No. 98-963

In The

Supreme Court of the United States

October Term, 1998

JEREMIAH W. NIXON, *et al.*,

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAN,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF ARKANSAS, CONNECTICUT, IOWA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, RHODE ISLAND, TENNESSEE, WEST VIRGINIA AND WISCONSIN; THE EXECUTIVE DIRECTOR OF THE HAWAII CAMPAIGN FINANCE SPENDING COMMISSION; AND THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCE OF KENTUCKY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici include the following Secretaries of State: Sharon Priest of Arkansas; Susan Bysiewicz of Connecticut; Chet Culver of Iowa; William Galvin of Massachusetts; Eric Clark of Mississippi; Bekki Cook of Missouri; Mike Cooney of Montana; Bill Gardner of New Hampshire; Rebecca Vigil-Giron of New Mexico; James Langevin of Rhode Island; Riley Darnell of Tennessee; Ken Hechler of West Virginia; and Doug LaFollette of Wisconsin.[1] *Amici* also include Robert Watada, Executive Director of the Hawaii Campaign Finance Spending Commission and William Maxwell Bushart, Acting Director of the Registry of Election Finance of Kentucky. In these positions, *amici* serve as chief election officers or supervisors of campaign finance in their States. They thus have considerable experience with the issues raised in this case and, in particular, have witnessed the serious threats that unlimited campaign contributions pose to the integrity of the electoral process.

Amici seek reversal of the Eighth Circuit's decision in this case because that court's interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), threatens to undermine reasonable campaign contribution limits at the state, local and federal level that are necessary to preserve the health of our democracy. Relying on this Court's conclusion that

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

legislatures may eliminate "the opportunity for abuse inherent in the process of raising large monetary contributions" (*Buckley*, 424 U.S. at 30), thirty-five states and a large number of localities have enacted campaign contribution limits similar to those at issue here, based on their studied belief that such regulations are necessary to prevent actual and apparent corruption in state and local government. These reasonable contribution limits help stem widespread public cynicism about elected officials' ability to govern in the public interest and check the capacity of wealthy interests to exert improper influence over legislative and executive policies. Left undisturbed, the Eighth Circuit's decision will erect a new, insuperable barrier for states to justify the adoption of such limits, undermining existing laws throughout the country and chilling the future efforts of other jurisdictions to enact similar, necessary regulations.

SUMMARY

Having examined "a broad spectrum of opinions" regarding the proper balance between the need for funds adequate to run viable campaigns and the potential for buying influence, the Missouri General Assembly adopted a schedule of carefully graduated contribution limits that would be adjusted over time according to inflation. Appendix ("App.") 14a-15a.[2] Notably, the

[2] In this brief, citations to "App." refer to the Appendix attached to the Petition for Writ of Certiorari filed by petitioners Jeremiah W. (Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. *See Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari (filed December 14, 1998). Citations to "Jnt. App." refer to the Joint Appendix filed by the parties along with their merits briefs on April 12, 1999.

highest of these contribution limits, which applied to statewide offices and to local offices where the population exceeds 250,000, matched the limit applicable to candidates for federal office upheld in *Buckley* which is still in force today. The District Court, noting that "[t]here is more than ample reason to defer to the considered judgment of the Missouri legislature", found the limits entirely consistent with this Court's decision in *Buckley*. App. 41a. A divided panel of the Eighth Circuit reversed, announcing three distinct interpretations of what a state must demonstrate to justify the imposition of contribution limits and casting a pall of doubt over the future viability of such limits throughout the country.

By rejecting the Missouri legislature's informed judgment regarding the actual conditions of Missouri politics, the panel majority ignored a central tenet of this Court's decision in *Buckley*. While the *Buckley* Court recognized that the contribution limits are necessary to serve the government's compelling interest in "deal[ing] with the reality or appearance of corruption *inherent* in a system" of large contributions (424 U.S. at 28) (emphasis added), the Court of Appeals insisted that the government does not have such a compelling interest absent proof of "real corruption" or the perception of corruption which is demonstrably "public", "objectively 'reasonable' " and " 'derived from the magnitude of . . . contributions' that historically have been made to candidates running for

public office in Missouri". App. 6a-7a.[3] The panel majority effectively nullified an integral premise of this Court's campaign finance decisions by imposing a new and impossible burden of proof for states to carry in order to justify contribution limits. *See* App. 18a (Gibson, J., dissenting).

