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ROBERTSON | GORNY**

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www.bflawfirm.com

JAMES BARTIMUS*
JAMES P. FRICKLETON**
EDWARD D. ROBERTSON, JR.+
STEPHEN M. GORNY**
ANTHONY L. DEWITT+
BETH PHILLIPS**
MARY D. WINTER+
BRETT T. VOTAVA***
MICHAEL C. RADER****
EDWARD D. ROBERTSON, III+
GRANT S. RAHMEYER+

OF COUNSEL
JULIE C. FRICKLETON**

*LICENSED IN MISSOURI, KANSAS AND COLORADO
**LICENSED IN MISSOURI AND KANSAS
***LICENSED IN MISSOURI, KANSAS AND CALIFORNIA
****LICENSED IN MISSOURI, KANSAS AND MISSISSIPPI
+LICENSED IN MISSOURI

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Reply to Jefferson City Office.

VIA HAND DELIVERY:

Thomas F. Simon, Clerk
Supreme Court of Missouri
207 W. High St.
Jefferson City, MO 65101

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AUG 03 2007
Thomas F. Simon
CLERK, SUPREME COURT

Re: James Trout v. State of Missouri, et al.
Case No. SC88476

Dear Mr. Simon:

In a letter dated July 19, 2007, the Court requested letter briefs from the parties in the above styled action addressing the effect of the invalidity of section 130.032, RSMo., on campaign funds originating from contributions collected in reliance on that section. The court specifically allowed other interested parties to file letter briefs as *amicus curiae* on or before August 3, 2007. The undersigned represent Majority Fund, Inc. and The Honorable Charlie Shields, Senator from the 34th District and Majority Floor Leader. This letter brief is submitted as *amici curiae* on behalf of Senator Shields and the Majority Fund.

House Bill 1900 ("HB 1900") was signed by the Governor and took effect January 1, 2007. Among other provisions, HB 1900 amended RSMo. § 130.032 by repealing limitations on contributions to candidates for state and local office. From the moment

LEAWOOD OFFICE
ONE HALLBROOK PLACE
11150 OVERBROOK ROAD, SUITE 200
LEAWOOD, KS 66211
913-266-2300
FACSIMILE 913-266-2366

JEFFERSON CITY OFFICE
715 SWIFTS HIGHWAY
JEFFERSON CITY, MO 65109
573-659-4454
FACSIMILE 573-659-4460

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HB 1900 took effect, campaign contributions were made and campaign contributions were accepted in excess of the old limits which had ostensibly been repealed by the law. On July 19, 2007, however, this Court ruled that the repeal of contribution limits “cannot be severed” from another contemporaneous amendment to §130.032 which a lower court had previously found to be unconstitutional (which finding was not appealed to this Court). Because, this Court reasoned, the two provisions could not be severed, “the repeal of the campaign contribution limits is also invalid.” 2007 WL 2068598 at page 4.

Reduced to its bare essence, the question now before the Court is this: Has a candidate who has accepted contributions in excess of the contribution limits repealed by § 130.032 and unexpectedly reinstated by this Court’s severability decision in *Trout v. State of Missouri*, violated § 130.032? This letter asserts that the proper answer to that question under a neutral application of this Court’s precedents is “No.” For this reason, the Court’s decision in *Trout* should be applied prospectively-only.

I. Under Missouri’s Common Law Retroactivity Test, the Court’s Ruling Cannot Be Made Retroactive to all Candidates and Contributors.

A. Good Faith, Reasonable Reliance on a Statute is the Most Widely Accepted Exception to the General Rule of Retrospective Operation of a Judicial Decision Finding a Statute Unconstitutional.

The general rule is that a judicial determination finding a statute unconstitutional is given retrospective operation. State ex rel. Miller v. O’Malley, 117 S.W.2d 319, 324 (Mo. banc 1938). That general rule has been substantially and properly eroded, however, by exceptions permitting courts to ameliorate the harsh impact of judicial declarations that undo policy determinations made by the people’s elected representatives. The most widely recognized and consistently applied exception to the rule of retrospective operation is based on concepts of good faith, reasonable reliance.

In the past, it has been stated that an unconstitutional statute is no law and confers no rights. State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, 583 S.W.2d 107, 118 (Mo.1979). This is true from the date of its enactment, and not merely from the date of the decision

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branding it unconstitutional. Id. The modern view, however, rejects this rule to the extent that it causes injustice to persons who have acted in good faith and reasonable reliance upon a statute later held unconstitutional. Id.

