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 FREDMAN and JOAN BRAY,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR RESPONDENT JOAN BRAY IN SUPPORT OF PETITIONERS

GERALD P. GREIMAN
DANKENBRING, GREIMAN,
OSTERHOLT & HOFFMAN, P.C.
120 South Central Avenue
Fifth Floor
St. Louis, Missouri 63105
(314) 863-7733

DEBORAH GOLDBERG
Counsel Of Record
BURT NEUBORNE
NANCY NORTHUP
ELIZABETH DANIEL
BRENNAN CENTER FOR JUSTICE
at New York University
School of Law
161 Avenue of the Americas
Fifth Floor
New York, New York 10013
(212) 998-6730

Attorneys for Respondent Joan Bray

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page

Cases:

Cited Authorities

Page

Cited Authorities

Page

Rules:

Other Authorities:

ARGUMENT

Respondents portray the decision below as an unexceptional attempt to ensure that Missouri's campaign contribution limits addressed a "real harm."[1] But the Eighth Circuit's ruling is in fact a radical departure from this Court's pragmatic approach to laws regulating the influence of private monetary payments to powerful public officials. Instead of recognizing the critical importance of combating both the reality and the appearance of corruption, and the difficulties of detecting secret influence-brokering, the Eighth Circuit has effectively declared state contribution limits *per se* unconstitutional, unless a state proves that its elected representatives have already abused the campaign financing process. That determination has no basis in this Court's First Amendment jurisprudence or recognized standards of legislative fact-finding. And the Eighth Circuit's elevated evidentiary threshold is particularly unwarranted in this case, where the challenged law has little First Amendment impact.

I.

The Insuperable Evidentiary Burden That the Eighth Circuit Has Imposed on Missouri Defies Binding Precedent and Violates Traditional Principles of Judicial Review.

The Eighth Circuit has held that contribution limits are unconstitutional, unless states prove that any appearance of corruption inherent in the financing system is also "objectively 'reasonable'" — a burden they can carry only by producing

---

1. For the purposes of this Reply Brief, "Respondents" refers to Shrink Missouri Government PAC ("SMGPAC") and Zev David Fredman.

"demonstrable evidence" of illegal conduct connected to contributions in the states at issue.[2] *Shrink Missouri Government PAC v. Adams*, 161 F.3d 519, 521, 522 (8th Cir. 1998) (quoting *Russell v. Burris*, 146 F.3d 563, 569 (8th Cir.) (invalidating Arkansas's contribution limits for failure to prove actual corruption), *cert. denied*, 119 S. Ct. 510 (1998)). That ruling flouts *Buckley* by rejecting its account of the harms that government may combat with contribution limits and its standard for reviewing the sufficiency of the state's interest in reducing the appearance of corruption. This Court should reassert the authority of *Buckley* and reverse the decision below.

A. This Court Has Consistently Recognized That Reasonable Contribution Limits Are Justified by the State's Compelling Interest in Eliminating Both Real and Apparent Corruption.

This Court has long recognized that the appearance of corruption is an independent harm "[o]f almost equal concern" to actual corruption. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (*per curiam*). According to *Buckley*, the appearance of corruption stems from "public awareness of *opportunities for abuse* inherent in a regime of large individual financial contributions." *Id.* (emphasis added). The problem derives not from wrongdoing in the past but from the *potential* for

2. The briefs defending the decision below confirm that the foregoing description of the Eighth Circuit's ruling does not overstate it. *See* Brief of Respondents Shrink Missouri Government PAC and Zev David Fredman ("Resp. Br.") at 34 (arguing that there can be no "reasonable perception of corruption" without "evidence connecting corruption to campaign contributions"); Brief of Senator Mitch McConnell *et al.* ("McConnell Br.") at 20 ("[T]he 'appearance of corruption' standard, in the absence of any claim of actual corruption, is too vague a foundation upon which to base a restriction on core political speech.").

corruption in the future. When politicians can, but do not, eliminate the "corrupting potential" of large contributions, *id.* at 36, the populace loses faith in the integrity of representative government. Because reasonable contribution ceilings "focus[] precisely" on that corrupting potential, while imposing only a marginal First Amendment burden, they are lawful. *Id.* at 28.

