment freedoms.[26]

CONCLUSION

This Court should affirm unequivocally that its flexible First Amendment standard applies in campaign finance cases and hold that Missouri's contribution limits, under that standard, are subject to less than strict scrutiny. In addition, the Court should reaffirm the pragmatic evidentiary burden imposed upon states seeking to establish interests in preventing the reality or appearance of corruption and hold that Missouri has carried that burden in this case — and would do so even under strict scrutiny. The Court should therefore reverse the Eighth Circuit decision below and lift the injunction against Missouri's contribution limits.

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26. Indeed, some members of Congress are evidently considering a deal whereby now-unregulated "soft money" contributions to political parties would be banned in exchange for an increase in the federal contribution limit. *See McConnell Hearing Focuses on Hard Money, Fuels Speculation about Reform Compromise*, 39 Money & Politics (BNA) 1 (Mar. 26, 1999). But even if Congress raises the federal limit, the new amount cannot suddenly be regarded as a constitutional minimum. States and localities should still have the "leeway" to adopt lower limits, provided that the caps do not dramatically inhibit the ability of candidates and associations to raise the funds necessary for effective advocacy.

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