Piskorski v. Larice, 70 S.W.3d 573, 575 (Mo. App. E.D. 2002). “By applying a decision prospectively-only when reliance by a party is found, courts seek to avoid injustice, hardship and unfairness.” Sumners v. Sumners, 710 S.W.2d 720, 724 (Mo. banc 1985). See, generally, Community Federal & Loan Assoc. v. Director or Revenue, 752 S.W.2d 794 (Mo. banc 1988) (refusal to permit refund of taxes illegally collected under unconstitutional statute on grounds of governmental reliance when taxes voluntarily paid) and Sumners (overruling statutory interpretation applied retroactively because of lack of reliance by parties).

B. Good Faith, Reasonable Reliance Defeats Retrospective Application.

1. By Definition, “Reliance” Requires a Voluntary Choice of Conduct by the Person Harmed.

Reliance “bespeaks a voluntary choice of conduct by *the person harmed*. It infers that the person exercising it can decide between available alternatives.” Barnam v. Rural Fire Protection Co., 537 P.2d 618, 622 (Ariz. App. 1975) (emphasis added), quoted with approval in Sumners, 710 S.w.2d at 724. Thus reliance focuses on persons who have been harmed – that is, persons who made a decision to act or who have forborne a decision to act based on rights or obligations created by the then-law.

The definition of reliance, though well known to this Court, is important because reliance concepts are misapplied by the Attorney General in his letter brief. The Attorney General seeks to transform reliance concepts adopted by courts to ameliorate injustice and hardship into a sweeping rationale for this Court to impose a rule of campaign contribution equity – a result that the law never intended and cannot achieve consistent with First Amendment principles.

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The Attorney General's letter brief describes scenarios that involve a person who has *not* made a decision to seek public office and who has made no decision at all regarding whether the new or the old § 130.032 applies. The Attorney General argues that prospective-only application of the Court's decision creates an inequity between (a) a candidate who relied on new law to solicit and accept campaign contributions in excess of the repealed limit and (b) a person who *may* make a decision to seek public office after this Court's decision. This is not a reliance argument at all. A might-file candidate could not have relied on the statute one way or another.

The proper focus of the Court's reliance analysis is one of two persons – (1) a person who accepted (or gave) contributions under the new (now unconstitutional) statute justifiably believing that he or she could solicit, accept, and spend greater amounts than the repealed campaign law allowed; (2) a person who made a campaign contribution believing that he or she could contribute amounts in excess of what the old law permitted.

2. Reliance by Candidates who Accepted Campaign Contributions under the New Law was in Good Faith and Reasonable.

The good faith, reasonable reliance test essentially asks whether a person justifiably relied on the now-unconstitutional law in accepting the benefit of the now-unconstitutional law. One of the tests of justifiable reliance is notice – whether the person who relied on the law could have reasonably contemplated that it was under risk of a finding of unconstitutionality.

As this Court frequently notes, and repeated in Trout, statutes “enacted by the legislature and approved by the governor have a strong presumption of constitutionality.” Trout, 2007 WL 2068598 at *2. Further, “[t]he use of procedural limitations to attack the constitutionality of statutes is not favored.” Id.

More important for purposes of notice, the constitutionality of the repeal of the campaign contribution limits was not attacked directly in the litigation. And to pile quirk on top of oddity, the Attorney General's Office did not appeal the trial court's decision that the § 130.032.2 blackout period for campaign contributions violated the constitution. The decision that the legislature's repeal of the campaign contribution limits was also

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unconstitutional because not severable was thus a ricochet and, while now the law, was certainly not expected, particularly in light of the statutory presumption that “the provisions of every statute are severable.” §1.140, RSMo 2000.

A reasonable person in the position of a candidate for office could reasonably have believed that the repeal of the campaign contribution limits would remain the law irrespective of the Trout litigation. Moreover, a person making the contribution could likewise justifiably rely on the repeal remaining the law.

