No. 98-963

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

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

AMICUS CURIAE BRIEF OF GUN OWNERS OF AMERICA, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, NATIONAL CITIZENS LEGAL NETWORK, U.S. BORDER CONTROL, AND POLICY ANALYSIS CENTER IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE

Amici curiae Gun Owners of America, National Citizens Legal Network (a project of Citizens United Foundation), The Lincoln Institute for Research and Education, U.S. Border Control, and Policy Analysis Center are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Each of the *amici* was separately established in the State of California, the District of Columbia, or the Commonwealth of Virginia for purposes related to participation in the public policy process. For each of the *amici,* such purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution. In the past, each of the *amici* has conducted research on other issues involving constitutional interpretation, and several have filed *amicus curiae* briefs in other federal litigation involving constitutional issues, including briefs before this Court.[2]

SUMMARY OF ARGUMENT

The court of appeals correctly applied the strict scrutiny standard to the Missouri law limiting campaign contributions.

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief. Such written consents, in the form of letters from counsel of record for the various parties, have been received and submitted to the Clerk of Court for filing. *See* Supreme Court Rule 37.3(a).

Petitioners' argument must be rejected as contrary to prior decisions and to the fundamental principle of popular sovereignty undergirding the First Amendment freedoms of speech, press, and assembly. As that fundamental principle prohibits the enactment of seditious libel laws because their purpose is to promote public confidence in the government, so also does it prohibit the enactment of laws regulating campaign finance which share the same unconstitutional purpose.

Because campaign finance laws rest upon an unconstitutional foundation, they spawn unconstitutional effects — discriminating in favor of incumbents over their challengers, the institutional press over their competitors, and major party candidates over independent and minor party candidates. Additionally, such laws violate the First Amendment guarantee of political speech recognized and enforced by this Court.

Although the Court could affirm the decision below solely on the strength of Buckley v. Valeo, 424 U.S. 1 (1976), and its progeny, nevertheless it should revisit Buckley and bring it into conformity with the fundamental principles of the First Amendment Speech, Press, and Assembly Clauses.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW TO MISSOURI'S LIMITS ON CONTRIBUTIONS TO POLITICAL CAMPAIGNS.

The question in this case is whether the court of appeals rightfully found that a 1994 Missouri law limiting political

campaign contributions violated respondents' First Amendment rights of speech and association. There is no doubt that it did.

First, the court of appeals applied the appropriate standard of review to the Missouri statute in question. Following the decision of this Court in Buckley, *supra*, and its own decisions in Carver v. Nixon, 72 F.3d 633, 638 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033 (1996), and in Russell v. Burris, 146 F.3d 563, 567 (8th Cir. 1998), *cert. denied.,* 119 S. Ct. 510 (1998), the court of appeals ruled that Missouri "must demonstrate…that it has a compelling interest and that the contribution limits at issue are narrowly drawn to serve that interest." Shrink Missouri Government PAC v. Adams (ShrinkPAC), 161 F.3d 519, 521 (8th Cir. 1998). This ruling is in keeping with this Court's decisions governing campaign reform laws that have been handed down since Buckley. *See* Colo. Rep. Fed. Camp. Comm. v. FEC, 518 U.S. 604 (1996).

Second, the court of appeals correctly applied the strict scrutiny standard to the facts of this case. In contrast with the findings of this Court in Buckley, 424 U.S. at 27, n.28, it found that Missouri provided no "demonstrable evidence that there were genuine problems [of corruption and the appearance of corruption] that resulted from contributions in amounts greater than the limits in place." Shrink PAC, *supra*, 161 F. 3d at 521. Thus, it concluded that Missouri had not sustained its burden of proving a "compelling interest." Additionally, the court of appeals found no evidence that the particular contribution limits were "narrowly tailored to serve" any compelling state interest. To the contrary, the court found that "the limits set by SB650 … can only be regarded as 'too low to allow meaningful participation in protected political speech….'" *Id.*, at 522-23. Such careful analysis of the

nature of the claimed interest, and the relation between means and ends, conforms with this Court's decisions in campaign regulation cases. *See* Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 613-26.

Although petitioners claim that they did meet the strict scrutiny standard applied by the court of appeals (Pet. Br., pp. 26-36), the main thrust of their argument is that the court of appeals applied the wrong standard of review. Pet. Br., pp. 13-26, 36-43. Claiming that **any** limits on political campaign contributions "only marginally affect the First Amendment rights of contributors and candidates," such limits are said to be constitutional because they "clearly and appropriately serve the public's vital interest in preventing the reality and appearance of corruption and fostering confidence in Missouri's representative government and do not unduly burden First Amendment rights." Pet. Br., p. 10.

