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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 FREDMAN, and JOAN BRAY,
Respondents.

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

In its opening brief, Missouri demonstrated that this case is controlled by *Buckley* v. *Valeo,* 424 U.S. 1 (1976). There, this Court acknowledged that a transfer of money from a contributor to a candidate is not pure speech and that limits on such transfers only marginally affect First Amendment rights. This Court further recognized the government's interest in protecting the integrity of the political system by preventing both the fact and the appearance of corruption inherent in a regime of unlimited contributions to candidates. The Court held that, when weighed against the minimal burden placed on First Amendment rights, this interest was constitutionally sufficient to support a $1,000 limit on contributions to candidates for federal office, and that Congress must be given substantial latitude in setting the lawful contribution limit. *Id.* at 28, 30.

Respondents, however, claim that in enacting the challenged contribution limits, Missouri was not entitled to rely on this Court's (and Congress') prior recognition that the public perceives a "system permitting unlimited financial contributions" to be "inherent[ly]" corrupt. *Buckley*, 424 U.S. at 28. Instead, say respondents, post-*Buckley* cases impose a new, supplemental requirement that a State produce empirical proof of such a public perception and hard evidence that the perception is correct before the State can enact a contribution limit. Moreover, respondents contend, the State also must present evidence that its chosen limit on contributions to candidates is narrowly tailored to address the precise contribution amount at which a public perception of corruption exists. This failure of hard proof, say respondents, requires invalidation of Missouri's law.

These arguments are but a thinly-disguised attempt to overrule *Buckley,* for they attack its central premise that the public perceives a regime of unlimited political con-

tributions as inherently corrupt. Respondents thus bear the heavy burden of demonstrating that decisions since *Buckley* have completely undermined this central premise, and that *Buckley*'s approval of a $1,000 contribution limit therefore does not control this case. Respondents have not remotely discharged this burden.

Since *Buckley*, this Court has never suggested that the appearance of corruption associated with unlimited contributions is a "conjectural" or "hypothetical" harm, nor has it required proof of this harm. Rather, the Court has consistently adhered to its common-sense holding that a system of unrestricted individual contributions to candidates inherently appears corrupt and thus undermines the public's confidence in the integrity of its representative government. In post-*Buckley* campaign finance cases, the Court has simply refused to find that the appearance of corruption inheres in *other* campaign activities, such as independent expenditures. Thus, although the record in this case demonstrates that Missouri did not rely on common sense alone in enacting its contribution limits, under *Buckley* and its progeny, empirical proof of the nexus between large campaign contributions and a public perception of corruption is not required.

That is why, while respondents and their supporting *amici* quibble over the adequacy of the State's evidence below, they are ultimately forced to argue that the public's perception of corruption is mistaken and thus cannot sustain the State's regulation. Respondents incorrectly assume that the sole manifestation of corruption is vote-buying, and then cite commentators who claim that such corruption does not exist and that public perceptions to the contrary are wrong. But the public also perceives that large contributions buy access, set the political agenda, and prevent consideration of government action. The State is entitled to address these ills even though they do not manifest themselves in concrete, provable acts.

Equally to the point, this Court has already rejected the argument that only *actual,* and not perceived, corruption can justify campaign contribution limits. Because *public* confidence in representative government lies at the heart of a healthy democracy, Missouri was entitled to enact legislation based on the views of its citizens, rather than the views of the more "sophisticated" commentators that respondents and their *amici* cite. Efforts to preserve the public's confidence in elected leaders, moreover, cannot be invalidated based on speculation that the State acted for improper reasons, such as protecting incumbents or equalizing political voices. Respondents' groundless insinuations amount, in the end, to the untenable argument that a State must suffer damage from actual corruption before it can address public concern over the integrity of its elected government. This is flatly inconsistent with *Buckley,* and more generally, it is not the law.

Respondents' arguments that Missouri's $1,075 contribution limit is not narrowly tailored are likewise irreconcilable with *Buckley*. There, the Court held that the legislature has significant latitude when addressing the evils associated with unrestricted contributions, provided the limit it sets does not unduly burden associational rights or "prevent[] candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley,* 424 U.S. at 21. The State demonstrated in its opening brief that its chosen limit is likewise entitled to deference, because it has only a marginal impact on First Amendment rights, affects only a minuscule percentage of those who contribute to candidates for statewide office, and has not hindered viable candidates from campaigning effectively.