C. Application of the Sumners Factors Defeats Retrospective Application.

While the reliance of individuals on their ability to give and receive contributions under the now-invalidated version of § 130.032 (and the lack of reliance by non-candidates) is decisive, consideration of the latter two¹ Sumners factors also compels prospective-only application. The Sumners court enunciated those factors as follows:

First, the decision in question “must establish a new principle of law... by overruling clear past precedent... **Second**, the Court must determine whether the purpose and effect of the newly announced rule will be enhanced or retarded by retrospective application... **Third**, the Court must balance the interests of those who may be affected by the change in the law, weighing the degree to which parties may have relied upon the old rule and the hardship that might result to those parties from the retrospective operation of the new rule against the possible hardship to those parties who would be denied the benefit of the new rule.

Id. at 724 (internal citations omitted, emphasis added).

1. Under the Second Sumners Factor, the Purpose of the Contribution Limits Would, if Anything, Be Undermined by Retroactive Effect.

¹ The first part of the Sumners test is clearly met, as an apparently valid law was rendered invalid by this Court’s July 19, 2007 decision.

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“[T]he purpose and effect of the newly announced rule” of contribution limits will not be advanced –and could be undermined—by retroactive effect. The only constitutionally permissible purpose for contribution limits is to prevent corruption and fraud, or at least the appearance of it. See Buckley v. Valeo, 424 U.S. 1, 28-29, 58 (1976) (upholding contribution bans only based on the governmental interest in “reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions”). But the Attorney General’s avowed purpose for making the contribution limits retroactive is not to head off corruption or the appearance of it, but to establish equality between candidates who are more successful and less successful at fundraising.

The disgorgement of already-contributed funds will have no effect on public corruption or the appearance of it. If anything, the return of money to donors will create an appearance of impropriety where none in fact exists, requiring candidates to explain to a skeptical public the complicated legal maneuvering and decision-making that led to the General Assembly’s campaign finance laws being invalidated and the subsequent imposition of a retrospective order. Furthermore, even if there is anything inherently troubling about candidates’ acceptance of contributions that exceeded the old (now reinstated) limits, the contributions have already been made, disclosed, and extensively reported in the media. The only thing that can be gained by returning the funds is a limitation on expenditure of the funds and political speech –a constitutionally impermissible purpose (as discussed below in Part II).

2. Under the Third Sumners Factor, the Degree of Contributors’ and Candidates’ Reliance and the Resulting Hardship They Will Face Overwhelms any Illusory “Benefit” Less Successful Fundraisers or “Might-File” Candidates Would Derive from this Court’s Decision.

a. The Contributors’ and Candidates’ Degree of Reliance and Hardship

There is an old saying that there are three finite resources in any political campaign: time, money and talent. It would be unfair and harmful to now penalize candidates and contributors who, in justifiable reliance on the clear statutory law, sought

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the advantage of time by beginning to raise money early. That precious time is forever lost if this court changes the rules, resets the clock and orders those campaign funds disgorged. As discussed below, the loss of campaign funds will significantly impact campaigns' political speech and association, creating a real harm that this Court cannot ignore. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976).

The Court may take judicial notice of the fact that a successful campaign for office requires well-laid plans and careful organization far in advance of the statutory filing periods or the few-month window in the summer and fall that most of the public views as "the election." Waiting too long to begin this process or devoting insufficient time and energy to nuts and bolts planning dooms a candidate, eventually taking its toll on election day (if not sooner). For this reason, substantial time and money is required during the initial phases of a campaign. This is especially true in races for statewide office, where a well-planned organization must be established in every nook and corner of the state. The effect is further heightened in hotly contested races. Thus, candidates who put off their decision to run, wait to organize their campaigns, and wait to raise the necessary "start-up" money for a well-run campaign, do so at their peril. This is no secret to the Attorney General or his opponent, who were deep into fundraising when the Court's July 19, 2007 decision was handed down.

Thus, for the many candidates who were diligent in establishing and funding an organization to promulgate their political speech for the next year and a half, retrospective application of the Court's decision will erase a significant phase of their campaigns. Substantial fundraising efforts will have been rendered worthless, and, unless campaign time and money can be diverted to locate additional contributions, political speech and association that would have been funded by expenditures from the disgorged campaign funds will be "disgorged" right along with them. This will constitute not just a severe harm, but an irreparable injury. Elrod, 427 U.S. at 373. It will be back to the drawing board.

- b. Less Successful Fundraisers and Might-File Candidates Cannot Show the Loss of Any Benefit.