More fundamentally, petitioners claim that the decision of the court of appeals — if allowed to stand — "effectively overrules … the foundation of campaign finance reform efforts for more than twenty years" because applying strict scrutiny would require "States somehow to prove that their citizens in fact perceive corruption in a system of unlimited campaign contributions; and … to prove that contribution limits are set at the precise point beyond which that perception of corruption occurs." Pet. Br., pp. 2-3. Because this burden is, in petitioners' eyes, an impossible one, they propose that this Court lower the First Amendment standards and defer to "a reasonable legislative judgment about what constitutes a 'large' and potentially corrupting contribution and thus serves the State's compelling interest in preventing the appearance of such corruption." Pet. Br., p. 39.

To date, this Court has declined to take such a deferential approach to legislation impacting upon the First Amendment. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). Hence, this Court has refused earlier invitations in campaign finance litigation to "allow the Government's suggested labels to control our First Amendment analysis." Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 627-28 (Kennedy, J., concurring in the judgment and dissenting in part, citing pp. 621-22). Petitioners have provided no good reason to depart from that practice here.

Nevertheless, petitioners have provided good reason for this Court to reexamine the distinction drawn in Buckley between the First Amendment protections as they apply to campaign contributions in contrast to those applied to campaign expenditures. Petitioners have argued here that Buckley established that legislative limits on "large" campaign contributions are *per se* constitutional because such contributions to political campaigns are "inherently" corrupting and such limits "clearly and appropriately serve the public's vital interest in preventing the reality and appearance of corruption and in fostering confidence in Missouri's representative government...." Pet. Br., pp. 10, 12. This argument is incompatible with the foundational purpose of the First Amendment and should be rejected by this Court. To that end, this Court should no longer follow Buckley's holding which permitted a government to regulate the conduct of election campaigns in pursuit of a policy of protecting public confidence in the American system of representative government.

II. CAMPAIGN FINANCE LIMITATIONS VIOLATE THE FIRST AMENDMENT'S GUARANTEES PRESERVING THE PEOPLE'S SOVEREIGNTY.

A. THE FIRST AMENDMENT'S SPEECH, PRESS AND ASSEMBLY CLAUSES PRESERVE THE FUNDAMENTAL PRINCIPLE OF POPULAR SOVEREIGNTY OVER GOVERNMENT.

Although not addressed by the courts below, nor in any of the briefs of the parties, the threshold issue in this case should be **why** the First Amendment's Speech, Press, and Assembly Clauses apply to State laws limiting money contributions to political campaigns engaged in by persons seeking election to State office. According to the express text of the First Amendment, only "Congress," not the legislatures of the several states, "shall make no law…abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." Yet, for nearly three-quarters of a century, this Court has applied these same protections against laws enacted by the legislatures of the several states and ordinances passed by their political subdivisions. *See, e.g.*, Fiske v. Kansas, 274 U.S. 380 (1927); Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995); Buckley v. American Constitutional Law Foundation, et al. ("ACLF"), 525 U.S. ___, 119 S. Ct. 636 (1999). Thus, those Clauses have been applied to state and local laws regulating the finances of political campaigns, imposing the same First Amendment standards as imposed upon laws enacted by Congress. *See, e.g.*, Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990).

This was not the practice in our nation's early history. The First Amendment — indeed, the entire Bill of Rights — applied only to the national government, not to the States. Barron v. Baltimore, 32 U.S. 243 (1833). This view held even after the ratification of the Fourteenth Amendment, as this Court refused to apply specific provisions of the Bill of Rights to the States. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36 (1873); United States v. Cruikshank, 92 U.S. 542 (1876).

Just after the first quarter of the twentieth century, however, the picture began to change. This Court began to apply First Amendment guarantees of freedom of speech, press and assembly to the States because they were "of the very essence of a scheme of ordered liberty," and "so rooted in the tradition and conscience of our people as to be ranked as fundamental." *See* Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). While these *amici* concur with this Court's rulings that such First Amendment guarantees apply to the States, they do so **only** on the grounds that the Fourteenth Amendment applies those rights to State laws "which abridge the privileges and immunities of citizens of the United States."