Unable to rebut this showing, respondents assert that the limits are unconstitutional simply because $1,075 is worth less in today's dollars than it was in 1976. But inflation alone does not establish that Missouri's limits are

"different in kind" from those the Court upheld in *Buckley*. Indeed, elsewhere in their brief, respondents concede that the "average Missourian" may well view $1,075 in today's dollars as a "large" contribution. Resp. Br. 40. In fact, respondents' principal contention is that Missouri's limits should be deemed unconstitutional because Fredman's ability to raise money for his campaign, and Shrink PAC's ability to donate money directly to him, were burdened. But *Buckley* makes clear that contribution limits that have a modest impact on a particular candidate's ability to raise money are nevertheless lawful where, as here, they do not have a "severe impact on political dialogue" as a whole. 424 U.S. at 21. *Buckley* further holds that contribution limits only minimally burden the rights of speech and association of a contributor such as Shrink PAC. *Id.* at 20-22. Respondents' claims, therefore, provide no basis for withholding the deference otherwise due a legislature's judgment concerning the line between legal and illegal contributions.

ARGUMENT

I. NOTHING IN *BUCKLEY* OR THIS COURT'S SUBSEQUENT CASES REQUIRES MISSOURI TO PROVE THAT A SYSTEM OF UNRESTRICTED CAMPAIGN CONTRIBUTIONS CREATES AN APPEARANCE OF CORRUPTION.

In *Buckley,* this Court recognized that the primary interest served by the $1,000 federal contribution limit was "the prevention of corruption and the appearance of corruption spawned by the real *or imagined* coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25 (emphasis added). The Court addressed these two harms separately and found that each justified the federal limit. The Court noted, first, that Congress had evidence from the 1972 elections demonstrating that the problem of actual corruption was "not an illusory one." *Id.* at 27.

"Of almost equal concern as the danger of actual *quid pro quo* arrangements," the Court continued, "is the impact of the appearance of corruption stemming from public awareness of the *opportunities* for abuse *inherent* in a regime of large individual financial contributions." *Id.* (emphases added). As to this harm, the Court required no evidence of the public's actual perceptions. Citing only the opportunities for corruption "inherent in a regime of large financial contributions," *id.,* the Court held that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* (quoting *CSC* v. *Letter Carriers,* 413 U.S. 548, 565 (1973)) (second omission in original).[1]

Attempting to sidestep the "heavy burden" they would assume if they asked the Court forthrightly to revisit and overrule *Buckley,* as their *amici* do,[2] respondents euphemistically contend that the Court has "supplemented

[1] Respondents suggest that empirical evidence of a public perception of corruption may have been unnecessary in *Buckley* because Congress "had some evidence of [actual] corruption from which a perception of corruption could arise." Resp. Br. 34 n.19. Nothing in *Buckley,* however, suggests that an appearance of corruption arises only when there is evidence of actual corruption. Moreover, under the evidentiary standards that respondents advocate and the Eighth Circuit employs, the evidence of improper contributions described in *Buckley,* which ranged from "$100,000" to "three million dollars," *id.* at 27 n.14, plainly would not suffice to show that donations of $1,000 create an appearance of corruption. *See Carver* v. *Nixon,* 72 F.3d 633, 642 (8th Cir. 1995), *cert. denied,* 518 U.S. 1033 (1996) ($420,000 contribution to various state races was insufficient to show that donations of $100, $200 and $300 created appearance of corruption).

[2] As the United States explains in detail, *see* U.S. Br. 21-30, respondents' *amici* completely fail to provide the "special justification." *United States* v. *International Business Machines Corp.,* 517 U.S. 843, 856 (1996) (internal quotation marks omitted), necessary to overrule *Buckley.*

Buckley" with a requirement that the government " 'demonstrate that [any] recited harms are real, not merely conjectural.' " Resp. Br. 26 (quoting *United States* v. *National Treasury Employees Union,* 513 U.S. 454, 475 (1995)). This argument is wrong. This Court has consistently recognized that the level of proof required to show that legislation addresses or will prevent "real" harm varies with the type of harm at issue. Some conduct is "inherently" harmful and the government need not await the occurrence of such harm before acting; in other circumstances, the government must prove that the conduct at issue will cause harm. In *Buckley,* this Court held that the harm caused by a regime of unlimited direct contributions to candidates for public office is of the first sort.

