

Nos. 04-1528, 04-1530 and 04-1697

IN THE
Supreme Court of the United States

NEIL RANDALL, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,
Respondents.

WILLIAM H. SORRELL, *et al.*,
Conditional Cross-Petitioners,

v.

NEIL RANDALL, *et al.*,
Conditional Cross-Petition Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

**BRIEF OF THE
REPUBLICAN NATIONAL COMMITTEE AS
AMICUS CURIAE SUPPORTING PETITIONERS AND
CONDITIONAL CROSS-PETITION RESPONDENTS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. ACT 64’S PRESUMPTION OF
COORDINATION VIOLATES THE FIRST
AMENDMENT AND DUE PROCESS
CLAUSE..... 2

A. Independent Expenditures Are Fully
Protected By the First Amendment..... 4

B. Act 64’s Related Expenditure
Provision Will Severely Restrict or
Eliminate Independent Expenditures
by Political Party Committees 5

C. The First Amendment Does Not
Permit the Government To Presume
that Speech Is Unprotected Until the
Speaker Rebutts the Presumption 6

D. Act 64’s Presumption of Coordination
Violates Due Process 8

1. Act 64’s Presumption of
Coordination Violates Due
Process By Shifting the Burden
of Persuasion..... 8

2.	Act 64 Fails To Provide Adequate Procedural Safeguards to Allow for the Prompt Rebutting of the Presumption	10
II.	VERMONT’S EXPENDITURE LIMITATIONS VIOLATE THE FIRST AMENDMENT	11
A.	Expenditure Limits Are Subject to Strict Scrutiny Because They Severely Burden Core Political Speech	13
B.	Act 64’s Expenditure Limits on Candidates Are Not Supported by Valid Governmental Interests	14
1.	A Legislative Desire to Prevent Actual or Apparent Corruption Cannot Excuse Expenditure Limits	15
2.	Incumbent “Time-Protection” Is Not a Valid Governmental Interest	18
C.	Act 64’s Expenditure Limits Are Not Narrowly Tailored To Advance the Asserted Interests of Anti-Corruption and Time-Protection	25
1.	Act 64’s Expenditure Limits Do Not Advance the Asserted Interests of Anti-Corruption and Time-Protection	25

2.	Act 64's Expenditure Limits Are Not the Least Restrictive Means of Advancing the State's Asserted Anti- Corruption and Time- Protection Interests	27
	CONCLUSION.....	29

TABLE OF AUTHORITIES**CASES**

<i>Ashcroft v. Am. Civil Liberties Union</i> , 542 U.S. 656 (2004).....	25
<i>Austin v. Mich. State Chamber of Commerce</i> , 494 U.S. 652 (1990).....	25
* <i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	passim
<i>Carroll v. Comm'rs of Princess Anne</i> , 393 U.S. 175 (1968).....	11
<i>City of Lakewood v. Plain Dealer Publ'g Co.</i> , 486 U.S. 750 (1988).....	10
* <i>Colo. Republican Fed. Campaign Comm. v. Federal Election Comm'n</i> , 518 U.S. 604 (1996).....	passim
<i>County Court of Ulster County, New York v. Allen</i> , 442 U.S. 140 (1979).....	8
<i>Federal Election Comm'n v. Cal. Democratic Party</i> , No. Civ. S-03-0547 FCD DAD, 2004 U.S. Dist. LEXIS 7269 (E.D. Cal. 2004).....	6
<i>Federal Election Comm'n v. Colo. Republican Federal Campaign Committee</i> , 533 U.S. 431 (2001).....	11-12

* Authorities principally relied upon are denoted by an asterisk (“*”).

<i>Federal Election Comm'n v. Furgatch</i> , 807 F.2d 857 (9th Cir. 1987)	5
<i>Federal Election Comm'n v. Mass. Citizens for Life, Inc.</i> , 479 U.S. 238 (1986).....	12, 13
<i>Federal Election Comm'n v. Nat'l Conservative Political Action Comm.</i> , 470 U.S. 480 (1985).....	passim
<i>Federal Election Comm'n v. Public Citizen</i> , 268 F.3d 1283 (11th Cir. 2001)	5
<i>Francis v. Franklin</i> , 471 U.S. 307 (1985)	8, 9
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965).....	7, 8, 9, 10
<i>FW/PBS, Inc., dba Paris Adult Bookstore II v. City of Dallas</i> , 493 U.S. 215 (1990)	10
<i>Homans v. City of Albuquerque</i> , 366 F.3d 900 (10th Cir. 2004)	24
<i>Home Box Office, Inc. v. FCC</i> , 567 F.2d 9 (D.C. Cir. 1977)	8
<i>In re 1650 Cases of Seized Liquor</i> , 721 A.2d 100 (Vt. 1998).....	4
<i>Kruse v. City of Cincinnati</i> , 142 F.3d 907 (6th Cir. 1998).....	22
<i>Landell v. Sorrell</i> , 118 F. Supp. 2d 459 (D. Vt. 2000).....	6, 7, 17
<i>Landell v. Sorrell</i> , 382 F.3d 91 (2d Cir. 2004)	passim