Respondents' attempt to overturn this central tenet of *Buckley* by questioning the corrupting potential of large contributions, *see* Resp. Br. at 40-41, fails for two main reasons. First, documented instances of actual corruption connected to large contributions, such as those alluded to in *Buckley*, *see* 424 U.S. at 27 n. 28, are indisputable proof that such contributions offer opportunities for abuse. Respondents do not explain why unlimited contributions in Missouri would not carry the same corrupting potential as the unlimited contributions to federal candidates permitted before the Federal Election Campaign Act ("FECA") was amended in 1974.

Second, the studies that supposedly cast doubt on the corrupting potential of large contributions examine only the correlation between PAC contributions and congressional *voting*. But the corruption — actual and potential — that undermines democracy, and on which contribution limits focus precisely, may not be so narrowly defined. To the contrary, the contributions "[l]ooming large in the perception of the public" when FECA was enacted included some given merely "to gain a meeting with White House officials" or to get corporate representatives "in the door."[3] *Buckley*, 519 F.2d 821, 839

3. *Buckley* thus directly contradicts Respondents' claim that "[a]ccess . . . is not bought." Resp. Br. at 36 n.22. Indeed, one of the commentators Respondents cite for that proposition actually admits: "Money may facilitate an opportunity to present one's case, and in the absence of conflicting testimony, the member may change his or her

nn.36, 37 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). Granting privileged access to powerful public officials in exchange for infusions of campaign cash is thus a classic example of *quid pro quo* corruption.[4]

Moreover, contributions do affect legislative behavior. Empirical studies that examine nothing more than congressional floor votes miss the far greater risk that a legislator will return favors to contributors before a bill actually hits the floor — in drafting legislation or in proposing amendments during mark-up, for example. Studies focusing on behind-the-scenes participation in the lawmaking process show that contributions have a "significant degree of influence" there. Frank J. Sorauf, *Inside Campaign Finance* 169 (1992); *see* Richard L. Hall & Frank W. Wayman, *Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees*, 84 Am. Pol. Sci. Rev. 797 (1990). And even the studies that focus only on

position as a result of the meeting." Janet M. Grenzke, *PACs and the Congressional Supermarket: The Currency Is Complex*, 33 Am. J. Pol. Sci. 1, 19 (1989). Awarding the scarce and valuable opportunity to influence policy as a special favor to contributors is thus corruption of the most basic kind. Moreover, when access is granted disproportionately to moneyed interests, contribution limits are justified to prevent systemic corruption of the democratic process. *See California Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.19 (1981) (upholding limits on contributions to PACs, because PACs could "corrupt the political process" by influencing it "to an extent disproportionate to their public support"); *cf. Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 647 (1999) (recognizing a "substantial state interest" in preventing "domination of the initiative process by affluent special interest groups").

4. The value of privileged access to a decision-maker is also reflected in rules barring *ex parte* communications with judges. Because we do not require that all parties to a policy debate be present whenever one party lobbies an official, alternative regimes are needed to reduce the risk that access — and policy — will be auctioned off to the highest bidder.

actual votes find that campaign contributions have an appreciable effect when "low-visibility, nonpartisan" issues are under deliberation. David B. Magleby & Candice J. Nelson, *The Money Chase* 78 (1990).

The corrupting potential of large contributions is recognized even among elected officials. For example, Senator John McCain has described the federal campaign financing system as "'an elaborate influence peddling scheme in which both parties conspire to stay in office by selling the country to the highest bidder.'" Alison Mitchell, *McCain Exhorts His Party To Reject Campaign System*, N.Y. Times, July 1, 1999, at A17. Although Senator McCain is assailing unlimited "soft money" contributions to political parties, the corrupting potential of unlimited contributions would be all the greater if the funds were given directly to candidates.[5]

Notwithstanding the corrupting potential of contributions to candidates in the federal system, and the appearance of corruption that contributions have caused both historically and in contemporary times, the Eighth Circuit has held that a state may not eliminate identical opportunities for abuse unless it can prove that its officials have also been involved in corrupt campaign financing practices.[6] If states have no "demonstrable

5. Respondents contend that "very large, . . . 'soft-money' contributions" are a more probable cause of any "widespread perception of corruption" than "$1000 or $1075 contributions made directly to . . . candidates." Resp. Br. at 34 n.20. But the fact that the "very large" contributions create more of an appearance of corruption than $1,075 contributions is precisely why the decision below should be reversed.