For at least two reasons, this Court's determination that an appearance of corruption is "inherent in a system permitting unlimited financial contributions" is not the product of some outdated mode of constitutional analysis. *Buckley,* 424 U.S. at 28. *First,* the requirement that the government produce proof of "real harm" is simply not the post-*Buckley* innovation respondents claim it is. *Second,* this Court's post-*Buckley* campaign finance cases continue to recognize the inherent risks of unrestricted contributions to candidates, and require proof of real harm only with respect to *other* campaign finance activities.

The Court's conclusion that a regime of unrestricted campaign contributions inherently creates a public perception of corruption is not the product of a less rigorous brand of First Amendment analysis that was abandoned by the time of the plurality opinion in *Turner Broadcasting Systems, Inc.* v. *FCC,* 512 U.S. 622 (1994) (*"Turner I"*). Even before *Buckley,* this Court often rejected certain types of restrictions on political speech based on a State's failure to prove that the particular restriction addressed a "real harm." Thus, for example, in *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503,

508 (1969), the Court refused to allow a school district to punish students who had worn arm bands to protest the Vietnam war, noting that the State had produced "no evidence whatever" of the harm caused by the speech, and that, without any evidence of "actual or nascent" harm, the restriction could not stand. Similarly, in *Cohen* v. *California*, 403 U.S. 15 (1971), the Court rejected the State's contention that appellant's speech was inherently likely to provoke violence. The Court found that there was "no showing that anyone who saw Cohen was in fact violently aroused," *id.* at 20, that there was "no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by [the appellant]," and that speculation about such harms was "an insufficient base" for the State's restriction on speech, *id.* at 23. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), too, the Court rejected the claim that strict ballot access requirements were necessary to prevent voter confusion and to encourage political stability, concluding that there was no evidence substantiating these alleged harms, which appeared to be "remote" and "no more than 'theoretically imaginable.' " *Id.* at 33. Thus, *Turner I* worked no sea change in this Court's First Amendment jurisprudence.

Indeed, the *Turner I* plurality itself reflects the Court's understanding that the nature of proof required still varies with the nature of the fact to be proven. There. the Court noted that the government was required " 'to adduce *either* empirical support *or at least sound reasoning* on behalf of its measures,' " *Turner I*, 512 U.S. at 666 (plurality opinion) (emphases added)—a statement completely at odds with respondents' insistence that *Turner I* is a watershed event in First Amendment law that mandates empirical proof of all harms the government seeks to address. See also *United States* v. *National Treasury*

Employees Union, 513 U.S. 454, 473 (1995) ("Congress reasonably could *assume* that payments of honoraria to judges or high-ranking officials in the Executive Branch might generate [an] appearance of improper influence") (emphasis added); *id.* at 475 ("[t]o justify suppression of free speech there must be *reasonable ground* to fear that serious evil will result if free speech is practiced") (emphasis added) (internal quotation marks omitted); *International Society for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 685 (1992) (upholding regulation of solicitation in airline terminals without proof of harm because "the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive"). Cf. *Edenfield* v. *Fane*, 507 U.S. 761, 774-46 (1993) (contrasting evidence needed to show harm from in-person solicitation by accountants with State's right to " 'presume' " that in-person solicitation by lawyers is " 'inherently conducive to over-reaching and other types of misconduct' ") (quoting *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 464, 466 (1978)).

More fundamentally, this Court, in the campaign finance decisions following *Buckley*, has never required fresh proof that unrestricted contributions create an appearance of corruption, and has instead continued to recognize this harm as self-evident. In *FEC* v. *National Right to Work Committee*, 459 U.S. 197 (1982), for example, the Court found that a restriction on the ability of unions and corporations to solicit funds used for political purposes was justified by the government's interest in preventing a loss of "public confidence in the electoral process through the appearance of corruption." *Id.* at 208. The Court required no proof of such a perception, and refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil *feared*." *Id.* at 210 (emphasis added). In numerous other cases, the Court has endorsed without reservation *Buckley*'s recognition that unrestricted contributions create an appearance of corruption.[3]

There is only one sense in which the Court has "supplemented" *Buckley*'s recognition of the inherent risks of unrestricted contributions: The Court has refused to assume that a public perception of corruption inherently arises from *other* campaign finance activities. Instead, the Court has required evidence that these different activities create a public perception of corruption. For example, in *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) ("*NCPAC*"), the Court struck down a restriction on independent campaign expenditures because there was no basis to believe such expenditures created the same risk of corruption that direct contributions to candidates create. The Court noted the "hypothetical[]" possibility