<i>Landell v. Sorrell</i> , 406 F.3d 159 (2d Cir. 2005) (denial of rehearing <i>en banc</i>	19, 22
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	12
* <i>McConnell v. Federal Election Comm'n</i> , 540 U.S. 93 (2003).....	passim
<i>Nixon v. Shrink Mo. Gov't PAC</i> , 528 U.S. 377 (2000).....	12, 14
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969).....	11
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958)	7, 9
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975).....	9

STATUTES

ALA. CODE § 17-22A-7(b)(2).....	28
ARIZ. REV. STAT. § 41-1234.01	28
GA. CODE ANN. § 21-5-35(a)	28
IND. CODE § 3-9-2-12.....	28
IOWA CODE § 68A.504(1)	28
KAN. STAT. ANN. § 25-4153a	28
LA. REV. STAT. ANN. § 18:1505.2(Q)(1)	28
LA. REV. STAT. ANN. § 18:1505.2(R)(1)	28
MD. CODE ANN., ELEC. § 13-235.....	28

N.C. GEN. STAT. § 163-278.13B.....	28
N.M. STAT. ANN. § 1-19-34.1.....	28
NEV. REV. STAT. 294A.300.....	28
NEV. REV. STAT. 294A.310.....	28
OKLA. STAT. tit. 74, § 257:10-1-6.....	28
TENN. CODE ANN. § 2-10-310(a)(1)	28
TENN. CODE ANN. § 2-10-310(b).....	28
TEX. ELEC. CODE. ANN. § 253.034	28
VT. STAT. ANN. tit. 17, § 2801(3).....	3
VT. STAT. ANN. tit. 17, § 2805a(a).....	23
VT. STAT. ANN. tit. 17, § 2805a(c).....	23
VT. STAT. ANN. tit. 17, § 2806(b).....	3
VT. STAT. ANN. tit. 17, § 2809(a)	3, 6
VT. STAT. ANN. tit. 17, § 2809(c)	3
VT. STAT. ANN. tit. 17, § 2809(d).....	passim
VT. STAT. ANN. tit. 17, § 2809(e)	4
VT. STAT. ANN. tit. 2, § 266(3)	28
VT. STAT. ANN. tit. 2, §§ 1-22	25

LEGISLATIVE MATERIALS

1997 Vt. Acts & Resolves 64.....	passim
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 213, 116 Stat 94 (2002).....	4
JOINT RULES OF THE SENATE AND HOUSE OF REPRESENTATIVES OF VERMONT (adopted Jan. 30, 1990), <i>available at</i> http://www.leg.state.vt.us/misc/rules2.htm	25

MISCELLANEOUS SOURCES

Tracie Dungan, <i>Hopefuls Putting Hands Out on Web: Campaigns Tap Online Potential</i> , ARK. DEMOCRAT-GAZETTE, Nov. 13, 2005	21
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Guide to Vermont's Campaign Finance Law (November 2005) <i>available at</i> http://vermont-elections.org/ elections1/2005_cf_guide_1118.htm	3
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Deborah L. Markowitz to the S. Gov’t
Operations Comm. and H. Local Gov’t
Comm. (Jan. 9, 2001) *available at*
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2001gamemocf.html](http://vermont-elections.org/elections1/2001gamemocf.html) 12, 15

Alexis Rice, Fellow at the Center for the
Study of American Government at Johns
Hopkins University, *Campaigns Online:
The Profound Impact of the Internet, Blogs,
and E-Technologies in Presidential
Political Campaigning* 45 (2004), *available*
at <http://www.campaignsonline.org/> 20

INTEREST OF THE AMICUS CURIAE

Amicus Republican National Committee (“RNC”) is an unincorporated association that participates extensively in national, state, and local elections.¹ The RNC is subject to and complies with applicable rules imposed by the federal and state governments, including Vermont. The RNC has in the past and will in the future support candidates who are subject to the provisions of Vermont’s Act 64.

SUMMARY OF ARGUMENT

1. Act 64’s presumption that political party independent expenditures primarily benefiting six or fewer candidates are coordinated with those candidates offends the First Amendment for the reasons set forth in *Colorado Republican Federal Campaign Committee v. Federal Election Comm’n*, 518 U.S. 604 (1996) (“*Colorado I*”). In *Colorado I*, the Court struck down a presumption that political party independent expenditures were coordinated with candidates because such a blanket presumption itself infringes speech, and independent expenditures present no prospect of corrupting the benefited candidate. Moreover, Act 64’s presumption offends the Due Process Clause because it reverses the burden of persuasion in a way that punishes speech, sets forth no definitive mechanism for challenging the application of the presumption to a particular expenditure, and fails to guarantee a prompt resolution of any such challenge so that the speech can proceed.