The Eighth Circuit's decision flies in the face of this Court's common sense recognition that "the scope of [actual corruption] can never be reliably ascertained". *Buckley*, 424 U.S. at 27. By requiring "demonstrable evidence" of "genuine problems" (App. 5a), the panel majority destroyed a major pillar of this Court's analysis of campaign finance, under which "marginal restrictions upon the contributor's ability to engage in free communication" have been approved in light of the grave, self-evident threat to our electoral systems' legitimacy posed by unlimited campaign contributions. *See Buckley*, 424 U.S. at 20-21.[4] Nothing in the record below justifies the

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[3] *Compare Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (contribution limits serve the government's compelling interest in "assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"); *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (avoiding appearance of improper influence is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent").

[4] *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (approving "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 Committee*, 459 U.S. 197, 210 (1982) ("Nor will [the courts] second-guess a

Eighth Circuit's departure from the established doctrine that contribution limits are constitutionally justified and practically necessary as a prophylactic shield against the corruption of our electoral process.

The pervasive appearance of corruption in electoral politics arises not only from the legion historical examples of influence peddling[5] but also from the simple fact that the vast majority of Americans cannot afford to contribute substantial money to campaigns as their

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legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("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").

[5] *See generally*, CHARLES LEWIS AND THE CENTER FOR PUBLIC INTEGRITY, THE BUYING OF CONGRESS: HOW SPECIAL INTERESTS HAVE STOLEN YOUR RIGHT TO LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS (1998). Analyses of corrupt political practices dominate public discourse throughout the country. *See, e.g.*, E.J. Dionne, *Democracy or Plutocracy?*, WASHINGTON POST, op-ed, February 15, 1994, p.A17; Tom Fiedler, *Big Interests Spending Equally Big Bucks: Millions of Dollars Given to Campaigns of Influential Policy Makers*, THE MIAMI HERALD, May 21, 1995, p.14A; Philip B. Heyman & Donald J. Simon, *Parties to Corruption*, THE WASHINGTON POST, op-ed, June 25, 1998, p.A23; Albert R. Hunt, *The Best Congress Money Can Buy*, THE WALL STREET JOURNAL, September 7, 1995, p.A15; Celinda Lake & Steve Cobble, *Voters Say Take 'Big Money' Out of Campaigns*, MILWAUKEE JOURNAL SENTINEL, op-ed, April 16, 1995, p.4A; Rodney A. Smith, *White House Auction*, THE WASHINGTON POST, op-ed, April 14, 1995, p.A19; Howard Wilkinson, *No Campaign Money? Keep Your Mouth Shut About It*, THE CINCINNATI ENQUIRER, editorial, November 22, 1998, p.C1; *Political Scandal*, BOSTON GLOBE, editorial, October 31, 1996, p.A26; *Unlimited Cash, Undue Influence*, ST. LOUIS POST-DISPATCH, editorial, July 27, 1998, p.B6.

wealthy counterparts do. Any constitutional analysis of corruption and the appearance of corruption must be informed by this reality. Contribution patterns in Missouri and in states with similar limits show that the overwhelming majority of voters do not – and, realistically, cannot – contribute to political campaigns at anywhere near the limits set by Missouri. Median household income statistics confirm that the $2,150 per election cycle limit in Missouri represents a substantial percentage of most citizens' earnings.

To determine the appropriate level of constitutional protection due to large contributions, one must also assay the systemic injuries they occasion. In this regard, it is critical to understand the actual operation of money in state politics. Respondents' own testimony below illustrates the instrumental use of campaign funds to discourage electoral competition. Campaign war chests impose a substantial *in terrorem* disincentive on citizens who would challenge well-funded candidates and on supporters who would contribute money to such challengers.

Moreover, allowing those with easy access to wealth to accumulate such war chests from a small number of prodigious contributors would violate the premise that candidates in democratic elections should enjoy a significant modicum of popular support. Attention to the actual uses of campaign war chests informs a detailed understanding of the corrosive role of money in elections and affords further evidence that the *Buckley* Court's approval of prophylactic contribution limits remains correct and wise.