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Sumner requires the Court to consider the effects of its decision on those parties who can demonstrate reliance and the loss of benefits. As discussed above in part (B), because the only parties who can show reliance are those who actually raised and gave contributions in excess of the limitations, prospective-only application of the Court's order is required. The same is true with respect to loss of benefits: less-successful fundraisers and might-file candidates cannot show they will have lost any "benefit" if this Court's order is applied prospectively-only.

The Attorney General's assertions to the contrary are based on an incorrect legal premise. The problem begins with the claim in the Attorney General's letter brief that the impact of prospective-only application must be measured not only on those who relied on the effectiveness of the old law, "but also on others." See Letter, p. at 3. This imprecise formulation obscures the real test set forth in Sumners: the Court is to consider the hardship borne by those "parties who would be denied the benefit of the new rule." Sumners, 701 S.W.2d at 724. Thus, the Court may not simply weigh generalized harms arising from any source whatsoever; it must first look to see whether "parties" would actually receive a benefit that they would have received had the rule previously been in effect. It is only the denial of this kind of benefit (through prospective-only application) that can be considered in balancing the harms. The parties the Attorney General claims to protect fail this test.

Sumners, which reviewed a marital dissolution case, aptly illustrates the analysis this Court must follow. At issue was a previous ruling by this Court overruling what appeared to be the prior rule in Missouri regarding the definition of marital property, holding that the source of funds which paid for marital assets, rather than a comparison of the date of inception of title to the date of marriage, would be used to determine whether property was a marital asset. Id. at 721. The trial court entered a dissolution of property under the old "inception of title" rule, and Mrs. Sumners appealed, arguing that the Court's prior decision adopting the "source of funds" rule should be given retroactive effect to her dissolution case. Id. Applying the third prong of its retroactivity test, the Court found that under prospective-only application of the new rule, "the non-owning spouse [Mrs. Sumners] would be deprived of any benefit of the funds and effort of the marital community used to enhance the value of the asset. This is exactly the injustice which led the Court to adopt the source of funds rule..." Id. at 724.

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Here, Mr. Trout would derive no “benefit” from the application of contribution limits to other candidates, nor would he somehow avoid the “injustice” –public corruption—sought to be remedied by contribution limits. Unlike the situation in Summers, a change in the law has not suddenly opened up a benefit to Mr. Trout that: (a) was not available to him before; (b) by all rights should have been available to him; and (c) is now in danger of slipping beyond his grasp –like Mrs. Summers’ right to marital property—without the equitable intervention of the Court.

In fact, Mr. Trout and all others in his position have always been in the same position as the candidates who might now be forced to disgorge their campaign funds. Every potential candidate and contributor in Missouri (including Mr. Trout and his contributors) have had the same opportunity to raise or contribute funds; the exact same laws and rules have always applied to Mr. Trout and everyone else. The laws before and after HB 1900 refrained from picking winners and losers; they did not distribute First Amendment speech rights among candidates in a sort of zero-sum game. Missouri’s campaign finance laws have never been like the marital property dissolution laws at issue in Summers, which did distribute the parties’ relative rights and benefits in zero-sum fashion. There, a shift in the law necessarily altered those rights and benefits, reversing the parties’ situation to some degree and making retrospective relief appropriate for those affected by the change.² But here, Mr. Trout and candidates who raised contributions in excess of the now-reinstated limits are in unequal positions not because the law has redistributed rights among them, but because of marked differences in their own organizational efforts and success: one group successfully raised funds in reliance on the newly-enacted campaign finance law, and one did not.

Nothing in Summers or any other case recognizes as a “benefit” the muzzling of a political opponent, or the sudden leveling of an opponent’s hard-earned political advantage gained solely by the strength of his own efforts and popular appeal. Plain and simple, the “benefit” the Attorney General seeks is the right to limit candidates’ political speech. In weighing the parties’ rights based on “fairness,” such a purported benefit has no place on the scale. Accordingly, the factors set forth in Cardinal Glennon and Summers compel prospective-only application of the Court’s recent order.

² So long, of course, as one party did not rely on the old law –the threshold test.

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II. An Order of this Court Mandating Candidates' Disgorgement of Campaign Funds Would Be A Constitutionally Impermissible Burden on Speech.