For over a century, this Court has limited these privileges and immunities to those which "owe their existence to the Federal government [in] its National character...." Slaughter-House Cases, *supra,* 83 U.S. at 79.[3] So the Court has applied

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[3] *See generally* Kimberly Shankman and Roger Pilon, Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government, Cato Institute Policy Analysis No. 326 (Nov. 23, 1998); Clarence Thomas, "The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment," Harvard Journal of Law and Public Policy 12 (1989).

the Privileges and Immunities Clause of the Fourteenth Amendment sparingly, only when "national issues" are being addressed. *See, e.g.*, Hague v. CIO, 307 U.S. 496 (1939). Rightly understood, however, the "privileges and immunities of citizens of the United States" cannot be so compartmentalized. As Justice Kennedy recently observed, the United States Constitution created a national government for a "federal union" in which the citizenry which would have "two political capacities, one state and one federal...." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). With the ratification of the Fourteenth Amendment, the United States Constitution removed from each State the power to determine how a person becomes a citizen of that State, and conferred such citizenship upon all United States citizens according to the State of their residence. In this way, State citizenship, itself, became a privilege of United States citizenship.

One privilege of a United States citizen, as a citizen of a State, is to live under a State government that is "republican in form." Article IV, Section 4, U.S. Constitution. And at the heart of a "republican form of government" is the right of the people freely to elect their government officials. *Federalist No. 10.*

During its 1994 October Term, this Court welcomed the opportunity to reaffirm this republican principle, endorsing its earlier decision in Powell v. McCormack, 395 U.S. 486 (1969), that the "fundamental principle of our representative democracy," is that "sovereignty is vested in the people, and that sovereignty confers on the people the right to choose freely their representatives" U.S. Term Limits, *supra*, 514 U.S. at 794. This Court further explained that:

> The true principle of a republic is, that the people should choose whom they please to govern them … This great source, popular election, should be perfectly pure, and the most unbounded liberty allowed.' [and] that restrictions upon the people to choose their own representatives must be limited to those 'absolutely necessary for the safety of the society.' [U.S. Term Limits, *supra*, 514 U.S. at 795.]

This principle of popular sovereignty undergirds the First Amendment guarantees of free speech, press and assembly. As James Madison said in his 1800 "Report on the Virginia Resolutions" in opposition to the Sedition Act of 1798:

> In the United States … [t]he people, not the government, possess the absolute sovereignty…. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. [Thus] [t]hey are secured … by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt, not only from previous restraint of the executive … but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licensers, but from the subsequent penalty of laws.

Thus, this Court has acknowledged that campaign reform legislation must conform to the rights of the people to choose how they will participate in election campaigns.

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices

> among candidates for office is essential, for the identities of those elected will inevitably shape the course that we follow as a nation. As this Court [previously] observed … 'it can hardly be doubted that the constitutional guarantee [of freedom of speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office.' [Buckley, *supra,* 424 U.S. at 14-15.]

This principle led the Buckley court to apply its highest standard — strict scrutiny — to the putative legislative purposes and the means employed by Congress in the Federal Election Campaign Act ("FECA") to regulate monetary contributions and expenditures in federal election campaigns. *Id.,* 424 U.S. at 29. Thus, it is this principle that implicitly underlies the ruling of the court of appeals in this case, applying "a strict standard of review." ShrinkPAC, *supra*, 161 F.3d at 522.

Petitioners argue to the contrary, seeking a lower standard of review because they believe that the only principle at stake is the people's faith in their government. Pet. Br., pp. 38-39. Not only have they forgotten that the primary purpose of the First Amendment is to preserve the "absolute sovereignty of the people" over their legislature, they also ignore the fact that the First Amendment was designed to preclude the enactment of legislation designed to preserve the people's confidence in their current government. As this Court quoted James Madison in New York Times v. Sullivan, 376 U.S. 254, 275 (1964):

> If we advert to the nature of Republican Government, we shall find that the censorial power is

> in the people over the Government, and not the Government over the people.

What is at stake in this case, then, is not just the appropriate constitutional test to be applied to the Missouri law in question, but the very First Amendment foundation upon which laws limiting campaign contributions supposedly rest. It is the position of these *amici* that there is no legitimate constitutional foundation for such laws, and that this Court should take this opportunity to revisit Buckley.