Without guidance from this Court resolutely reaffirming the constitutionality of contribution limits, a

wave of strategic litigation challenging such limits throughout the country will effectively destroy the modest, yet critical, prophylactic role they play in our electoral process. This Court has specifically disavowed any evidentiary burden that effectively requires a state's political system to "sustain some level of damage before the legislature can take corrective action". *See Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986).[6] *Amici* respectfully urge the Court to repel respondents' onslaught on the modest role that contribution limits play in the preservation of the integrity of our electoral process. By assessing in a realistic light the exclusionary and distorting effects of large or unlimited campaign contributions, this Court should reaffirm the wisdom of its established understanding that "marginal restrictions on the contributor's ability to engage in free communication" are constitutionally sound and fundamentally necessary. *Buckley*, 424 U.S. at 20.

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[6] In *Munro*, this Court noted that

> "[w]e have never required a State to make a particularized showing . . . prior to the imposition of reasonable restrictions on ballot access. To require States to prove [harm] as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless Court battles over the sufficiency of the 'evidence' . . . "

Munro v. Socialist Workers Party, 479 U.S. 189, 195 (1986). As set forth below in section II, contribution limits bear many functional similarities to ballot access requirements, because both oblige candidates to demonstrate a significant base of popular support.

ARGUMENT

I. BECAUSE EXISTING CONTRIBUTION LIMITS RADICALLY EXCEED SUMS THAT THE OVERWHELMING MAJORITY OF CITIZENS CAN CONTRIBUTE TO CAMPAIGNS, THE REMOVAL OR RAISING OF THOSE LIMITS CAN ONLY AUGMENT THE PERVASIVE AND CORROSIVE PERCEPTION OF CORRUPTION IN POLITICS.

Neither respondents nor the panel majority have articulated any convincing reason to depart from the principle articulated in *Buckley* that prophylactic contribution limits are justified by the government's compelling interest in stemming the corrosive effects of corruption and the appearance of corruption. The district court below recognized that "[d]espite Missouri's contribution limits, candidates for political office in the state are still able to amass impressive campaign war chests". App. 37a. The district court also noted that, since so few citizens contribute at or near Missouri's limits, "there is no reason to believe that Missouri's contribution limits have any 'dramatic adverse effect' on funding campaigns for state office". App. 39a (citing *Buckley*, 424 U.S. at 21). The panel majority did not dispute either of these findings.

While Missouri's limits have no demonstrable adverse effect on fundraising, they do provide a modest, but necessary, check on the ability of small numbers of wealthy contributors to corrupt officials or otherwise to improperly influence legislative and executive policies. Of equal importance is the role contribution limits play in alleviating the widespread perception of corruption in

politics. *Buckley*, 424 U.S. at 25-26; *see also Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 496-501 (1985). However, the capacity of such limits to quell doubts about wealthy interests exerting improper influence is directly tied to the levels at which they are set. If, for instance, limits are gauged to allow the contribution of sums far beyond the means of an overwhelming majority of citizens, then the vast majority of citizens will naturally perceive that contributors who approach those limits exert a disproportionate influence over the officials they support. This common sense conclusion is borne out by experience. As one former United States Congressman put it,

> "[p]eople who contribute get the ear of the [candidate] and the ear of the staff. They have access – and access is it. Access is power. Access is clout. That's how this thing works . . . ."[7]

The *Buckley* Court and the Missouri legislature recognized that the endemic problem of corruption was *inherent* in any system that allows large financial contributions. 424 U.S. at 30; App. 14a-15a.

In *Buckley*, the Court found it significant that only 5.1% of the money raised by federal candidates came in amounts greater than $1,000. 424 U.S. at 26 n. 27. By

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[7] MARTIN SCHRAM, CENTER FOR RESPONSIVE POLITICS, SPEAKING FREELY: FORMER MEMBERS OF CONGRESS TALK ABOUT MONEY IN POLITICS, 63 (1995) (quoting Rep. Romano Mazzoli of Kentucky). Representative Mazzoli's comments about the correlation between contributions and influence are echoed throughout the book by members of both political parties.