A. The Disgorgement of Campaign Funds Implicates the First Amendment.

Although the question before the Court has been framed as one of retrospectivity, the First Amendment, not common law retroactivity rules, must control the fate of the affected candidates' and contributors' funds. Asking whether the effect of the Court's decision of July 19, 2007, "is retrospective or prospective only" is a misplaced inquiry because it ignores the fact that parties' attempt to apply the Court's ruling to all other candidates and contributors in Missouri opens up an entirely new case. Thus, the Court must now consider the core First Amendment rights of active Missouri candidates and contributors –not, as in typical retrospectivity cases, laws apportioning rights between private parties or between a private party and the government (e.g., tax laws).

It is important to note that the two parties currently appearing before the Court are the ones who have framed this as a simple question of retrospectivity occurring at the tail end of a dispute between the two of them, rather than an attempt to limit expenditures on other candidates' political speech. As this Court is aware, these parties now have interests that are not dissimilar, and in their arguments before this Court have elected to raise only narrow procedural issues regarding the passage of H.B.1900. The parties now seem to agree that the Court's procedural ruling on HB 1900 should be wielded to reach out and muzzle other candidates' political speech and expenditures while erasing the prior speech of those candidates' contributors and supporters.

The parties' efforts threaten to unravel months of hard work and (literally) millions of dollars' worth of political speech and association undertaken by Missouri candidates and contributors –none of whom have yet been heard by this Court, but whose interests are directly adverse to the interests of the legal representative of the State of Missouri. Thus, the core First Amendment political speech and association rights of Missouri candidates and contributors (which have been at stake in this litigation from day one) are now squarely before this Court. In fashioning a remedy, the Court is bound to

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protect the First Amendment rights of the candidates and contributors who were the subject of both the old and new campaign finance laws, and whose rights of political expression and free speech now hang in the balance.

Under the law of this state and the United States Constitution, the Court cannot order the “return” of “contributions.” Chapter 130, RSMo. establishes that contributions, once made and accepted, are non-refundable expenditures-in-waiting. Restrictions or outright bans on their expenditure, or (as here) requirements that they be returned to contributors, are subject to the most exacting scrutiny. See Buckley v. Valeo, 424 U.S. 1 (1976) (expenditure limitations, “while neutral as to the ideas expressed, limit political expression “at the core of our electoral process and of the First Amendment freedoms.”). “[T]he constitutionality of [an expenditure limitation] turns on whether the governmental interests advanced in its support satisfy the **exacting scrutiny** applicable to limitations on core First Amendment rights of political expression. Id. at 44-45 (emphasis added).

As discussed below, the single interest advanced by the state for barring expenditure of the contributions –to level the playing field between those candidates who successfully raised money under the old limits and those who did not—is not only not compelling, it is constitutionally impermissible. Buckley, 424 U.S. at 48. This compels one result: the Court cannot constitutionally order Missouri candidates to disgorge parts of their campaign war chests, forego expenditures, and waste valuable political association, all for purposes of “leveling” the playing field between candidates.

B. Under Chapter 130 and the First Amendment, the Funds in Missouri Candidates’ Campaign Accounts Are Funds Awaiting Expenditure, not “Contributions.”

The plain language of RSMo. § 130.032 prior to its amendment by HB 1900 provides the backdrop. The now-reinstated RSMo. § 130.032 prohibits contributions in excess of specified limits for specified offices “made by or accepted from any person other than the candidate in any one election.” Id. The operative legal prohibition is two-fold. First, persons (defined broadly in RSMo. §130.011(22)) are prohibited from making contributions over a specified amount to the campaign of a candidate seeking

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specified office. Id. Second, candidate committees for candidates seeking specified offices are prohibited from accepting contributions over specified amounts. Id.

Ten business days after they are received, contributions “stick” with a committee and must be reported. By statutory definition, “contributions” cannot be returned or refunded if they are not “expressly and unconditionally rejected and returned to the donor within ten business days after receipt.” RSMo. §130.011(12)(i)b. At this point, Missouri law assumes the money is the committee’s and will become expenditures for political speech. In recognition of this fact, nowhere in Chapter 130, or anywhere else, is there a prohibition on possessing over-the-limit contributions. (In fact, when contribution limits were first passed in Missouri, candidate committees maintained and spent contributions made before later enactment of statutory limits.) Further, while Chapter 130 does include various penalties for illegal conduct in contributing to candidate campaigns, no Missouri statute provides for disgorgement to contributors of over-the-limit contributions. Thus, Missouri law recognizes that once a candidate committee has accepted a contribution and has deposited it in its account, the funds commingle with other cash on hand to become a source of expenditures. Depriving a committee of the use of such funds is a prohibition on expenditures, not a “remedy” for enforcing contribution limits.