B. CAMPAIGN FINANCE LIMITS SERVE NO LEGITIMATE PURPOSE.

When the constitutionality of the FECA initially came to this Court, the United States Solicitor General contended that it served a broad range of goals. After Buckley, however, these goals have been essentially reduced to one: to maintain the people's confidence in America's system of representative government. Accordingly, petitioners claim that the Missouri law serves one purpose:

> The fundamental realities that government officers who receive money or items of value appear to be in debt to the giver, and that this appearance erodes public confidence in government, are the basis of laws that limit campaign contributions and otherwise regulate campaign finance generally. [Pet. Br. p. 30.]

See also, Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 609. According to the Missouri Attorney General, the goal of preserving "public confidence in our system of

representative government" is so substantial and compelling that no "proof that unregulated donations create the perception of corruption" is required. Rather, he insists that such "appearance of corruption" is "inherent" in any system that permits unlimited campaign contributions. According to this view, courts must defer, regardless of the absence of any concrete evidence, to the legislative determination that "unlimited direct contributions to candidates necessarily creates a public perception of corruption, and that limiting the size of contributions to candidates will ameliorate that ill." (Pet. Br., p. 34. Otherwise, these reformers maintain, "the very fabric of a democratic society [is endangered], for a democracy is effective only if the people have faith in those who govern." Pet. Br., p. 38 (citations omitted).

What is so striking about this apology for campaign finance regulation is that it almost exactly parallels the rationale given for the English common law crime of seditious libel. Under that law, the prohibition of statements impugning the reputation of the government or of its officials was justified as "very necessary for all governments" because "the people should have a good opinion of it." Furthermore, that law presumed that all such defamatory statements, even if true, damaged the government, because if the people possessed "an ill opinion of the government" for whatever reason, then "no government can subsist." Rex v. Tutchin, 14 Howell's State Trials 1095, 1128 (1704).

Twice, Congress attempted to impose upon the American people this English regime of seditious libel. First, a Federalist-led Congress passed the Sedition Act of 1798, punishing libels "against the government of the United States" in an effort to preserve the American form of government from

the perceived threat of the French Revolution. *See generally* J. Miller, Crisis in Freedom (1951). Second, in 1918 a Republican-led Congress passed the Sedition Act of 1918 prohibiting any act bringing "contempt or scorn for the form of government of the United States" in an effort to preserve America's government from the perceived threat of the Russian Revolution. *See generally* Lawrence, "Eclipse of Liberty: Civil Liberties in the United States during the First World War," 21 Wayne L. Rev. 33 (1974).

While neither law was struck down as unconstitutional, enforcement of the 1918 statute prompted Justice Oliver Wendell Holmes to write:

> [T]he ultimate good … is better reached by free trade of ideas — that the best test of truth is the power of the thought itself accepted in the competition of the market.... That at any rate is the theory of our Constitution [and] I think that we should be eternally vigilant against attempts to check the expressions of opinion that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. [Abrams v. United States, 250 U.S. 616, 630 (1919) (dissenting opinion).]

Fifty-five years later, Justice Holmes's view was vindicated by an unanimous Supreme Court when it struck down an Alabama libel statute in a suit brought by a government official. Writing for the majority, Justice William Brennan

observed that the First Amendment freedoms of speech, press and assembly together constituted "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, *supra,* 376 U.S. at 270. Drawing from "the lesson" learned "from the great controversy over the Sedition Act of 1798," Justice Brennan rejected the common law of seditious libel as undermining the original foundations of the First Amendment freedoms: the sovereignty of the people over their government. *Id.,* at 273-76.

At the heart of this Court's rejection of the common law of seditious libel, then, is the First Amendment principle that the government may not regulate speech in an effort to protect the government's reputation. Any such law reflects the constitutionally-rejected idea that sovereignty resides in the government, rather than in the people. As James Madison put it in the 1800 Virginia Resolutions in opposition to the Alien and Sedition Act of 1798:

> In the British government, the danger of encroachments on the rights of the people is understood to be confined to the executive magistrate. The representatives of the people in the legislature are not only exempt themselves from distrust, but are considered sufficient guardians of the rights of their constituents….
>
> In the United States, the case is altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power.

> Encroachments are regarded as possible from the one as well as from the other. Hence, in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition.…

Not surprisingly the legislative ambition about which James Madison warned is oftentimes packaged as reform. And nowhere is this more evident than in the efforts of Congress and many state legislatures, including Missouri, to enact campaign finance reform legislation.

C. LIMITATIONS ON CAMPAIGN FINANCE UNCONSTITUTIONALLY DISCRIMINATE IN FAVOR OF INCUMBENTS, THE INSTITUTIONAL PRESS AND MAJOR PARTY CANDIDATES.

