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August 3, 2007

Mr. Thomas F. Simon, Clerk  
Supreme Court of Missouri  
P.O. Box 150  
Jefferson City, Missouri 65102

**FILED**  
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THOMAS F. SIMON  
CLERK, SUPREME COURT

**RE: James Trout v. State of Missouri – SC88476**

Dear Mr. Simon:

This letter brief is submitted on behalf of Rex and Jeanne Sinquefield who are residents of the State of Missouri and who have made numerous campaign contributions during 2007 which could be impacted by this Court's determination as to whether the ruling of July 19, 2007 (the "Decision") is retrospective or prospective.

**A. Rex and Jeanne Sinquefield are interested parties to this litigation because they made twenty-four campaign contributions to Democrats and Republicans in reliance on the Campaign Finance Reform Bill.**

On July 19, 2007, this Court granted "interested parties" leave to file amicus curiae letter briefs as to whether the effect of the invalidity of Mo. Rev. Stat. § 130.032 (Supp. 2006) ("Campaign Finance Reform Bill") should be retrospective or prospective.

The Sinquefields made twenty-four campaign contributions to both Democrats and Republicans in reliance on the Campaign Finance Reform Bill. In addition to the Sinquefields, this letter is written on behalf of other similarly situated donors to implore

this Court not to issue a ruling which acts as a catalyst in requiring Missouri candidates to return millions of dollars which were gathered lawfully.<sup>1</sup> The Sinquefields reasonably relied on the statute in structuring their contributions early in the campaigns because they believe that early contributions have a greater impact on a political race than those made in later months.

**B. A retrospective application of the Decision cannot be harmonized with the holding of *Buckley v. Valeo*.**

“[T]he 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...” *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1974). A retrospective application of the Decision cannot be harmonized with *Buckley*. In fact, a rule which requires candidates to return money to donors amounts to a sanctioning by this Court of a direct violation of both the donor’s and the candidate’s constitutional rights. The people affected by such a retrospective application relied in good faith on a lawfully enacted statute in making and receiving contributions.

The Sinquefields are aware of the great pains and efforts which these candidates undertook to obtain the funds at issue. Should these candidates be required to return money, their efforts will have been in vain. Meanwhile, their opponents (whose primary

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<sup>1</sup>This Court does not appear to suggest that it has the authority to require candidates to return money. Nonetheless, the current ruling, if retrospective, may impact certain elections. For example, it is well publicized that if the current decision is retrospective and the Missouri Ethics Commission orders Governor Blunt and his opponent, the Missouri Attorney General, to return certain funds, Governor Blunt may be required to return millions of dollars more of contributions than the Attorney General. Thus, it at least appears that the Attorney General may have a conflict of interest in taking a position on the retrospective application of the Decision.

focus was on other fundraising activities which did not utilize or were less successful in utilizing the new limits under the Campaign Finance Reform Bill) will gain an unfair advantage if the Decision is applied retrospectively.<sup>2</sup>

**C. A retrospective application of the Decision exposes donors, candidates, committee treasurers and committee deputy treasurers to personal liability.**

If this Court applies the Decision retrospectively, the donors whose contributions are at issue risk being fined by the Missouri Ethics Commission. Mo. Rev. Stat.

§ 130.072 (2000).<sup>3</sup> Under certain circumstances a candidate, candidate committee treasurer or deputy treasurer may be held personally liable for paying a surcharge of one