It is significant that Missouri has in the past attempted to limit expenditures by requiring the return or escheat of “contributions.” That law is no longer on the books because it failed “exacting” scrutiny. See Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422, 1427-1428 (8th Cir. 1995) (striking down Missouri “spend down” law, former RSMo. §130.130). The statute at issue in Maupin was intended to encourage candidates to “spend down” all of their contributions during the current election, barring the accumulation of “war chests” transferable from election to election. Id. The law imposed a stiff disgorgement penalty: within 90 days after an election, candidates for office were to return all funds in their war chests to their contributors, save an amount ten times the individual contribution limit for the applicable office. Id. Like the order urged by the Attorney General in this case, the “spend down” law would have required the return of previously received and accepted contributions that had become part of a candidate’s war chest for campaign expenditures. Id.

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The Attorney General in Maupin claimed that the strict scrutiny should not apply to the law because it only shifted³ candidates' speech from future elections (when the accumulated war chests would presumably otherwise have been spent) to the current election, assuming that candidates would seek to find some use for the money rather than losing it altogether by forfeiting it to their contributors. Maupin, 71 F.3d at 1428. The Eighth Circuit disagreed. Even the "shifting" of expenditures from a future election cycle to the current cycle, the Court held, nonetheless limited expenditures –and therefore speech—in future cycles. Id. The Court concluded that "this effect is identical to the effect of the expenditure limits addressed earlier in this opinion except that the impact of the provision is postponed to future elections." Id. Thus, strict scrutiny applied. Id. at 1427. The Court went on to find that threatened compulsory disgorgement of campaign funds under the spend down law failed strict scrutiny; the state's proffered interests, including the interest in keeping candidates with large war chests from drowning out participation by candidates without large war chests, were either not compelling or not met by narrow tailoring. Id. at 1428-1429.

Thus, Maupin makes clear what is implicit in Chapter 130: contributions that are accepted by a candidate become part of a campaign account that belongs to that candidate, and any attempt to disgorge those funds is, for constitutional purposes, an attempt to limit or completely bar their expenditure. While the parties currently before the Court may agree that the issue of a remedy in this case is simply a matter of retroactive housekeeping, requiring the "undoing" of some unfortunate contributions here and there, this Court should not be misled. It is an unabashed attempt to limit candidates' expenditure of those already collected funds for the sole purpose of "leveling" the playing field. As discussed below, this purpose is unconstitutional.

³ The Attorney General makes a similar argument in this case, claiming that candidates who must give up contributions now can simply shift their political association and speech to a period close to the 2008 general election, when candidates who were not as successful in collecting funds will presumably be able to "catch up." As discussed above, the Court did not buy this argument in Maupin. Further, the burden on core First Amendment rights of political speech and association is not mitigated by the state's claim that burdened or completely restricted speech can be somehow recovered or "made up for" somewhere else, with someone else, at a later point in time. See Meyer v. Grant, 486 U.S. 414, 414 (1988) (striking down Colorado's ban on paid petition circulators as an undue burden on speech, and rejecting argument that proponents could still use alternative means for promulgating their message by using millions of in-state volunteers.)

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C. Prohibiting Some Candidates from Making Expenditures for the Sole Purpose of “Leveling the Playing Field” Is Constitutionally Impermissible.

In his letter brief, the Attorney General openly admits that the real interest of the state is not to protect against fraud or encourage public confidence in elections –the only constitutionally permissible purposes for the contribution limits at issue here. There are no allegations that the underlying purpose of the contribution limits will be subverted unless they are made retroactive, or that any current candidates’ funds came from contributors raising the danger of quid pro quo corruption. The Attorney General seeks only one thing from this Court: to “level the playing field” between those candidates who have been successful under the interim no-limits rules and those who have not. This is the same interest the Attorney General asserted in favor of expenditure limitations in Maupin. There, the Court found not only that expenditure bans are not narrowly tailored to meet that interest, or that the interest isn’t compelling, but that a “leveling” interest violates the First Amendment:

The state also argues that the expenditure limits are justified by its interests in (1) maintaining the individual citizen's participation in and responsibility for the conduct of government and (2) discouraging "the race toward hugely expensive campaigns, especially at the local level," State's Brief at 17-18. The state's interest in maintaining individual participation is what the District Court correctly described as an effort to " 'level[] the playing field' between the rich and the poor." Shrink Missouri Gov't PAC, 892 F.Supp. at 1253. The Supreme Court in Buckley, however, specifically held that the government may not "**restrict the speech of some elements of our society in order to enhance the relative voice of others,**" Buckley, 424 U.S. at 48-49, 96 S.Ct. at 649, and no subsequent decision of the Court has undermined that holding.