6. For evidence of at least perceived corruption dating back to the early part of this century, see *United States v. UAW*, 352 U.S. 567, 570-83 (1957) (describing the events precipitating the enactment and amendment of the Federal Corrupt Practices Act).

evidence" of past misconduct within their own governments, they must live with an increasingly destructive appearance of corruption, as well as the corrosive effects of actual corruption, until they can penetrate the barriers of secrecy and collect the requisite proof. Only then will the appearance of corruption inherent in a regime of large contributions be "objectively reasonable"; only then will the state show "genuine problems" that may be addressed with contribution limits.

The Eighth Circuit's evidentiary barrier is directly at odds with this Court's campaign financing jurisprudence. This Court has never questioned either the corrupting potential of large contributions or Congress's discretion to design laws addressing that threat.[7] *See FEC v. National Right to Work Comm.* ["*NRWC*"], 459 U.S. 197, 210 (1982) ("[W]e accept Congress' judgment that it is the potential for such influence that demands regulation."); *California Med. Ass'n v. FEC*, 453 U.S. 182, 199 n.20 (1981) ("Congress was not required to select the least restrictive means of protecting the integrity of its legislative scheme."). Even when the Court has invalidated *expenditure* limits, it has reaffirmed the need to defer to legislative judgments about the need for and levels of *contribution* limits. *See FEC v. National Conservative Political Action Comm.* ["*NCPAC*"], 470 U.S. 480, 500 (1985)

7. Respondents' claim that Missouri must prove that a $1,075 contribution is "'large' in the sense of causing corruption or the appearance of corruption," Resp. Br. at 25, turns *Buckley* on its head. The *Buckley* Court never asked Congress to prove that a $1,000 contribution was large. To the contrary, *Buckley* explicitly rejected the claim that $1,000 was too low to influence a federal candidate. *See* 424 U.S. at 30. *Buckley* held that as long as some limit were needed — which it unquestionably was in a system that permitted unlimited contributions — the legislature had the discretion to decide where to set the limits, provided that candidates were still able to amass the necessary funds for campaigns. *See id.*; *see also* Bray Br. at 45-49.

(recognizing the "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"). This Court should therefore reject the Eighth Circuit's attempt to force Missouri to prove again what experience has firmly established.

B. This Court Has Invalidated Prophylactic Laws Addressing Threats to Governmental Integrity and Legitimacy Only When There Was No Basis Whatsoever for Concern About Potential Corruption.

Respondents argue that this Court has repudiated *Buckley*'s deferential approach to the regulation of large contributions and that the Eighth Circuit's demand for case-by-case proof of jurisdiction-specific corruption should therefore be affirmed. But the precedents Respondents cite do not support their thesis. In the only case they mention that actually involved a law regulating campaign contributions — *NWRC* — they admit that this Court "deferred broadly to Congress." Resp. Br. at 27. And in the other cases they cite involving efforts to curb the influence of money on public officials, this Court refused to second-guess the legislature, unless there was no basis whatsoever for fearing real or perceived corruption.