contrast, in Missouri, less than 0.72% of the contributors to candidates for Secretary of State in 1992 made contributions of more than $2,000.[8] Less than 1.5% of the contributors to candidates for State Auditor in 1994 made aggregate contributions of more than $2,000.[9] These groups of large contributors represent only 0.0000026% and 0.000012%, respectively, of the voting age population in Missouri.[10] For the typical family in Missouri, where the median household income is $31,701,[11] one contribution to a statewide candidate at the per-cycle maximum of

[8] These figures are derived from testimony presented by the Missouri Office of the Attorney General. *See* Jnt. App. 34-35. The figures compiled by the Attorney General's office, however, do not take into account the non-itemized contributions below $100 when calculating the percent of total contributions that exceeded $2,000. By dividing the total non-itemized contributions by the highest possible non-itemized contribution ($99), *Amici* have derived the most conservative estimate of the number of non-itemized contributions. Adding this figure to the number of named contributors produces a more accurate, yet still conservative, estimate of the total number of contributions made to each office. *Amici* then calculated the percentage of contributions at or above $2,000 using these totals.

[9] "Presumably, some or all of the contributions in excess of $1,000 could have been replaced through efforts to raise additional contributions from persons giving less than $1,000." *Buckley v. Valeo*, 424 U.S. 1, 26 n. 27 (1974).

[10] *See* U.S. Census Bureau, *Estimates of the Population of the U.S. and States by Single Year: July 1, 1992* (visited April 9, 1999) <http//:www.census.gov/population/estimates/state/stats/ag9297.txt>.

[11] *See* U.S. Census Bureau, *County Estimates for Median Household Income for Missouri: 1995, Table C95-29* (visited Feb. 24, 1999) <http://www.census.gov/cgi-bin/hhes/saipe93/gettable.p1>.

$2,150 represents almost one month's pre-tax salary. Clearly, large campaign contributions remain the exclusive prerogative of the wealthy.[12]

Fundraising data amassed by states with contribution limits similar to those in Missouri support the conclusion that the vast majority of the population cannot make contributions at or near the challenged ceilings. This data confirms the conclusions drawn by the district court regarding contributions in Missouri, in both statewide and legislative elections. In states with similar limits for statewide office, the vast majority of contributors contribute less than $100 per election cycle. Only a tiny percentage contribute even half of the allowed per cycle maximum.

[12] In this vein, it is also critical to consider the relative differences in disposable income between wealthy and nonwealthy citizens. *Buckley*, 424 U.S. at 21 n. 22 ("Other factors relevant to an assessment of the 'intensity' of support indicated by a contribution include the contributor's financial ability").

Contribution Patterns In States With Comparable Limits For Statewide Elections[13]

STATE & Cont. Limit	Perc. (%) <$100	Cumulative Perc. (%) <$250	Cumulative Perc. (%) <$500	Cumulative Perc. (%) <$750	Cumulative Perc. (%) <$1,000	Perc. (%) >$1,000
Wash. ($2,300 per cycle)	89.2%	94.9%	97.7%	98.2%	98.3%	1.7%
Wyoming ($2,000 per cycle)	79.9%	89.3%	95.4%	95.8%	96.1%	3.9%

[13] *See* Samantha Sanchez, National Institute on Money in State Politics, *Comparison of Contribution Sizes in Statewide and State Legislative Campaigns* (visited April 9, 1999) <http//:www.followthemoney.org>.

In state legislative races operated by states with contribution limits similar to Missouri's, the official records of campaign contributions reflect the same pattern. Again, only a small fraction of contributors give even half of the allowed per cycle maximum.

Contribution Patterns In States with Comparable Limits for State Legislative Elections[14]

STATE	Perc. (%) <$100	Cumulative Perc. (%) <$250	Cumulative Perc. (%) <$500	Perc. (%) >$500
Alaska	62.2	84.1	98.1	1.9
Florida	48.4	66.6	99.9	0.1
Kansas	67.7	88.6	98.3	1.7
Michigan	77.9	91.3	99.2	0.8
Wash.	84.0	93.0	97.4	2.6

The significance of these statistics becomes apparent when one takes account of citizens' average income, poverty rates, and the percentage of the total voting age population that makes any form of political contribution.