> that candidates may take notice of and reward those responsible for PAC expenditures. . . . But here, as

[3] *See Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 297 (1981) (contribution limits are justified by "the perception of undue influence of large contributors to a candidate") (emphasis deleted); *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985) (campaign financing may be restricted to prevent "the appearance of corruption"); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990) (Stevens, J., concurring) ("the danger of either the fact, or the appearance, of *quid pro quo* relationship provides an adequate justification for state regulation of . . . contributions"); *id.* at 682 (Scalia, J., dissenting) limits are justified by the "substantial *risk* of corruption" that "plainly exists when . . . wealth is given directly to the political candidate") (emphasis added); *id.* at 702 (Kennedy, J., dissenting) ("campaign contributions are subject to greater regulation because of the enhanced risk of corruption from the *possibility* that a large contribution would be given to secure political favors") (emphasis added); *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604, 609 (1996) (noting the government's " 'compelling' " interest in protecting the electoral system "from the appearance and reality of corruption"); *id.* at 648 (Stevens, J., dissenting) (limits "serve the interest in avoiding both the appearance and the reality of a corrupt political process").

> in *Buckley*, the absence of prearrangement and coordination [between the PAC and the candidate] undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.

Id. at 498. *NCPAC* thus does not cast the slightest doubt on *Buckley*'s finding that the appearance of corruption is inherent in unrestricted *contributions* to candidates. Instead, *NCPAC* adheres to *Buckley*'s determination that this same risk does not inhere in independent *expenditures*, and that, for such expenditures, the risk must be proved. See *Buckley*, 424 U.S. at 46 (independent expenditures "do[] not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions").

Similarly, none of the opinions in *Colorado Republican Federal Campaign Committee* v. *FEC*, 518 U.S. 604 (1996) ("*CRFCC*"), questioned *Buckley*'s holding that unrestricted contributions create an inherent appearance of corruption. Instead, members of the Court were divided about whether it is appropriate to assume, without empirical evidence, that independent expenditures by political parties create a public perception of corruption. The plurality struck down the restriction, explaining that " 'the absence of prearrangement and coordination' . . . 'alleviate[s]' " any inherent risk of corruption, *id.* at 616 (quoting *NCPAC*, 470 U.S. at 498), and that the government could "not point to record evidence . . . suggesting" that such expenditures created any "special corruption problem." *Id.* at 618. Three other members of the Court would have invalidated the restriction on coordinated expenditures by parties as well. In their view, "[t]he structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less than the

threat of individuals or other groups doing so," and the government had offered no evidence to the contrary. *Id.* at 646 (Thomas, J., concurring and dissenting).[4] By contrast, the dissent believed that the appearance of corruption inheres in both independent and coordinated party expenditures, and that restrictions on both expenditures were constitutional. *Id.* at 648 (Stevens, J., dissenting).

In short, the Court has in some, though not all, post-*Buckley* campaign finance cases required the government to prove that activities *other than* direct contributions to a candidate pose a risk of real or apparent corruption.[5] The Court, however, has consistently adhered to its prior determination that such a risk inheres in a system of unrestricted, direct contributions to candidates. Accordingly, Missouri was not required to prove this long-recognized and common sense truth.

II. THE APPEARANCE OF CORRUPTION IS A CONSTITUTIONALLY ADEQUATE JUSTIFICATION FOR CAMPAIGN CONTRIBUTION LIMITS.

Although Missouri was not required to demonstrate that unrestricted campaign contributions create an appearance of corruption, the State in fact made such a showing. While respondents and their supporting *amici* quarrel with the sufficiency of that showing, their real argument

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[4] In a portion of his concurrence that no other member of the Court joined, Justice Thomas advocated overruling *Buckley*'s distinction between contributions and expenditures. *CRFCC*, at 635-44. In so doing, however, Justice Thomas did not contend that unrestricted contributions do not create the appearance of corruption. Rather, he argued that, because some contributions are made for innocent reasons, a ban on all contributions is unduly broad. *Id.* at 642-44.

[5] In *Michigan Chamber of Commerce*, 494 U.S. at 659-60, a case respondents simply ignore, the Court sustained a state prohibition on independent expenditures by corporations and unions without requiring any showing that the asserted harms arising from such expenditures were "real, not conjectural."

is that the appearance of corruption, standing alone, is a constitutionally inadequate justification for limiting campaign contributions. This argument is deeply flawed.