In Buckley, Chief Justice Warren Burger predicted "that the Court's holding will invite avoidance, if not evasion, of the intent of the Act, with 'independent' committees undertaking 'unauthorized' activities in order to escape the limits on contributions." Buckley, *supra,* 424 U.S. at 253. In addition, the Chief Justice forecast "that the contribution limits of the Act create grave inequities that are aggravated by the Court's interpretation of the Act":

> All candidates can now spend freely; affluent candidates … can spend their own money without limit; yet contributions for the ordinary candidate are severely restricted in amount — and small contributors deterred. [*Id.,* 424 U.S. at 254.]

Both of the Chief Justice's observations have proven true. Not only has campaign reform legislation spawned innumerable "Political Action Committees," thereby blunting the impact of campaign contributions limits to particular candidates, but such laws have proved ineffectual in curbing contributions to political parties which, in turn, funnel the money into the parties' campaigns. FEC v. Colo. Rep. Fed. Camp. Comm., 1999 U.S. Dist. LEXIS 1822 (D.Colo., Feb. 18, 1999). Such developments have, in turn, aggravated the "significant inequities" about which he warned. Buckley, *supra*, 424 U.S. at 253-54. Not only has a candidate "with substantial personal resources [gained] a clear advantage over his less affluent opponents," but "[m]inority parties … are prevented from accepting large single-donor contributions [relegating them to] compete for votes against two major parties whose expenditures [have become] vast" while "distinctions between contributions in money and contributions in services" have proved to "enhance the disproportional influence of groups who command large quantities of these volunteer services" while at the same time "not allowing for an inflation adjustment to the contribution limit." *Id.,* at 253-54.

Campaign reform legislation has not enhanced public confidence in government; rather, it has diminished it by favoring incumbent legislators over their challengers, the "institutional press" over competing interest groups, and major party candidates over minor party and independent candidates. Such favoritism is unconstitutional.

1. Limits on Campaign Finance Are Incumbent Protection Legislation.

As noted earlier, petitioners claim that limiting campaign finance purifies the political process from "private political influence," 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." Pet. Br., p. 38. Stripped of its "high-sounding" language, what petitioners are really saying is that campaign contribution limits protect incumbents, for they are the natural beneficiaries of a system that cultivates in the people "faith in those who govern." After all, it is the incumbents, not their challengers, who have been governing.

As Justice Clarence Thomas has observed, "history demonstrates that the most significant effect of election reform has not been to purify public service, but to protect incumbents and increase the influence of special interest groups." Colo. Rep. Fed. Camp. Comm. v. FEC, *supra*, 518 U.S. at 644, n.9 (Thomas, J., concurring in the judgment and dissenting). The results of recent national elections and statewide elections in Missouri confirm that the true beneficiaries of so-called campaign reforms are incumbent office holders, who are able to use such "reform" to their advantage.

While challengers must create a campaign organization and donor base, incumbents already possess both. By virtue of their office, incumbents enjoy an array of advantages over their challengers that fall outside the scope of limitations on contributions. While some of these advantages flow naturally and properly from the office, others have been contrived so as to maximize the incumbents' edge over challengers. *See*

generally James C. Miller, III, Monopoly Politics, Hoover Institution Press (1999).

For example, members of Congress receive many taxpayer-funded benefits allowing each incumbent to enter an election hundreds of thousands of dollars ahead of his challenger. Such benefits include:

- Taxpayer-paid postage. Depending upon the number of addresses in their districts, incumbents can send nearly 1 million pieces of "franked" mail a year at taxpayers' expense.

- Taxpayer-paid personal staff. Incumbents are allowed to hire a staff at taxpayers' expense, many of whom in turn "volunteer" for their bosses' reelection campaigns.

- Taxpayer-paid constituent service. Incumbents are able to use the constituent services they provide as a means for more direct and frequent contact with voters.

- Taxpayer-paid travel. Incumbents are allowed to pay for travel expenses from taxpayer-funded "official expense accounts."

- Taxpayer-paid internet sites. Incumbents are allowed to develop and maintain internet web sites at taxpayers' expense.[4]

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[4] Revealingly, in 1996, when an internet provider sought to offer free internet sites to incumbents and challengers alike, the Federal Election Commission, in Advisory Opinion 1996-2, prevented it from doing so on

- Taxpayer-paid recording studios. Incumbents have free access to facilities for the production of videotapes and audiotapes.

See O'Keefe and Steelman, *supra*; Miller, Monopoly Politics, *supra*, at 15.