[14] *Id.* Alaska and Florida limit contributions to legislative candidates to $1,000 per cycle. In Kansas, the limits are $2,000 per cycle for state senators and $1,000 per cycle for representatives. In Michigan, the limits are $1,000 per cycle for senators and $500 for representatives. In Washington, all legislative candidate contributions are limited to $1,150 per cycle. Federal Election Commission, *Campaign Finance Law 98: Chart 2-A Contribution and Solicitation Limitations* (visited April 9, 1999) <http://www.fec.gov/pages/chart2a.htw>.

Income, Poverty, and Voter Contribution Rates[15]

STATE	Median Household Income	Poverty Rate	Total Voting Age Pop.	Percent of VAP Making Cont.
Alaska	46,628	8.8	425,000	4.5%
Florida	29,993	16.3	11,043,000	0.8%
Kansas	30,288	12.9	1,897,000	1.9%
Michigan	35,719	13.9	7,072,000	1.0%
Wash.	35,885	12.1	4,115,000	3.7%
Wyoming	32,220	11.6	356,000	1.9%
Missouri	32,040	13.7	3,995,000	1.1%

Clearly, contribution limits in these states are not relevant to the vast majority of citizens except insofar as they prevent the miniscule portion of the electorate who have substantial wealth from usurping total control over the financing of campaigns. The majority of the American public perceives the potential and actual corruption

[15] *See* U.S. Census Bureau, *Income 1995: Table C Median Income of Households by State: 1993, 1994, and 1995* (visited April 9, 1999) (data is average of years 1993-1995) <http//:www.census.gov/hhes/income/income95/in95med1.html>; U.S. Census Bureau, *Poverty 1995: Table B Percent of Persons in Poverty by State: 1993, 1994, and 1995* (visited April 9, 1999) (data is average of years 1993-1995) <http//:www.census.gov/hhes/poverty/pov95/statepov.html>; *see also* voting age population and contribution data from Sanchez, *supra n. 13.*

caused by large campaign contributions.[16] Without robust contribution limits, this corrosive problem can only worsen.[17] In this regard, it is important to keep in mind

[16] In a 1996 poll taken directly after the November elections, Americans ranked the "power of special interest groups in politics" second only to "international terrorists" when asked to identify "major threats" to the future of the country. Princeton Survey Research Associates/Pew Research Center, *Public Opinion Survey* (November 1996) (visited March 18, 1999) <http://www.people-press.org/unionrpt.htm>. In this same survey, forty-nine percent of those polled believed the country was "losing ground" in its efforts to fight political corruption. A 1997 poll determined that three-quarters of Americans believe that "public officials make or change policy decisions as a result of money they receive from major contributors." *See* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, N.Y. TIMES, Apr. 9, 1997, at A1. Although polls formerly showed that voters trusted their own congressional representatives while decrying corruption in general, even that has changed. An August 1998 poll of voters in eight states showed that between 65% and 75% of voters now believe that campaign contributions affect the votes of *their own* senators on issues of concern to special interests. The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (visited March 18, 1999) <http://www.publicampaign.org/poll9___3___98.html>.

[17] Even under the existing regimes of contribution limits, monied interests can still exert overwhelming influence over the electoral process through practices such as bundling – the coordinated donation of campaign contributions from individuals representing the same corporation, industry, or special interest – and other stratagems. *See, e.g.*, Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1140-1142 (1994); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 326-327 (1993) (citing LARRY MAKINSON, CENTER FOR RESPONSIVE POLITICS, OPEN SECRETS: THE ENCYCLOPEDIA OF CONGRESSIONAL

that over ten percent of Missourians live at or below the poverty level.[18] The national poverty rate from 1995 through 1997 averaged 13.6%.[19] For these citizens, campaign contributions, and thus access to meaningful representation, are all but impossible.

On a related vein, the income disparities between counties in Missouri present another functional justification for contribution limits. The residents of Wayne County, whose median household income in 1995 was $18,180, suffer a profound disadvantage in supporting their preferred candidates for statewide election compared to their fellow Missourians who live in St. Charles County, where the median household income is $50,932.[20] A legislature could legitimately discern an injury of constitutional proportions in the fact that nearly three-to-one gross income disparities could, under a regime without contribution limits, undermine the fairness of statewide elections. If, as respondents claim, *see infra* Section II, a candidate's fundraising determines his or her success in

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MONEY & POLITICS (2d ed. 1992)). While contribution limits alone may not be sufficient to assure the integrity of our political processes, they nonetheless remain a necessary element of any regulatory scheme. *Buckley*, 424 U.S. at 28; *Colorado Republican*, 518 U.S. at 609.