The first case Respondents cite, *United States v. National Treasury Employees Union* ["*NTEU*"], 513 U.S. 454 (1995), does not support the Eighth Circuit's decision. As has been previously explained, *see* Brief of Respondent Joan Bray ("Bray Br.") at 35-37, this Court used different language in *Buckley* and *NTEU* but both cases applied the same pragmatic evidentiary standard. Just as *Buckley* asked for reasons to believe that the problems Congress sought to prevent were real rather than "illusory," 424 U.S. at 27, so *NTEU* asked for reasons to believe that the harms Congress sought to prevent were "real" rather than illusory, 513 U.S. at 475 (internal

quotations omitted). Under that standard, *NTEU* invalidated a ban on honoraria to low-level officials because there was "no evidence" to support fears about corrupting rank and file employees. *Id.* at 472. But the *NTEU* Court would have permitted Congress to "assume" that honoraria to judges, for example, *would* create an appearance of improper influence. *Id.* The assumption could be made because the analogy between judges and other powerful decision-making officials for whom there was "limited evidence of actual or apparent impropriety," *id.*, made it reasonable to believe that they would be perceived similarly, even without proof of past judicial misconduct. Likewise, the analogies between federal candidates and state candidates make it reasonable to believe that unlimited contributions would create the same appearance of corruption in Missouri as they did in the federal system prior to the enactment of FECA.

Respondents' citation to *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), is similarly misplaced. That case involved a challenge to limits on *independent expenditures* by political parties. Before it would overrule the longstanding judgment that such expenditures had "no tendency . . . to corrupt or give the appearance of corruption," *NCPAC*, 470 U.S. at 497, the *Colorado Republican* plurality sought evidence of "special dangers of corruption associated with political parties." 518 U.S. at 616. Because the government could not point to *any* such evidence, the limits could not be sustained. *See id.* at 618.

Rather than imposing a new, heavy burden on the government, *Colorado Republican* thus reaffirms *Buckley*'s standard for establishing the state's interests in preventing the reality and appearance of corruption. With absolutely no evidence that independent expenditures caused such harms, the problems alleged in *Colorado Republican* remained "illusory,"

and the interests in averting them could not justify the challenged limits. By contrast, the plurality explicitly confirmed that "reasonable contribution limits directly and materially advance the Government's interest in preventing exchanges of large financial contributions for political favors." *Id.* at 615. In fact, the plurality went out of its way to assuage any doubts on that score, stating: "We could understand how Congress, were it to conclude that the potential for evasion of individual contribution limits was a serious matter, might decide to change the statute's limitations on *contributions* to political parties." *Id.* at 617 (emphasis added).

Finally, the commercial speech cases cited by Respondents, *see* Resp. Br. at 29, provide no authority for the Eighth Circuit's evidentiary test. None of those cases stands for the proposition that states must first suffer, and then prove they have suffered, actual harm before they will be justified in adopting prophylactic measures.[8] To the contrary, in *Rubin v. Coors Brewing Co.*, this Court acknowledged a "significant interest in . . . preventing brewers from competing on the basis

---

8. Indeed, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), suggests that the evidence available in this case is precisely the sort that supports preventive measures. The *Zauderer* Court confirmed this Court's prior holding in *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447 (1978), that two features of in-person solicitation by lawyers "justified a prophylactic rule": first, the practice was "rife with possibilities for . . . the exercise of undue influence, and outright fraud," and second, it "presents unique regulatory difficulties because it is not visible or otherwise open to public scrutiny." 471 U.S. at 641 (internal quotations omitted). *Zauderer* invalidated Ohio's attempt to discipline an attorney merely for advertising, because truthful advertising lacked those features. But it is precisely the possibilities for the exercise of undue influence and the regulatory difficulties presented by secret corruption that justified the prophylactic contribution limit upheld in *Buckley*, *see* 424 U.S. at 27, and should also justify it in Missouri.

of alcohol strength" because the state's concern about *future* harm made obvious sense: "We have no reason to think that strength wars, if they were to occur, would not produce the type of social harm that the Government hopes to prevent." 514 U.S. 476, 485 (1995).[9]