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<sup>2</sup> On page four of his brief, the Attorney General gives an example of what he perceives to be the unfairness of allowing someone to keep a forty thousand dollar donation when another candidate would be required to obtain six hundred and fifty dollars from sixty contributors to receive this amount. However, the Attorney General's office discounts both the efforts which the candidate undertook to convince the donor to give forty thousand dollars, and the lost opportunity cost now confronting the donor if he is required to give that donation back. That same candidate could have convinced the donor to hold a fundraising event, the goal of which was to raise forty thousand dollars from sixty attendees. This may well have been the type of fundraising activity his opponent undertook. Now, the candidate who accepted the forty thousand dollar donation in lieu of holding a fundraiser for sixty people may now be required to return the money while his opponent can keep his forty thousand dollars. Certainly, the donor who gave the forty thousand dollar donation would get his money back and can sponsor a fundraising event, but his opponent has gained the benefit of extra time. The opponent can hold additional fundraising events, while the candidate who was required to return the donations must scramble in an attempt to make up for lost time. A retrospective application of the present ruling will hurt certain candidates and help others. In other words, it will foster the "uneven playing" field which the Attorney General purportedly seeks to avoid. It is impossible to determine, as the Attorney General suggests, that less candidates will be hurt by a retrospective application than by a prospective one. Certainly, at least in the Governor's race, this does not appear to be the case – a retrospective ruling will result in Governor Blunt returning millions of more dollars than his opponent, both of whom relied on the presumed validity of the law.

<sup>3</sup> The Statute reads in pertinent part: "Any person who knowingly accepts or makes a contribution or makes an expenditure in violation of any provision of this chapter ..., in

thousand dollars plus an amount equal to the contribution per non-allowable contribution.

See also Mo. Rev. Stat. § 130.032.7 (2000).

**D. A purely retrospective application of the Decision will have devastating consequences on donors who relied on the validity of the Campaign Finance Reform Bill in making contributions.**

Once this Court finds a statute unconstitutional, the decision can be made fully retroactive, purely prospective, or selectively prospective. See generally James B. Beam Distilling Co., 501 U.S. 529, 535-538 (1991); O'Dell v. School District of Independence, 521 S.W.2d 403, 421-22 (Mo. banc. 1975) (Finch, J., dissenting). Recognizing that a purely retrospective application of a decision can have devastating consequences on those who either relied on a Court ruling or on a statute, this Court has attempted to ameliorate the potential impact of its decisions by looking at the merits of each individual case before deciding how it should apply its decision. See Hill v. Boles, 583 S.W.2d 141, 149 (Mo. banc. 1979).<sup>4</sup>

Cases such as Hill suggest that if a party relies to their detriment on an opinion of this Court or on a statute, and this Court reverses course or overrules a statute, the new rule of law should not apply retrospectively. In this case, those people who made donations reasonably relied on the Campaign Finance Reform Bill in determining how to

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addition to or in the alternative to any other penalty imposed by this chapter, may be held liable to the state in civil penalties in twice the amount of such contribution or expenditure, not to exceed a total amount of five thousand dollars.” Mo. Rev. Stat. § 130.072 (2000).

<sup>4</sup> “The doctrine of prospective application is predicated on a rationale of reliance on a legal principle and the effect visited upon the parties who have, quite reasonably, relied on the law as it existed at the time they acted, but now find themselves with the ‘carpet’ suddenly pulled from beneath them by reason of the change in the law.” Hill, 583 S.W.2d at 150.

best support their candidates. For example, the Sinquefields, instead of contributing large sums of money to certain candidates, would have held many more fundraisers than they have this year. This is not speculation or conjecture – this is a fact which the Sinquefields, if required to do so, would affirm to the trial court. More than six months of the Sinquefields’ election efforts to raise funds for candidates in this election cycle will be forever lost to them if this Court applies the present ruling retrospectively. With all due respect to the Office of the Attorney General’s comments found on page five of its letter brief, while there may be a myriad of reasons why a candidate may not have collected contributions before July 19, 2007, there are many more reasons why a candidate would start his fundraising activities earlier than that date. Similarly, it is not for the Missouri Attorney General to speculate as to how many people chose not to seek so-called “over-limit contributions” or how many candidates were unsuccessful in getting large donations:<sup>5</sup> rather, it is his responsibility to at least acknowledge, on behalf of those citizens who made contributions, that a retrospective application of the Decision undermines Missourians’ First Amendment Rights<sup>6</sup> – rights which were asserted in reliance on a statute of this State – the violation of rights which cannot be compensated for by the mere return of money.