[18] *See* U.S. Census Bureau, *Poverty 1997* (visited Feb. 24, 1999) <http://www.census.gov/hhes/poverty/poverty97/pv97state.html>.

[19] *Id.*

[20] *See* U.S. Census Bureau, *County Estimates for Median Household Income for Missouri: 1995, Table C95-29* (visited Feb. 24, 1999) <http://www.census.gov/cgi-bin/hhes/saipe93/gettable.pl>.

electoral competition, then clearly the residents of St. Charles County have a disproportionate opportunity to select and support candidates for statewide office.

Even if the *actual* integrity of elections were somehow not undermined by the dominant influence of large contributions, the *apparent* integrity of elections unavoidably is. When only a select few citizens are able to contribute vast sums of money, the remaining majority will quite rationally and justifiably assume that large contributors purchase access to public office, if not the office itself.[21] The widespread perception of corruption in politics is no accident. Rather, it is the natural and rational conclusion drawn by citizens who cannot financially support electoral candidates at anywhere near the level of their wealthy counterparts. As the *Buckley* Court recognized, the government has a compelling interest in undertaking measures to check the pervasive perception of corruption and the deleterious long-term consequences it comports for our democracy.

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[21] A 1998 study of individuals who contributed over $200 to federal candidates revealed that the overwhelming majority of large contributors report personal communication with officeholders they support, often regarding matters relating to their job or business. Notably, 95% of those who make large contributions are white and 81% are male. Further, 81% report incomes over $100,000. JOHN GREEN, PAUL HERRNSON, LYNDA POWELL, & CLYDE WILCOX, JOYCE FOUNDATION OF CHICAGO, INDIVIDUAL CONGRESSIONAL CAMPAIGN CONTRIBUTORS: WEALTHY, CONSERVATIVE – AND REFORM-MINDED (1998).

II. BY STEMMING THE EXCLUSIONARY AND DISTORTING EFFECTS OF CAMPAIGN WARCHESTS BUILT FROM SCANT POPULAR SUPPORT, CONTRIBUTION LIMITS HELP PRESERVE THE "UNFETTERED INTERCHANGE OF IDEAS" NECESSARY TO ELECTORAL POLITICS.

Respondents' own testimony only underscores the necessity of contribution limits. *See* Affidavit of Zev David Fredman in Support of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, Jnt. App. at 10-11 (*hereinafter*, "Fredman TRO Aff."). In their various affidavits, Fredman and the Shrink Missouri Government PAC ("Shrink PAC") candidly admit that purely tactical concerns fuel their alleged need for large donations. *See* Jnt. App. at 10-11 (Fredman TRO Aff. ¶¶ 6-7), at 40 (Schock Aff. ¶ 24), and at 54-55 (Fredman Aff. ¶¶ 4, 11). Recognizing that money has become the essential weapon of campaign warfare, Fredman seeks larger contributions of money in order "to make it more difficult for other candidates to attract . . . voters" and "to discourage other potential candidates from entering the primary". Fredman TRO Aff. at ¶¶ 6-7.

While his candor may be admirable, Fredman's intentions are not. Respondents' stated objective of "discouraging other potential candidates" violates basic principles that the *Buckley* Court deemed essential to the proper function of our political system. The First Amendment was "designed to 'secure the widest possible dissemination of information from diverse and antagonistic sources', and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' ". *Buckley*, 424 U.S. at 49 (citations

omitted). Flatly contradicting the assumption that more campaign money leads to more campaign speech and a greater diversity of voices, respondents' testimony unmasks the instrumental and exclusionary role of fundraising in electoral competition.

Respondents' avowed intentions are no aberration; rather, they reflect the widespread use of fundraising as a tactical weapon in state electoral politics. *See, e.g.* William Cassie & David Breaux, *Expenditures and Election Results*, in CAMPAIGN FINANCE IN STATE LEGISLATIVE ELECTIONS (Joel A. Thompson and Gary F. Moncrief, eds. 1998). As respondents suggest, viable electoral competition now revolves around the acquisition of money, instead of the potency of ideas. Those without fundraising prospects are driven from competition by the substantial, *in terrorem* specter of well-funded competitors. Accordingly, the unregulated race for money that respondents seek to reintroduce into Missouri politics is impermissibly exclusionary. If a small number of wealthy citizens can amass a campaign war chest to "discourage" competition from a candidate broadly supported by nonwealthy citizens, then the fundamental First Amendment interest in diverse information from the widest possible range of sources is defeated. The Court should gauge the constitutional protection due to large contributions in light of the exclusionary uses to which they are put.