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

2. Act 64's scheme of expenditure limitations violates the First Amendment by imposing "direct and substantial restraints on the quantity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The proffered justifications for Act 64 do not withstand strict scrutiny. As explained in *Buckley*, 424 U. S. at 45-46, 47-48, expenditure limits do not correlate to any anti-corruption purpose. Moreover, the asserted interest in protecting the time of incumbent politicians is neither compelling nor related to the imposition of expenditure limits, since much if not most political fundraising by such means as direct mail and the Internet is done with little personal involvement of the candidate, the expenditure limits do not ensure that officeholders will devote more time to their official responsibilities (as opposed to other campaign activities), and the expenditure limits enhance the powers of incumbency. Finally, the expenditure limits are neither narrowly tailored to advance the asserted state interests, nor are they the least restrictive means for doing so, since Vermont has not, unlike many other states, enacted legislation that prohibits fundraising while the legislature is in session. Finally, the suggestion that this Court revisit its precedents holding expenditure limitations offensive to the First Amendment fails to satisfy the threshold requirements for overruling settled precedent.

ARGUMENT

I. ACT 64'S PRESUMPTION OF COORDINATION VIOLATES THE FIRST AMENDMENT AND DUE PROCESS CLAUSE.

Act 64 provides that independent expenditures made by a political party "that primarily benefit[] six or fewer candidates" associated with that party are presumed to be coordinated expenditures on behalf of those candidates. VT. STAT. ANN. tit. 17, § 2809(d). Any coordinated expenditure,

in turn, is deemed to be “a contribution to the candidate on whose behalf it was made,” VT. STAT. ANN. tit. 17, § 2809(a), and is subject to the applicable limit for contributions to that candidate. *See* VT. STAT. ANN. tit. 17, § 2809(a).² The Act defines “expenditure” broadly to encompass any spending “for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.” VT. STAT. ANN. tit. 17, § 2801(3). Thus, an “independent expenditure” under Act 64 is a very broad and vague concept.³

The text of Act 64 does not state whether this presumption of coordination is conclusive or rebuttable, but administrative guidance promulgated by Vermont’s secretary of state suggests that the presumption is rebuttable. *See* Guide to Vermont’s Campaign Finance Law 30 (November 2005) *available at* http://vermont-elections.org/elections1/2005_cf_guide_1118.htm (“When an expenditure is presumed to be a related expenditure, the presumption can be overcome by evidence that the elements of the definition in section 2809(c) were not met.”).

Although Act 64 does provide that a *candidate* may bring an expedited court action to declare that expenditures made

² Violations of Act 64’s contribution limits through independent expenditures deemed to be coordinated expenditures appear to be civil, as opposed to criminal offenses. *See* VT. STAT. ANN. tit. 17, § 2806(b) (providing for a civil penalty of up to \$10,000 for each violation of Act 64). A \$10,000 civil penalty is very substantial: it is more than 3-percent of the expenditure limit for candidates for Governor; 10-percent for Lieutenant Governor; and 22-percent for certain executive branch offices. The penalty exhausts the spending limits for State Senate, county office, and State Representative.

³ The RNC contends that the definition of “expenditure” is grossly overbroad in numerous respects, but this issue is not currently before the Court.

on behalf of an *opposing* candidate are coordinated, *see* VT. STAT. ANN. tit. 17, § 2809(e), neither the Act nor administrative guidance provides a similar judicial or administrative mechanism for a *political party* making such expenditures to bring a court action or administrative proceeding to rebut the presumption. Indeed, the enumeration of one mechanism for seeking review under 2809(e) suggests that other modes of review are prohibited. *See In re 1650 Cases of Seized Liquor*, 721 A.2d 100, 106 (Vt. 1998) (applying *expressio unius* canon of construction to Vermont statute).

A. Independent Expenditures Are Fully Protected By the First Amendment.

This Court has twice reviewed restrictions on political party independent expenditures and both times has held them unconstitutional. In *Colorado I*, 518 U.S. at 617-18, the Court ruled that an expenditure by the Colorado Republican Party was constitutionally protected, and rejected the argument that political parties have a lesser right to make independent expenditures than other speakers: “We do not see how a Constitution that grants individuals, candidates, and ordinary political committees the right to make unlimited independent expenditures could deny the same right to political parties.” *Id.* at 618 (principal opinion by Breyer, J.). The Court was unpersuaded by the FEC’s presumption that, “as a matter of law,” party expenditures are coordinated with candidates, writing “[a]n agency’s simply calling an independent expenditure a ‘coordinated expenditure’ cannot (for constitutional purposes) make it one.” *Id.* at 621-22.