Given these (and other) advantages, all of which are placed outside the reach of any purported campaign finance reform, it is no wonder that the reelection rate of incumbents has held at about 90 percent. Data compiled by the Federal Election Commission show that in the 1996 general house elections, every incumbent congressman in Missouri won reelection. *See* Federal Activity of House Campaigns 1997-98, Federal Election Commission.[5]

Moreover, contribution limitations imposed by the FECA ensure that incumbents enjoy a huge advantage over challengers in raising funds. In a recent report analyzing the 1998 congressional elections, the Federal Election Commission stated that "[as in past elections, incumbents received most of the [political action committee] PAC money, $158.4 million, with challengers receiving $21.5 million…." Federal Election

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the ground that it would purportedly constitute a prohibited in-kind contribution. *See* Eric O'Keefe and Aaron Steelman, The End of Representation: How Congress Stifles Electoral Competition, Cato Institute Policy Analysis No. 279 (Aug. 20, 1997).

[5] This report is available on the Federal Election Commission's website, http://www.fec.gov/1996/states/mohse97.htm (visited June 3, 1999).

Commission News Release, FEC Reports On Congressional Fundraising For 1997-98 (April 28, 1999).

Data on Missouri state elections is equally remarkable. In the 1998 general elections, 93.3 percent of incumbent Missouri state senators and 95.8 percent of incumbent Missouri state house members won reelection. *See* Project Vote Smart, Missouri State Legislative Election 1998.[6] By erecting new financial barriers in 1994, Missouri incumbents further increased their advantage over challengers. This is not reform; it is monopolization. *Cf.* John L. Kelley, Bringing The Market Back In: The Political Revitalization Of Market Liberalism, New York University Press (1997), at 128 ("If the logic of the antitrust movement had been applied to [FECA] it is difficult to see how it could have survived even cursory examination.")

Even those who support petitioners criticize the financial and other advantages incumbents enjoy over challengers. *See, e.g.*, Common Cause, 87 Percent of House Incumbents In Financially Uncompetitive Races (November 2, 1998).[7] Though they mourn the failure of the contribution limitations to promote competitive elections, these groups nonetheless support laws like Missouri's which perpetuate such advantages.

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[6] This report is available on Project Vote Smart's website, http://www.vote-smart.org/elections/candidates.asp?eid=32 (visited June 4, 1999).

[7] This article is available at Common Cause's website, http://www.commoncause.org/publications/house.html (visited June 3, 1999).

Petitioners ignore the First Amendment, yet attempt to seize the "moral high ground" with the argument that they are on the side of public righteousness. In fact, they are on the side of government self-interest, confirming Chief Justice Burger's eloquent observation that"[t]here are many prices we pay for freedoms secured by the First Amendment; the risk of undue influence is one of them, confirming what we have long known: Freedom is hazardous, but some restraints are worse." Buckley, 424 U.S. at 256-257 (Burger, C.J., concurring in the judgment and dissenting).

2. Limits on Campaign Finance Benefit the Institutional Press.

The Missouri statute contains a press exception,[8] similar to FECA's press exception.[9] The reason is simple. Any effort to limit expenditures by or investments (*i.e.*, contributions) in the institutional press would be clearly unconstitutional. *See* Miami Herald v. Tornillo, 418 U.S. 241 (1974).

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[8] Mo. Rev. Stat. § 130.011(e). "Expenditure" does not include "Any news story, commentary or editorial which is broadcast or published by any broadcasting station, newspaper, magazine or other periodical without charge to the candidate or to any person supporting or opposing a candidate or ballot measure."

[9] 2 U.S.C. section 431(9)(B). "The term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate...."

The Court in Buckley did not examine whether the "institutional press" had greater First Amendment speech and association rights vis-a-vis campaigns than ordinary citizens subject to the FECA. After Buckley, in 1978, Chief Justice Burger wrote "The Court has not yet squarely resolved whether the Press Clause confers upon the 'institutional press' any freedom from government restraint not enjoyed by all others." First National Bank of Boston v. Bellotti, 435 U.S. 765, 798 (1978). It is now time for the Court to do just that — to determine if "significant inequities" discriminating in favor of the institutional press are a constitutionally permissible consequence of campaign reform legislation.