Respondents' citations to *Edenfield v. Fane*, 507 U.S. 761 (1993), and *Ibanez v. Florida Department of Business & Professional Regulation, Board of Accountancy*, 512 U.S. 136 (1994), do not help their case. Those cases employ evidentiary standards completely at odds with that of the Eighth Circuit. *Edenfield* indicates that "anecdotal evidence, either from Florida *or another State*" might have validated Florida's ban on in-person solicitation by certified public accountants. 507 U.S. at 771 (emphasis added). *Ibanez* explains that if this Court had been persuaded that use of a "CFP" (certified financial planner) designation were "inherently" misleading, the state's "concern about the possibility of deception" would have had support and the Board would have been justified in taking preventive action. 512 U.S. at 145 (internal quotation omitted); *see id.* at 150 (O'Connor, J., concurring in part and dissenting in part) ("States may prohibit inherently misleading speech entirely."). This Court invalidated the ban and the disciplinary action at issue in *Edenfield* and *Ibanez* because Florida had no basis for them. But the Eighth Circuit invalidated Missouri's contribution limits notwithstanding evidence of actual corruption from another jurisdiction and solid grounds for

9. The *Rubin* Court did not question the sufficiency of the state's interest but instead invalidated the restriction at issue in that case because other less restrictive regulatory regimes were available to address the harm. But contribution limits focus precisely on the problem of large contributions, and experience has already shown that less restrictive regimes banning bribery and requiring mere disclosure are inadequate to address that problem. *See Buckley*, 424 U.S. at 27-28.

concluding that the appearance of corruption is "inherent" in a system of unlimited campaign contributions.

In sum, this Court has not "supplemented" *Buckley* with a new and higher evidentiary standard for establishing the government's interests in preventing the reality and appearance of corruption caused by large campaign contributions, as Respondents suggest. Resp. Br. at 33.[10] This Court did not permit the government to invoke harms that were wholly "illusory" in *Buckley*, 424 U.S. at 27, and since *Buckley* this Court has continued to ask for reasons to believe that problems states seek to prevent are "real," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994). But as long as there has been *some* basis for concern — whether "anecdotal evidence," *Edenfield*, 507 U.S. at 771, or "sound reasoning," *Turner*, 512 U.S. at 666 (internal quotation omitted) — this Court has recognized the sufficiency of asserted state interests in preventing the reality and appearance of corruption.[11]

10. The different degree of deference accorded to Congress in *NRWC* as opposed to *NCPAC* or *Colorado Republican*, *see* Resp. Br. at 27, is not the result of a doctrinal shift but of the Court's adherence to its distinction between contributions and independent expenditures.

11. Respondents are therefore wrong to suggest that Missouri has claimed the right to regulate with no basis whatsoever. *See* Resp. Br. at 25-26. Missouri merely questions the Eighth Circuit's refusal to acknowledge that reason and experience provide that basis. *See infra* Point I(C). Moreover, the deference owed to the Missouri legislature when the fundamental legitimacy of state government is in question is necessarily greater than that owed to Congress in *Turner*, which involved commercial practices of far less moment and into which Congress had no special insight.

C. The State's Compelling Interest in Combating the Reality and Appearance of Corruption Is a Matter of Legislative Fact for Which No Jurisdiction-Specific Empirical Evidence Is Required.

The diverse *amici* taking interest in this case, including 29 states and the federal government, confirm that the decision whether Missouri has established its compelling interest in preventing real and perceived corruption will have far-reaching ramifications. Because the sufficiency of the state's interest is a question typically resolved through legal reasoning that draws on precedent, logic, shared experience, and common sense, that determination is best regarded as a matter of legislative fact, subject to broad standards of judicial notice. Although evidence submitted by the parties may help to inform that reasoning, the government's justification of the challenged statute cannot properly be regarded as an adjudicative fact requiring empirical proof specific to the parties — the approach the Eighth Circuit has taken.

Legislative facts are those which aid a court in the exercise of its lawmaking, as opposed to adjudicative, power. *See* Fed. R. Evid. 201(a) advisory committee notes. Although the line is not always easy to draw, it is clear that a court is never more engaged in its lawmaking functions than while reviewing the constitutionality of a statute, so the facts it considers in performing that task are properly characterized as legislative facts. *See* 1 Jack B. Weinstein *et al.*, *Weinstein's Evidence* ¶ 200[04], at 200-21 (1996).