More recently, in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 213-19 (2003), the Court unanimously struck down section 213 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 94, which

required political parties to elect between making coordinated expenditures and independent expenditures. Again, the Court emphasized that political party independent expenditures are “plainly . . . entitled to First Amendment protection,” and that no “meaningful purpose” was served by restricting such expenditures. *McConnell*, 540 U.S. at 217-18.

B. Act 64’s Related Expenditure Provision Will Severely Restrict or Eliminate Independent Expenditures by Political Party Committees.

Section 2809(d) was intended to and does encompass the vast majority of political party independent expenditures. Any independent expenditure criticizing a candidate would presumably benefit only that candidate’s opponent, and would fall within the presumption. Any independent expenditure praising a single candidate would fall within the presumption. Indeed, it is unusual for an independent expenditure to “benefit” more than one candidate, meaning that the presumption will swallow the bulk of independent party spending.⁴

⁴ Judicial decisions addressing particular independent expenditures confirm this point. *See e.g., Colorado I*, 518 U.S. at 608 (concerning independent expenditures by a political party committee for advertisements about U.S. Senate candidate Timothy Wirth); *Federal Election Comm’n v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 483 (1985) (“*NCPAC*”) (concerning independent expenditures by political action committees in support of President Ronald Reagan); *Federal Election Comm’n v. Public Citizen*, 268 F.3d 1283, 1286 (11th Cir. 2001) (concerning independent expenditures by a non-profit organization for advertisements opposing Speaker of the House Newt Gingrich); *Federal Election Comm’n v. Furgatch*, 807 F.2d 857, 858 (9th Cir. 1987) (concerning independent expenditures by an advertiser opposing President Jimmy Carter); *Federal Election Comm’n v. Cal. Democratic Party*, No. Civ. S-03-0547 FCD DAD, 2004 U.S. Dist. (continued...)

Moreover, section 2809(a) imputes independent expenditures by political parties to candidate committees, counting them not only as “contributions” to the beneficiary candidate, and thus subjecting them to the draconian contribution limits, but presumably also against that candidate’s spending limit. This provision is patently unfair to candidates because independent expenditures – which by definition the candidate does not control or even know are coming – may deplete candidate spending allowances. Consequently, political party committees will be deterred from making any independent expenditures because their activities may preempt the favored candidate’s ability to communicate directly with voters. Plainly, such deterrence was the very purpose of the provision.⁵

C. The First Amendment Does Not Permit the Government To Presume that Speech Is Unprotected Until the Speaker Rebutts the Presumption.

Section 2809(d) creates the same type of “presumption of coordination” that this Court found improper in *Colorado I*,

LEXIS 7269, at *3-*5 (E.D. Cal. 2004) (concerning independent expenditures by a political party committee in support of Congresswoman Lois Capps).

⁵ According to the district court below, the restraint on independent expenditures in section 2809 “was designed to plug a loophole that would have allowed for circumvention of Act 64’s individual contribution limits.” *Landell v. Sorrell*, 118 F. Supp. 2d 459, 490 (D. Vt. 2000). The restriction would prevent political candidates from evading campaign finance restrictions “by asking others to collect and spend money for them.” *Id.* This is an argument for regulating *coordinated expenditures*, however, not independent expenditures, which involve no prior communication between the political party and the candidate’s campaign.

518 U.S. at 622. As the Court explained, “[a]n agency’s simply calling an independent expenditure a ‘coordinated expenditure’ cannot (for constitutional purposes) make it one.” *Id.* at 621-22. Under *Colorado I*, section 2809(d) must fail.

The lower court attempted to distinguish *Colorado I* on the ground that the presumption of coordination in that case was “conclusive,” whereas the presumption in section 2809(d) is ostensibly rebuttable, through as yet unspecified procedures. *See Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2004). This is no distinction at all; as did the presumption in *Colorado I*, section 2809(d) plainly places a severe burden on independent speech for no valid reason. The time, effort, and expense necessary to rebut the presumption is a burden on speech, especially in the fast moving context of a political campaign. The result will be little if any independent party spending. No government interest has been advanced to justify this suppression of speech.⁶

Further, the government may not simply presume speech unprotected until the putative speaker rebuts the presumption. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) (the burden of proving that speech is unprotected “must rest on the censor”); *see also Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“In practical operation, therefore, this procedural device [a statutory presumption that speech is unprotected] must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free.”).

⁶ In what appears to be the only reason for the presumption, Vermont State Representative Terry Bouricius, who is the sponsor of the legislation, asserted that expenditures supporting six or fewer candidates were “more likely to be part of [a] campaign.” *Landell*, 118 F. Supp. 2d at 492 n.28.