In the proceedings below, the State offered the affidavit of Missouri State Senator Wayne Goode, who explained that the Committee of the state legislature that proposed the limits explicitly considered the point at which contributions become unduly influential and "have the appearance of buying votes." J.A. 46-47. The district court also could and did take judicial notice of the fact that an overwhelming majority of the electorate supported Proposition A's lower contribution limits. App. 32a n.7. The district court properly viewed the vote on this initiative as the equivalent of a poll demonstrating the public's perception that a $300 contribution to a candidate for state office is large and that unrestricted contributions create political debts. The latter assessment was confirmed by numerous publicly-reported statements about large contributions to candidates for state office and about Proposition A, all of which decried the influence of "special interests" and "big money." *Id.* at 31a n.6.

Respondents and their supporting *amici* ostensibly challenge the State's showing, arguing that Senator Goode's affidavit reflects only his own beliefs, rather than the public's perception, Resp. Br. 37, and that the support for Proposition A "speaks as much to an attempt to redress perceptions of economic inequality as it does to any public perception of corruption." *Id.* at 40.[6] Yet, despite their insistence that this case turns on the sufficiency of the State's evidentiary showing, respondents and their supporting *amici* effectively concede that the "average Missourian" may well view $1,075 as a "large amount," *id.*, and that most voters do, in fact, perceive large contributions to be corrupting. Thus, respondents characterize as "commonplace" the "assumption that campaign contributions are the dominant influence on policymaking," *id.* at 41 (internal quotation marks omitted), and their supporting *amici* cite a recent public opinion poll that shows that, regardless of party affiliation, two-thirds of Americans "believe excessive influence of political contributions on elections and government policy is a major problem with the system," more than half "believe political contributions often buy influence . . . for one group by denying another group its fair say," and nearly half believe that contributions lead "elected officials to vote against their constituents' interests." Center for Responsive Politics, *Money and Politics Survey: Summary and Overview* (visited June 10, 1999) <www.opensecrets.org/pubs/survey/s2.htm>.

Once the smoke clears, respondents' real argument becomes apparent—*i.e.*, that the public's perception of corruption, standing alone, cannot justify restrictions on campaign contributions. According to respondents, "[c]ommon sense, as is the case here, may well be wrong," because the perception that money corrupts ignores the teachings of scholars who have found "that 'campaign contributions are made to support those politicians who already value the same positions as their donors.'" Resp. Br. 42 (quoting S. Bronars & J. Lott, *Do Campaign Donations Alter How A Politician Votes? Or, Do Donors Support Candidates Who Value The Same Things That They Do?* 40 J. L. & Econ. 317, 319 (1997)); see also

[6] Respondents also claim that Senator Goode's statements are inconsistent with his vote for a 1995 measure that allowed candidates who had incurred campaign debts prior to enactment of Proposition A to accept unrestricted contributions in order to pay off such debts. Resp. Br. 38 & n.24. The bill in question, however, was a one-time measure passed to ameliorate the otherwise harsh consequences of Proposition A, which sets ceilings as low as $100 on contributions to repay debt incurred at a time when no limits existed. The measure applied only to elections that had already occurred, and allowed donations to individuals who had lost as well as to those who had won.

id. at 16-17 ("[a]ny public perception of corruption . . . is most probably wrong"). Senator McConnell likewise contends that "[t]wenty-five years of sophisticated economic, public policy, and social science literature shows *overwhelmingly* that legislative voting is driven by personal ideology, constituent desires and party loyalty, *not* political contributions." McConnell Br. 18.

This Court properly rejected these arguments in *Buckley* and should reject them again here. In *Buckley*, the appellants argued that the "generally negative view of private campaign financing . . . finds little or no support in the works of scholars who have studied the subject over the last generation," and that "contributions generally go to candidates already disposed to the donor's point of view." Brief of the Appellants at 56, 65, *Buckley* v. *Vaelo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437). The health of a representative government, however, depends upon the views of the public, not those of scholars. The public, moreover, perceives that large contributions purchase not only votes, but also access, attention and services for select constitutents, and an ability to influence the government's agenda, including the power to keep certain items off that agenda. The truth of these very real public perceptions is not easily measured by scholars or commentators who dismiss public perceptions of vote buying.