Maupin, 71 F.3d at 1426 (emphasis added). As the Eighth Circuit recognized in Maupin, Buckley v. Valeo is the final word on this issue. Id. The Buckley Court explained, in relevant part:

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It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by s 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which 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.' " **The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.**

Buckley, 424 U.S. at 49 (internal citations omitted, emphasis added).

It is certainly one thing to insist on the equal application of the laws so that if a candidate has a lower level of popular support than an opponent, the candidate's difficulties in winning will reflect the fact that the opposing team simply has more money to pay better players –not that the candidate has an uphill run to the endzone or twelve instead of ten yards to make a first down. However, it is entirely another thing to insist on laws imposing equality of outcome as a goal in its own right, regardless of popular support. Such laws effectively single out candidates based on their level of popular support (i.e., candidates who have been successful) and then attempt to penalize them in an illusory quest for a fifty-fifty public debate between both candidates. Under Buckley v. Valeo, this is a flatly impermissible basis for limiting candidate expenditures, a core First Amendment activity. The contributions limits cannot have retrospective effect.

Summary

While First Amendment scrutiny is the most appropriate framework for considering a limitation on candidate expenditures and speech of this magnitude, a retrospectivity analysis reaches the same result because of the fairness considerations underlying both lines of authority. In the context of political speech, a truly level playing

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field means maximizing speech and access to voters, while making sure that the same rules apply to all candidates. It does not mean making sure that all candidates raise the same amount of money, or that all candidates are equally successful in promulgating their messages.

The Attorney General has it exactly backwards when he suggests at the conclusion of his brief that re-leveling the financial playing field after fundraising has already begun is “order,” while allowing the parties to move forward in varied financial states that have come about solely because of their own efforts and popularity is “chaos.” See Br. at 8. If this inequality is “chaos,” it is a healthy chaos that is required by the First Amendment and central to our democratic system of government. This Court should resist the invitation to impose an undemocratic “order” on Missouri candidates aimed at nothing more than guaranteeing equality of outcome. It should allow Missouri candidates to spend the money they have raised for political speech, and should resist the invitation to erase the political speech of contributors and voters who donated that money in the first place.

For the foregoing reasons, this Court’s order of July 19, 2007 should not be given retrospective effect.

BARTIMUS, FRICKLETON, ROBERTSON & GORNY, P.C.

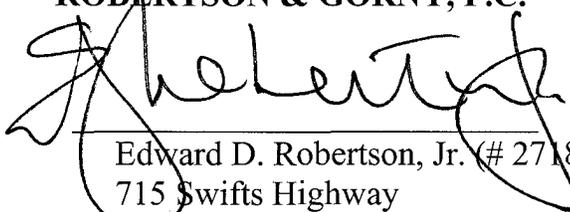
Thomas F. Simon

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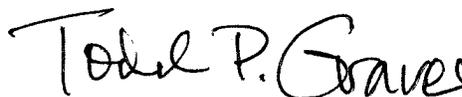
Very truly yours,

**BARTIMUS, FRICKLETON,
ROBERTSON & GORNY, P.C.**



Edward D. Robertson, Jr. (# 27183)
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
(573) 659-4460 (fax)

**GRAVES BARTLE & MARCUS,
LLC**



Todd P. Graves (# 41319) *by EDRJ.*
Edward D. Greim (# 54034)
1100 Main Street, Suite 2600
Kansas City, MO 64113
(816) 256-4144
(816) 817-0863 (fax)

Counsel for Majority Fund, Inc.

*Counsel for Senator Charlie Shields,
Missouri 34th District.*

EDR/lgb

Cc: Jane Ellen Dueker
Alana M. Barragan-Scott
James Layton
Charles W. Hatfield
Gretchen Garrison