Because legislative facts go to the legal reasoning in a case, they are not subject to strict application of the Rules of Evidence, and judicial notice may freely be taken of them. *See* Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5103, at 476 (1977). Judicial notice of

legislative facts is proper even if those facts are in dispute or are not fully supported by the record. *See* Weinstein, *supra*, ¶ 200[03], at 200-17. In fact, when the constitutionality of a statute is in issue, and judicial review will affect the rights of non-parties, "courts have always taken notice of facts without any evidence in the record." Wright & Graham, *supra*, § 5102, at 462. In such cases, "the judge is determining the content of our substantive law, and formal restrictions on resort to extra-record information may impede its growth."[12] Weinstein, *supra*, ¶ 200[04], at 200-25.

Buckley's pragmatic approach to the establishment of the state's interest in preventing real and apparent corruption is a classic case of legislative fact-finding.[13] The *Buckley* Court referred to anecdotal evidence of actual corruption, but it relied principally on logic and common sense in holding that the government was justified in closing opportunities for abuse that inhered in systems permitting large contributions. No empirical evidence was cited for that proposition, and none was needed,

---

12. Of course, in a First Amendment case, legislative fact-finding must be based on more than a hunch. But "in other First Amendment contexts, [this Court has] permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citations and internal quotations omitted). The Eighth Circuit cannot just ignore those factors.

13. The First Circuit has expressly recognized this point in *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (explaining that the state's interest in combating real and apparent corruption rests on "so-called 'legislative facts,' which go to the justification for a statute [and] usually are not proved through trial evidence but rather material set forth in briefs, the ordinary limits on judicial notice having no application to legislative facts").

because the Court's shared understanding of human nature, and the country's long experience with money in politics, made the conclusion self-evident. Similarly, in recognizing that "Congress reasonably could assume that payments of honoraria to judges . . . might generate a[n] . . . appearance of improper influence," *NTEU*, 513 U.S. at 473, this Court accepted the corrupting potential of such payments without specific evidence of judicial bribes — as a matter of legislative fact.

The Eighth Circuit's demand for empirical, party-specific proof thus reflects a fundamental misunderstanding of the nature of constitutional justification. The legislative fact-finding involved in assessing Missouri's interest in combating the corrupting potential of large contributions is not compatible with that court's refusal to consider experience in other jurisdictions, its disregard of common sense reasoning in this Court's campaign finance cases, or its truncated description of the evidence supporting the district court opinion.[14] Because the Eighth Circuit's misconception effectively bars state efforts to limit contributions, even when the First Amendment impact is limited, this Court should reverse the decision below.

14. Although jurisdiction-specificevidence should not have been necessary, it was available in this case. *See* Bray Br. at 39-42. The Eighth Circuit ignored everything except Senator Goode's affidavit, which it improperly discounted as only a "single legislator's perception." *Shrink*, 161 F.3d at 522. Contrary to that demeaning description, the affidavit in fact proffered an account of the "concerns" of Missouri's Joint Interim Committee on Campaign Finance Reform about "the need for campaign contributions versus the potential for buying influence." (JA 47.)

II.

The Eighth Circuit's Unprecedented Demands Are Particularly Misplaced Here, Where Contribution Limits Have Only a Marginal Impact on First Amendment Rights.

Respondents cannot show that Missouri's contribution limits imposed a severe burden on their constitutional rights. The elevated procedural hurdles erected by the Eighth Circuit are thus especially inappropriate in this case. Moreover, Missouri's limits would survive First Amendment challenge even if *Buckley* were read to require the application of strict scrutiny, as the Eighth Circuit has held. Because there is no basis for overturning *Buckley*'s holding on contribution limits, the decision below should be reversed.

In a facial First Amendment challenge, courts should not find that contribution limits impose a severe burden, unless two conditions have been satisfied. First, plaintiffs should have to demonstrate that a significant number of candidates have not been able amass the resources for effective advocacy. *See Buckley*, 424 U.S. at 21. Contribution limits should not be held unconstitutional on their face if they affect only one lone candidate, while the vast majority of candidates can successfully raise sufficient funds. *See Planned Parenthood v. Casey*, 505 U.S. 833, 895 (1992) (requiring that a law impose substantial constitutional burden in a "large fraction of . . . cases" to warrant facial invalidation).