As this Court has explained, legislation designed to prevent the appearance of corruption "'is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials . . . engage in activities which arouse *suspicions* of malfeasance and corruption.'" *Crandon* v. *United States*, 494 U.S. 152, 165 n.20 (1990) (quoting *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 562 (1961) (emphasis added). Accordingly, in *Buckley*, this Court held that "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is . . . critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" 424 U.S. at 27 (quoting *CSC* v. *Letter Carriers*, 413 U.S. 548, 565 (1973)) (second omission in original); see also *National Right to Work Committee*, 459 U.S. at 208 (restrictions on the ability of unions and corporations to solicit funds used for political purposes was justified by the government's interest in preventing a loss of "*public confidence* in the electoral process through the appearance of corruption") (emphasis added).

Faced with the inescapable link between public perception and the health of a State's electoral system, respondents seek to undermine the legitimacy of this justification for campaign finance regulation by insinuating that Missouri and other States will use the "appearance of corruption" standard to mask impermissible agendas, such as protecting incumbents, Resp. Br. 41, or redressing economic inequality in the political arena, *id.* at 43. In order to disable the State from protecting "the very fabric of a democratic society," however, respondents and their *amici* must offer more than unsubstantiated speculation that the State has acted for improper reasons.

In this case, for example, respondents and their *amici* suggest that Missouri's limits "reflect incumbent 'self-dealing.'" McConnell Br. 13; see also Resp. Br. 41. Their claim, however, is belied by the fact that Missouri *citizens* adopted the even stricter limits of Proposition A. More fundamentally, as this Court has already held, the impact of contribution limits in any given election will depend on a host of factors that do not "invariably and invidiously benefit incumbents as a class." *Buckley*, 424 U.S. at 33.

Similarly, in the absence of evidence of actual *quid pro quo* arrangements, the public's perception that large contributions buy undue influence can always be characterized—and then dismissed—as a disguised attempt to equalize political voices. By their very nature, "large" contributions will be made only by a small elite, and the majority of voters, unable to contribute at these levels, will naturally perceive that certain measures are passed or defeated and that certain constituent services and access are delivered or refused due to the financial leverage of large contributors.[7] To argue, as respondents do, that this perception is in reality a constitutionally impermissible desire to mute the voice of wealthy contributors is simply to argue again that the appearance of corruption cannot justify contribution limits. This Court rejected that argument in *Buckley*,[8] and properly so: a State need not wait until the public's confidence in its representative government has actually been undermined by real or perceived corruption before the State can act to prevent such damage. Cf. *Burson* v. *Freeman*, 504 U.S. 191, 209 (1992) (State need not demonstrate actual voter intimidation and election fraud to justify "campaign-free" zone around polling place, because such a requirement would improperly require " 'that a State's political system sustain some level of damage before the legislature could take corrective action' ") (quoting *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195-96 (1986)).

[7] Respondents contend that the elite group of contributors who gave more than $2,000 in two 1992 races could not cause any " 'real harm' " because their contributions covered only a small percentage of state-wide candidates' expenditures. Resp. Br. 37. But these facts reinforce the legitimacy of Missouri's efforts. The tiny number of "large" contributors will stand out from the sea of "small" contributors who contribute to a statewide campaign for public office. For example, Missouri's law addresses the perception of corruption that would arise if a candidate like respondent Fredman had been elected with substantial financial support solely from respondent Shrink PAC and then engaged in conduct that had benefited Shrink PAC.

[8] Indeed, in *Buckley* itself, the government defended the $1,000 contribution on the grounds that it prevented real and apparent corruption *and* equalized the ability of individuals and groups to affect the outcome of elections. *Buckley*, 424 U.S. at 25-26. The Court, however, nowhere questioned the *bona fides* of the "appearance of corruption" rationale, and did not conduct a searching review of evidence of the public's perceptions in order to ensure that Congress was not using this rationale to "mask" the impermissible goal of "equalization."

III. BECAUSE MISSOURI'S LAW IMPOSES MINIMAL BURDENS ON FIRST AMENDMENT RIGHTS, THE LEGISLATURE'S JUDGMENT ABOUT THE PRECISE LIMIT IS ENTITLED TO DEFERENCE.