A prospective application of the Decision is especially appropriate in this case because it was the black-out period, not the increase in contribution limits, which led this

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<sup>5</sup> The phrase “over-limit contributions” as used by Office of the Missouri Attorney General in its brief, p. 4, fn. 1, is a misnomer because at the time the donations were made, the donors complied with statutory limits.

<sup>6</sup> See Buckley, 424 U.S. at 48-49.

Court to invalidate the statute. Therefore, there is no basis for anyone to suggest that donors should not have relied on the new contribution limits in the Campaign Finance Reform Bill. Many, such as the Sinquefields, in reliance on the statute, gave more money to a candidate than they might have otherwise contributed, in lieu of holding a fundraiser. This was a choice by the Sinquefields on how to assert rights guaranteed by the First Amendment to the United States Constitution. Thus, this Court should apply its ruling only prospectively because numerous Missourians relied on the Campaign Finance Reform Bill in determining how best to assert their First Amendment Rights. If this Court applies the Decision retrospectively, the damage is irreparable. The mere return of money to donors does not fully compensate them for rights which are forever lost.

**E. A balance of hardships weighs in favor of prospective application of the Decision because a retrospective application only adversely affects the rights of donors who made contributions in excess of pre-January 1, 2007, limits and imposes no hardship on those donors who did not make such contributions.**

The Office of the Attorney General, in reliance on Sumners v. Sumners, 701 S.W.2d 720 (Mo. banc. 1985), suggests that this Court “must balance interests of those who may be affected by change in law, weighing degree to which parties may have relied upon old rule and 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 (citation omitted). Assuming arguendo<sup>7</sup>

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<sup>7</sup>In reliance on Hill, 583 S.W.2d 141, the Sinquefields disagree with the Missouri Attorney General that the Sumners, 701 S.W.2d 720, test applies to this case. Under the holdings of cases such as Hill, this Court must only decide whether donors reasonably relied on the Campaign Finance Reform Bill to their detriment. Because the answer is in the affirmative, the Decision must only be applied prospectively.

that the rule set out in Sumners governs the current analysis, the Attorney General has failed to recognize that when people, such as the Sinquefields, contributed what the Attorney General characterizes as “over-limit contributions,” they did so in lieu of undertaking other fundraising activities on behalf of their chosen candidates. In asserting their rights, contributors had no reason to suspect that a statute passed by the Missouri Legislature was invalid. In fact, as it later turned out, the provision on which they relied was only made infirm because of an unrelated provision in the Campaign Finance Reform Bill.<sup>8</sup>

To the extent that any party to this litigation suggests that Akin v. Missouri Gaming Commission, 956 S.W.2d 261 (Mo. banc. 1997) and Nike IHM, Inc. v. Zimmerman, 122 S.W.3d 615 (Mo. App. 2003) vitiate donors’ reliance on The Campaign Finance Reform Act, such a position is baseless. Akin was a riverboat gambling license case, an area over which states have traditionally exercised their police power to its fullest extent. In Nike, there was no allegation, and in particular no discussion in the opinion, of whether any interested party acted or declined to act deliberately in reliance on the statute at issue. At best, an interested party in Nike had a mere expectancy that

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<sup>8</sup> Nor has the Office of Attorney General addressed the practical difficulties which a retrospective application of the Decision will cause. In order to fully analyze a balancing test, one must address issues such as: What does a candidate do if he or she does not have the money to reimburse the donors? What if a candidate has cash on hand but has made contractual commitments which will bankrupt a campaign if it is required to return funds or subject that campaign to lawsuits from its vendors? Are the donors entitled to interest on their funds? Will donors be subjected to statutory penalties? Will the candidates or committee members be held personally liable for fines in an amount equal to a contribution if a candidate cannot return money? See Mo. Rev. Stat. § 130.032(7) (2000).

they would not be taxed. It is ludicrous for any party to compare these cases to a campaign finance case which by definition implicates core first amendment rights. Additionally, reasonable reliance issues are typically very fact specific. In this case, even the Missouri Attorney General relied on the validity of the statute. There is something fundamental awry if a Missouri citizen can be told that he or she cannot reasonably rely on a statute when the highest judicial officer charged with upholding the law himself accepted the benefits and relied on that statute.