The press exception is profoundly important, as it applies to over 40,000 press outlets, which in the aggregate reach virtually every American on a regular basis. There are 4,747 AM radio stations (*The Wall Street Journal Almanac 1999*, 1998, p. 688); 7,566 FM radio stations (*id.*); 1,587 TV broadcast stations (as of April 1, 1999) (source: www.nab.org, web site of the National Association of Broadcasters); 10,845 basic and pay cable TV systems (1998) (*The New York Times 1999 Almanac*, p. 397); 1,509 daily newspapers (*id.*, p. 389); around 7,000 to 8,000 weekly newspapers (*id.*); about 5,000 consumer magazines (source: Washington office of the Magazine Publishers of America); and about 2,700 trade publications (source: *The New York Times 1999 Almanac*, p. 391.)[10]

Blatantly partisan editorials, commentaries and news coverage supporting a candidate for office can reach a high

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[10] Statistics are for 1997 unless otherwise stated.

percentage of all households in the electoral district, worth many thousands — if not millions — of dollars. With the press exception, a preferred class of corporations owning media outlets receives the exclusive right to unlimited corporate speech. This preference may be one reason why these media so insistently support campaign reform and are so laudatory of politicians who use their powers as incumbents to revise the "rules of the game" to promote their re-election. By doing so, they impair the ability of citizens to challenge their continued rule, in order to give themselves and the press greater power[11] in determining the outcome of future elections.

In sum, campaign contribution limitation legislation never addresses the appearance of corruption emanating from the institutional press, which alone remains free from any government-imposed limitation to influence the outcome of elections.

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[11] *See, e.g.*, "Campaign Finance Clock," Washington Post, May 24, 1999, p. A24, praising Washington, D.C. Metropolitan-area Republicans Constance Morella, Frank Wolf (who, in 1980 as a challenger to incumbent Congressman Joseph Fischer had complained that the incumbent has the advantages of "free mailing, free newsletters, a free mobile camper (to meet with constituents) and free staff allowances" and other benefits which Wolf estimated were worth $1.2 million (Fairfax Journal, June 13, 1980, p. 1) and Tom Davis for their willingness to sign a discharge petition in 1998 to force a House vote on campaign reform legislation. *See also* "Editorials Release Campaign Finance Reform," The Atlanta Constitution, May 21, 1999, p. A18.

3. Limits on Campaign Finance Benefit the Two Major Parties.

The Buckley Court acknowledged that the contribution limits, including their disclosure requirements, contained in the Federal Election Campaign Act posed a potentially discriminatory impact upon minor parties. But the court deferred ruling on such claims to future litigation. Buckley, *supra*, 424 U.S. at 68-74. This Court need defer no longer.

Since Buckley, this Court has ruled that "independent expenditures" on behalf of a candidate made by a political party committee could not be limited as "contributions" to that candidate. Colo. Rep. Fed. Camp. Comm. v. FEC, 518 U.S. 604 (1996). And on February 18, 1999, the United States District Court for the District of Colorado ruled that "coordinated expenditures" on behalf of a candidate made by a political party committee could likewise not be limited as "contributions" to that candidate. FEC v. Colo. Rep. Fed. Camp. Comm., 1999 U.S. Dist. LEXIS 1822 (D.Colo., Feb. 18, 1999). Taken together, these rulings mean that political parties may expend unlimited amounts of money in support of their party candidates for office.

These two rulings confer an enormous advantage on candidates affiliated with major parties, further increasing their advantage over independent candidates and those associated with minor parties. In the 1999 Colorado Republican decision, the district court acknowledged that candidates routinely participate in the fund-raising efforts of their parties, that the "government" parties track which incumbents helped raise contributions to the party committees and use this information to determine allocations of party campaign funds, and that

contributors who have already made their maximum contribution to the candidate's committee are encouraged to give to the party committee so that the contribution can indirectly assist the candidate by party spending. *Id.*, 1999 U.S. Dist. LEXIS 1822 at **17-18. Quoting from Justice Kennedy's opinion in the 1996 Colorado Republican decision, the court explained that

> Party spending 'in cooperation, consultation or concert with' a candidate therefore is indistinguishable in substance from expenditures by the candidate or his campaign committee. We held in Buckley that the First Amendment does not permit regulation of the latter, see 424 U.S. at 54-59 … and it should not permit this regulation of the former…. [*Id.*, at **53-54.]

It is urged by these *amici* that, because coordinated party expenditures (like independent expenditures) cannot be limited, this Court should avoid an even more profound imbalance in favor of the two "government parties" by removing limitations on contributions to all third-party candidates.