In *Buckley*, the Court concluded that a "$1,000 contribution limitation 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, and allowing candidates to conduct effective campaigns. Critically here, the Court rejected the argument that the limit was "unrealistically low," and held that "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2,000 ceiling might not serve as well as $1,000." *Id.* at 30 (internal quotation marks omitted) (alteration in original). "Such distinctions in degree," the Court explained, "become significant only when they can be said to amount to differences in kind." *Id.*

In its opening brief, the State demonstrated that its contribution limits address a compelling public interest and have only a limited impact on First Amendment rights, because they affect only a very small percentage of contributors and do not prevent candidates for statewide office or the political committees that support them

from raising sufficient sums of money to conduct effective campaigns. *Buckley* makes plain that when a legislature's chosen limit has such modest effects, the legislature's judgment about precisely where to draw the line between legal and illegal contribution is entitled to significant judicial deference. 424 U.S. at 28.

Respondents entirely fail to address this showing. Instead, they claim that Missouri's limits are unconstitutional simply because $1,075 is worth less in today's dollars than it was in 1976. In *Buckley*, however, the Court nowhere suggested that $1,000 was the minimum, constitutional contribution limit. As noted above, moreover, respondents acknowledge that, even today, the "average Missourian" may well view $1,075 as a "large" contribution. Resp. Br. 40. And respondents do not even attempt to show that Missouri's laws prevent candidates for statewide office from conducting substantial and effective campaigns.[9]

Instead, respondents complain that, even if Missouri's limits do not generally burden First Amendment rights, they significantly burdened Fredman's candidacy and Shrink PAC's right to associate itself with Fredman's candidacy and thus cannot be considered narrowly tailored. First, limits do not seriously restrain political

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9 Respondents speculate that campaign expenditures in 1996 (post-limits) compare favorably to campaign expenditures in 1992 (pre-limits) solely because candidates in 1996 obtained money from less regulated sources, such as political party committees. Resp. Br. 24. But a review of publicly available disclosure reports that the State is lodging with the Court reveals that in each of the 1996 statewide races, contributions from political party committees accounted for less than five percent of the total expenditures in that race. The newspaper article cited by respondents, Jo Mannies, *Laws Shift Flow of Money to Political Parties*, St. Louis Post-Dispatch, Aug. 1, 1996, at 5B, does not state otherwise. It merely notes that contributors were donating more money to parties which, in turn, made larger independent expenditures. That increase simply is not relevant here.

communication simply because they hinder the campaign of a single, marginal candidate. Fredman's speech was in no way restrained; his claim is instead the attenuated one that he was not able to receive additional money from a single donor and "did not have time to raise the seed money necessary for his statewide campaign by asking a large number of contributors for small contributions." Resp. Br. 6. But the requirement that Fredman take the time to do so does not violate his First Amendment right to speak. *Buckley* makes clear that where, as here, viable candidates are able to raise money sufficient to campaign effectively, contribution limits are lawful. See 424 U.S. at 22 (explaining that candidates do not have a constitutional right to raise money in large lump sums).[10]

Similarly, *Buckley* expressly holds that a contribution limit does not unduly burden a contributor's right to associate with a candidate. Many alternative ways of associating with a preferred candidate and other supporters of that candidate remain available. An individual may volunteer, may join a political association, and may independently expend unlimited amounts of money promoting a candidacy. Reasonable limits such as those enacted by

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10 Respondents wrongly suggest that Missouri's $1,075 limit on Shrink PAC's contributions to Fredman should be compared not to the $1,000 federal limit on contributions by individuals and most groups, but rather to the $5,000 federal limit on contributions by multicandidate committees that register and meet certain other requirements. Resp. Br. 46-47. Of course, Shrink PAC does not meet the requirements necessary to make a $5,000 contribution, and *Buckley* expressly upheld the federal act's provisions limiting some committees to $1,000 contributions (to prevent individuals from circumventing the restrictions on individual contributions by deeming themselves committees) and others to $5,000 contributions. 424 U.S. at 35-36. As explained in text, *Buckley* clearly refused to embroil the courts in questions of fine-tuning once it upheld the legislative judgment that some limits on contributions to candidates are constitutional.

Missouri only minimally burden Shrink PAC's right to associate with Fredman.

In sum, in light of the minimal burden Missouri's limits place on First Amendment rights, *Buckley* appropriately requires courts to defer to the Missouri legislature's judgment about precisely where to draw the line between legal and illegal contributions to candidates.

CONCLUSION

For the foregoing reasons and those stated in the opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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