As stated above, this reliance impacted how donors, such as the Sinquefields, asserted their constitutional rights. Thus, if there is a balance of hardships, that balance weighs in favor of prospective application of the Decision because a retrospective application only adversely affects the rights of donors who made contributions in excess of pre-January 1, 2007, limits and imposes no hardship on those donors who did not make such contributions.

On page five of its brief, the Office of the Attorney General states that if this Court does not retrospectively apply the Decision, it will have allowed candidates to play on an “uneven field.” There was even a suggestion by the Attorney General that this Court will effectively become the arbiter of elections. While the Sinquefields have not had an opportunity to fully review the record, it appears that neither party submitted evidence that any particular candidate did not actively seek donations in excess of pre-January 1, 2007, limits. Thus, if all candidates acted on the assumption that the Campaign Finance Reform Bill was valid, no campaign would suffer a hardship by a prospective application of the Decision. In other words, the playing field between January 1, 2007, and July 19,

2007, was even. Any candidate who is now found to complain that his opponent eclipsed him in raising money under the new limits of the Campaign Finance Reform Bill seeks an unfair advantage. As to the argument that some candidates have not yet entered the race and are now at a disadvantage, any candidate who waits longer than his opponent to move forward with fundraising is generally at some disadvantage.

There is no empirical evidence that one candidate benefited over another by virtue of the Campaign Finance Reform Bill because one of the candidates concluded that the statute was invalid (and chose not to solicit the maximum allowed under the new statutory scheme). There are too many variables to determine with any degree of certainty whether more candidates will benefit from a retrospective or prospective application of the Decision. It is impossible to assign a value to the missed opportunities caused by candidates seeking greater donations based on the limit increases. At least as far as the Sinquefields are concerned, in reliance on the statute, they gave more money in lieu of fundraising events. Not even the Sinquefields know whether they would have raised more money for a candidate through fundraising than they contributed to that candidate. What is certain, however, is that donors, such as the Sinquefields, made decisions in reliance on the statute, and those decisions will have negative consequences for their candidates if the money must be returned.<sup>9</sup> Similarly, candidates may have focused their campaign efforts over the last six and a half months on procuring large

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<sup>9</sup> In addition to sponsoring fundraisers, the Sinquefields could have established political action committees to support candidates that champion causes of importance to them.

individual contributions and limited their efforts on obtaining numerous smaller campaign contributions.<sup>10</sup>

**F. A limited exception to a retrospective application should not be made for candidates whose elections are complete or whose committees have been terminated.**

Based on the above, this Court need not consider arguments which suggest a limited exception to the retrospective application of this Court's ruling for those candidates whose election is completed or whose committee has been terminated.<sup>11</sup> The idea of carving out an exception for individuals who are not parties to the litigation is not foreign to this Court. However, it has only been done on limited occasions.

For example, in State ex rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner, 583 S.W.2d 107 (Mo. banc 1979), this Court invalidated a statute which required any person having a malpractice claim against a health care provider to refer their claim to the Secretary of the Professional Liability Review Board ("Board") before filing an action in court. The statute provided that the limitation period for plaintiffs to file their claims was tolled while the Board considered a malpractice claim and made its recommendation. In this context, the Court found that it would be manifestly unjust to persons who acted in good faith and in reasonable reliance on the statute not to toll the statute of limitations for the period from the time they filed their claim with the Board

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<sup>10</sup>The Sinquefields recognize that much of the six and half months at issue was during the black-out period. However, this period provided candidates with an opportunity to plan their fundraising activities, many of which were likely in reliance on the statute at issue.