D. LIMITATIONS ON CAMPAIGN FINANCE REQUIRE AN ENFORCEMENT SYSTEM INCOMPATIBLE WITH THE FIRST AMENDMENT PROTECTION OF ANONYMOUS POLITICAL SPEECH.

In order to enforce the limits on campaign finance, and their underlying policy of eliminating even the appearance of corruption, the Missouri law, like the FECA, compels the

disclosure of the names of contributors of amounts that exceed a statutory maximum. In Buckley, this Court struggled to find a constitutional justification for such "compelled disclosure" in light of a long line of cases striking down similar laws. It did so on three grounds: (1) "[D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office."; (2) "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"; and (3) "[D]isclosure requirements are an essential means of gathering data necessary to detect violations of the contribution limitations…." Buckley, *supra*, 424 U.S., at 67-68.

Prior to this ruling, this Court had never upheld a law compelling disclosure of the names of people in an associative relationship **fully** protected by the First Amendment.[12] *See* NAACP v. Alabama, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Florida Legislative Comm., 372 U.S. 539, 546 (1963); Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982). Moreover, prior to Buckley this Court found that:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the

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[12] This rule was not followed where the disclosure related to a Congressional investigation into a foreign-controlled organization dedicated to the violent overthrow of the American government. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

> progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all.... Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes. [Talley v. California, 362 U.S. 60, 64-65 (1960).]

Subsequent to Buckley, this Court has twice revisited the subject of "anonymous" political speech. Both times it has struck down laws compelling disclosure. In McIntyre v. Ohio Elections Comm'n, this Court wrote:

> Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. [514 U.S. 334, 357 (1995), citation omitted.]

In Buckley v. ACLF, *supra*, this Court upheld a lower court ruling striking down a Colorado statutory requirement that initiative-petition circulators wear identification badges. Observing that "[p]etition circulation...'of necessity involves both the expression of a desire for political change and a

discussion of the merits of the proposed change,'" the Court found that the statute caused a heightened injury to speech "because the badge requirement compels personal name identification at the precise moment when the circulator's interest in anonymity is greatest." 119 S. Ct. at 646.

This Court also upheld the lower court's decision to strike down the requirement that ballot-initiative proponents file "detailed monthly disclosures" of the name and addresses of each paid circulator, and the amount of money paid and owed to each circulator. *Id.,* at 647.

Only in Buckley has this Court examined and upheld government regulation preventing individuals from retaining anonymity when engaged in political speech. While the Court has valiantly attempted to distinguish the McIntyre and ACLF rulings from Buckley, the effort has failed. As Justice Scalia observed in dissent in McIntyre:

> We have approved much more onerous disclosure requirements in the name of fair elections.... The Court's attempt to distinguish Buckley ... would be unconvincing, even if it were accurate in its statement that the disclosure requirement there at issue 'reveals far less information' than requiring disclosure of the identity of the author of a specific campaign statement. That happens not to be accurate.... Besides which the burden of complying with this provision [in Buckley], which includes the filing of quarterly reports, is infinitely more onerous than Ohio's simple requirement for signature of campaign literature. If Buckley remains the law, this is an easy case. [514 U.S., at 383-84.]

Buckley is not out of line just because of the onerous burdens imposed by FECA's disclosure provisions. Rather, its disclosure requirements serve no purposes legitimate under the First Amendment. As Chief Justice Burger observed in Buckley, the enforcement of campaign contribution limitations would inevitably benefit the political status quo.

> Rank-and-file union members or rising junior executives may now think twice before making even modest contributions to a candidate who is disfavored by the union or management hierarchy. Similarly, potential contributors may well decline to take the obvious risks entailed in making a reportable contribution to the opponent of a well-entrenched incumbent. This fact of political life did not go unnoticed by the Congress:
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> "The disclosure provisions really have in fact made it difficult for challengers to challenge incumbents." 120 Cong. Rec. 34392 (1974) (remarks of Sen. Long). [424 U.S. at 237.]

No wonder the Chief Justice observed that the FECA's "contribution limits are a far more severe restriction on First Amendment activity than the sort of 'chilling' legislation for which the Court has shown such extraordinary concern in the past." 424 U.S. at 245. Clearly, Buckley now lies as "a derelict on the waters of the law." *See* Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). It is time for this Court to remove Buckley from the otherwise legitimate family of cases protecting anonymous political speech and association under the First Amendment.

CONCLUSION

For the foregoing reasons, *amici curiae* Gun Owners of America, Lincoln Institute for Research and Education, National Citizens Legal Network, U.S. Border Control, and Policy Analysis Center respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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