Second, the failure to amass the necessary funds must be fairly attributable to the contribution limits, rather than other factors. There are many reasons why an individual candidate may be unable to raise substantial sums: he may not be willing to do the work necessary to run a viable campaign; he may have no base of support from prior involvement in civic affairs or

through recognition for another achievement; or he may be unattractive to supporters for a host of reasons, from a lackluster speaking style to unpopular political positions. Limits — as opposed to other factors — place a severe burden on speech only when they prevent otherwise qualified, hardworking candidates from raising enough funds to communicate with the voters. *Cf. American Party v. White*, 415 U.S. 767, 787 (1974) (noting that "hard work and sacrifice" does not make the burden of signature-gathering too onerous, especially when others seeking ballot access have carried it).

Respondents have established neither prerequisite. The suggestion that the limits had a dramatic effect on candidates other than Fredman — which appears for the first time in Respondents' brief to this Court — is contradicted by the record. (JA 24-28.) In addition, Respondents' affidavits show that their own choices, not the limits, were responsible for their fundraising failure.

Fredman claims that he could not run an effective primary campaign without immediate large contributions. But he identifies no one who would have bankrolled that campaign, and SMGPAC had never raised more than $1,800 in any prior year. Moreover, Fredman recites no facts to support his asserted need for large contributions. There is no evidence that Fredman made any attempt to collect seed money in $1,025 increments or to ask supporters for fundraising help, so there is no way to know how much money he might have raised. Nor did he make any attempt to spend the early PAC contribution in ways that would increase his visibility and augment his treasury.[15] But he did run quite an effective campaign once he

15. SMGPAC could have made independent expenditures to assist Fredman's campaign or called potential supporters and asked them to contribute to his committee. Fredman received no contributions (except from the PAC) for the first year of his candidacy, so any donor the PAC could have found would have been helpful. The potential donors whom SMGPAC called as soon as the limits were enjoined could have been called pre-injunction, had the PAC been as interested in advancing Fredman's campaign as it apparently was in making a record for this litigation.

made a "reasonably diligent" effort, *Storer v. Brown*, 415 U.S. 724, 742 (1974), capturing 20% of vote with only 12 days' fundraising and only 6 individual contributions — all of which were *at or under the enjoined limit* — plus $2,325 from SMGPAC. That success suggests that a comparable effort as late as March 1998 might have won the attention of the Republican party leaders — but we will never know, because Respondents made no effort at all until the Eighth Circuit enjoined the law.

Nor did the limits have a greater impact on candidates other than Fredman. Notwithstanding counsel's insinuation, *see* Resp. Br. at 24, there is no record evidence of "invidious discrimination against challengers as a class," a claim absent entirely from Respondents' complaint and previously rejected in *Buckley*.[16] 424 U.S. at 31. To the contrary, Missouri

16. Respondent Bray's concern that she might be harmed if the limits were lifted says nothing about incumbents as a class. Bray ran even her first campaign, *as a challenger*, largely with individual contributions of less than $100 — and won. Affidavit of Joan Bray, sworn to on April 30, 1998, ¶ 5. Moreover, even her opponent in the last election stated only that large contributions would be helpful to his campaign but not that he would be differentially disadvantaged by contribution limits. Affidavit of Alexander Hasler, sworn to on July 26, 1998 (attached to Reply Brief of Appellants in the Eighth Circuit). In any event, Bray's concern was not that she would lose if the limits were invalidated — she in fact won her last election — but that even if she continued to raise funds in small increments, her reputation would be tarnished by association with a system inherently carrying an appearance of corruption. *Id.* ¶ 6.

campaign finance data show that challengers were able to raise large sums under the limits and sometimes raised even more than the incumbent. (JA 24-27.)[17]

Missouri's contribution limits thus imposed no more than the "marginal" First Amendment burden inherent in any contribution limit. *Buckley*, 424 U.S. at 20. The limits therefore did not warrant strict scrutiny, *see* Bray Br. at 13-28, much less the heightened evidentiary standard imposed by the Eighth Circuit. But even if *Buckley* is read to have subjected FECA's $1,000 contribution limit to strict scrutiny, Missouri's limits would survive because they too "focuse[d] precisely on the problem of large campaign contributions . . . while leaving persons free" otherwise to exercise key First Amendment freedoms. *Buckley*, 424 U.S. at 28.