<sup>11</sup>The Sinquefields would not object to a retrospective application of this Court's ruling to James Trout. He is, after all, the person who went through the expense and effort of bringing the current litigation.

through the time the Court found the statute unconstitutional. Cardinal Glennon, 583 S.W.2d at 118.

It is in reliance on cases such as Cardinal Glennon that the Attorney General seeks to carve out an exception for those candidates whose election was terminated or whose committee has been terminated. Yet, it is unclear whether a retrospective ruling of the Decision would hurt those candidates whose campaigns were terminated. It is entirely possible that a candidate concluded an election with sufficient cash to return contributions which he or she collected after January 1, 2007, which did not conform to earlier contribution limits. In this scenario, there can be no “manifest injustice.”<sup>12</sup> Also, the termination of a committee does not in and of itself create a situation of manifest injustice. Thus, there is neither evidence nor a valid equitable argument to support the Attorney General’s assertion that candidates whose elections or committees were terminated will suffer manifest injustice if the current ruling is applied to them.

The Sinquefields, however, will suffer a manifest injustice if the ruling is applied to their previous donations and they are prepared to submit evidence before the trial court if required to do so, that they will suffer a manifest injustice if their chosen candidates cannot keep donations. If the Court seeks to carve out an exception, that exception should cover all donors who have acted in good faith and reasonable reliance upon a statute later held unconstitutional. Id. at 118.

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<sup>12</sup> See Cardinal Glennon, 583 S.W.2d at 118 (if tolling provision of statute are “viewed as retroactively unconstitutional, those claimants who have reasonably and in good faith relied” upon the tolling provisions “to protect their rights to ultimately submit their claims to the courts would suffer a *manifest injustice*.”) (emphasis added).

**G. Conclusion.**

No one can in good conscience argue that donors such as the Sinquefields reasonably relied on the Campaign Finance Reform Statute. If the Attorney General of the State of Missouri relied on the statute in collecting money, certainly he cannot now argue that Missouri citizens, too, were not entitled to rely on it. Therefore, the only other question which remains is whether donors will suffer an injustice if their chosen candidates are required to return donations given in reliance on a statutory scheme. Here, there is no question that a retrospective application will cause an injustice to the Sinquefields. They relied on the statute in making donations, and they did not utilize other methods of raising funds for their candidates because of the statute. While the Missouri Attorney General seeks to minimize this impact, the hardship is great. The Sinquefields wanted to fund candidates early in the race and that opportunity may be forever lost.<sup>13</sup> Under the Attorney General's rationale, donors too should be excluded from any retrospective application. In other words, so many people will suffer an injustice if the Court's ruling is retrospective, that the exceptions will effectively swallow the rule. Therefore, this Court should only apply the Decision to all donations made after July 19, 2007.

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<sup>13</sup> Many candidates also relied in good faith on the statute including the Missouri Attorney General. For many months, those candidates have planned strategy and entered into contracts in reliance on donations received over the last six months. If this ruling either explicitly requires campaigns to return money or results in the Missouri Ethics Commission ordering candidates to return money, many of those candidates will suffer irreparable damage.

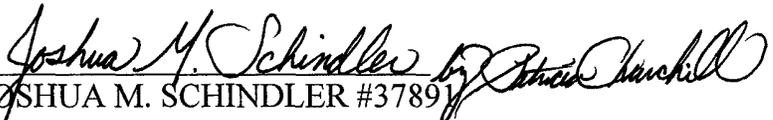
Based on the forgoing, the Sinquefields on their own behalf, and on behalf of similarly situated donors, respectfully request that this Court apply the Decision prospectively.

**H. Request to participate in oral argument.**

To the extent that this Court hears oral argument as to whether the effect of the invalidity of Mo. Rev. Stat. § 130.032 is retrospective or prospective, the Sinquefields respectfully request the opportunity to participate in any argument in favor of a purely prospective application because the Attorney General (and we assume the Plaintiff) will maintain that the statute should apply retrospectively (at least to some parties).

RESPECTFULLY SUBMITTED

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