By encouraging candidates to raise relatively smaller amounts from a larger group of contributors, contribution limits serve much the same electoral function as ballot access signature requirements. This Court has routinely approved reasonable limitations on access to the ballot in light of a state's "undoubted right to require candidates

to make a preliminary showing of substantial [popular] support in order to qualify for a place on the ballot". *Munro*, 479 U.S. at 194 (citing *Jenness v. Fortson*, 403 U.S. 431 (1971); *American Party of Texas v. White*, 415 U.S. 767 (1974); and *Anderson v. Celebrezze*, 460 U.S. 780, 788-789 n.9 (1983)). Since contribution limits encourage candidates to raise money from more sources, they promote the broadest possible political participation while only marginally restricting each contributor's rights to political expression. *Buckley*, 424 U.S. at 20. In the obverse, they prevent candidates without popular support from selling themselves to the highest, most potentially corrupting bidder.

In approving a campaign finance regulatory framework in which candidate spending cannot be limited, this Court has relied on the premise that the "[r]elative availability of funds is after all a rough barometer of public support". *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986) ("*MCFL*"); *see also Buckley*, 424 U.S. at 56 ("Given the limitation of the size of outside contributions, the financial resources available to a candidate's campaign . . . will normally vary with the size and intensity of the candidate's support."). Such an observation, however, holds true only if contribution limits ensure that individuals contribute on roughly the same order of magnitude. Otherwise, a small group of wealthy citizens will be able to amass campaign funds grossly out of proportion to their numbers or the potency of their ideas.

This Court's decisions in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990), *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), and *MCFL*, *supra*, instruct that the political arena may be

corrupted by "immense aggregations of wealth that ar accumulated with the help of the corporate form and tha have little or no correlation to the public's support for th corporation's political ideas." *Austin*, 494 U.S. at 65 Noting the compelling governmental interest in preven ing corruption from "resources amassed in the economi marketplace" that are used to obtain "an unfair advan tage in the political marketplace", these cases recogniz that the electoral marketplace of ideas is corrupted b aggregations of wealth that are unrelated to popular sup port. *See MCFL*, 479 U.S. at 257. If, as *Buckley* held, th "quantity of communication by the contributor does no increase perceptibly with the size of the contribution since the expression rests solely on the undifferentiated symbolic act of contributing", then a restriction on th size of contributions takes nothing from the marketplac of ideas. 424 U.S. at 21. The inverse, however, is not tru without contribution limits, candidates like Fredman who do not enjoy broad popular support, could amas wealth entirely out of proportion to the power of thei ideas. As *Austin* instructs, the power of ideas in electora politics must be measured by popular acclaim, and not b access to wealth.

If, as respondents claim, large contributions effec tively determine the viability of candidacies and the out come of elections, it follows that an electoral regim without limits significantly impairs nonwealthy citizens opportunity for meaningful electoral participation. *Se* Jnt. App. at 10-11 (Fredman TRO Aff. ¶¶ 6-7), at 4 (Schock Aff. ¶ 24), and at 54-55 (Fredman Aff. ¶¶ 4, 11) Citizens without disposable income cannot purchas access or representation. Accordingly, large contribution

from small numbers of people actually diminish the number of voices in the political arena. To the extent that contribution limits help mitigate the exclusionary effects of money in politics, they are justified by this Court's longstanding dedication to the "free and unfettered" functioning of the electoral marketplace of ideas.

* * *

Both the actuality and the appearance that money purchases influence over our elected representatives comprise serious threats to the integrity of our democracy. *Buckley* and its progeny recognize and revile both of these threats. Contribution limits, which provide a modest check against the possibility of corruption and thereby help diffuse the pervasive perception of corruption, remain constitutionally sound and practically necessary.

CONCLUSION

The judgment of the panel below should be reversed.

Respectfully submitted,

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