Despite *Buckley*, Respondents attempt to show that Missouri's contribution limits will not alleviate the appearance of corruption "in a direct and material way." Resp. Br. at 45. But their argument is only that inflation has rendered the limits too "heavy-handed" — a judgment about the appropriate level of the ceilings, which *Buckley* left to the legislature unless the limits prevented candidates from amassing necessary campaign funds. Because Missouri's ceilings had no such impact, the changing value of money over time has no constitutional significance.[18] *See* Bray Br. at 45-49. Indeed, even the

17. Contrary to Respondents' suggestion, *see* Resp. Br. at 24., the figures do not include unregulated funds given to political parties.

18. The inconvenience of fundraising under the $1,000 federal limit is no better a reason to invalidate Missouri's law. *See* McConnell Br. at 7. *Buckley* gives Congress the power to address that problem by raising the limits or, better yet, enacting a public funding system. Judicial intervention is thus unnecessary to save Congress from itself.

practical significance of inflation is questionable when a federal candidate can raise $36.3 million in only four months. *See* Richard L. Berke, *Bush Announces a Record Haul, And Foes Make Money an Issue*, N.Y. Times, July 1, 1999, at A1.

The argument that contribution limits do not "materially advance a 'sufficiently important interest'" because the campaign finance system is "riddled with exceptions," Brief *Amicus Curiae* of the American Civil Liberties Union *et al.* at 15, is similarly unavailing. The purpose of contribution limits is not to eliminate campaign spending but to combat the uses of money with obvious corrupting potential.[19] Of course, if other uses of money do have corrupting potential, the solution is not to give up on regulating campaign finances but to close the widely recognized loopholes.[20] The *Colorado Republican* plurality recognized as much in noting that Congress could change the law governing soft money contributions to political parties. *See* 518 U.S. at 617.

In sum, neither Respondents nor their supporting *amici* have offered any reason to reconsider *Buckley*'s holding about the constitutionality of *contribution* limits — the only question

19. Respondents speculate that the state's asserted interest in combating perceived corruption masks an intent to "level the playing field." Resp. Br. at 44. But the fact that Missouri does not limit contributions to political parties suggests precisely the opposite: the state has focused on contributions with obvious corrupting potential, not on what individuals can afford to spend on politics. Moreover, the "leveling" effect of contribution ceilings is a constitutionally permissible consequence of limiting the real and apparent improper influence of big money on candidates.

20. The fact that contribution limits may not be *sufficient* to stem the loss of public confidence is hardly a reason to find them constitutionally invalid, as some *amici* suggest. *See* McConnell Br. at 4-5. According to that logic, this Court would also have to invalidate laws banning bribery.

presented for review in this case. Indeed, it would be inappropriate and dangerous to reconsider *Buckley*'s distinction between contributions and expenditures without first ensuring that this Court had a complete factual record and thorough legal briefing by the parties about the impact of campaign expenditures on the integrity and legitimacy of the federal system. Because this Court can decide this case within the parameters of *Buckley*, and Missouri's limits are constitutional under *Buckley*, this Court should reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated in Bray's main brief, Petitioners' briefs, and the briefs *amici curiae* in support of Petitioners, the Eighth Circuit's decision should be reversed.

Respectfully submitted,

Deborah Goldberg, *Counsel of Record*
Burt Neuborne
Nancy Northup
Elizabeth Daniel
BRENNAN CENTER FOR JUSTICE at NYU Law School
161 Avenue of the Americas, Fifth Floor
New York, NY 10013
212-998-6730

Gerald P. Greiman
DANKENBRING, GREIMAN, OSTERHOLT
& HOFFMAN, P.C.
120 South Central Avenue, Fifth Floor
St. Louis, MO 63105
314-863-7733

Attorneys for Respondent Joan Bray