

**No. 04-**

**IN THE  
SUPREME COURT OF THE UNITED STATES**

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NEIL RANDALL, ET AL.,

*Petitioners,*

v.

WILLIAM H. SORRELL, ET AL.,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

1. Whether Vermont's mandatory limits on candidate expenditures violate the First Amendment and this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).
2. Whether Vermont's treatment of independent expenditures by political parties and committees as presumptively coordinated if they benefit fewer than six candidates, and thereby subject to strict contribution and expenditure limits, is consistent with the First Amendment and this Court's decision in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996).
3. Whether Vermont's contribution limits, which are the lowest in the country, which allow only a single maximum contribution in an entire two-year general election cycle, and which prohibit even state political parties from contributing more than \$400 to their gubernatorial candidate, fall below an acceptable constitutional threshold and should be struck down.

### **LIST OF PARTIES**

Petitioners are Neil Randall, George Kuusela, John Patch, Steven Howard, Jeffrey Nelson, and the Libertarian Party of Vermont.

Consolidated Plaintiffs are Marcella Landell, Donald R. Brunelle, Vermont Right to Life Committee, Inc., Political Committee, Vermont Republican State Committee, and Vermont Right to Life Committee-Fund for Independent Political Expenditures.

Respondents are the Attorney General of the State of Vermont, William H. Sorrell, the Secretary of State of the State of Vermont, Deborah Markowitz, and various state and local officials charged with enforcement of the challenged statute: John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, and Robert L. Sand.

Ready, Nancy Rice, Cheryl Rivers, and Maria Thom Respondent-Intervenors are Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth pson.

**CORPORATE DISCLOSURE STATEMENT**

None of the Petitioners are a corporation that has issued shares to the public, nor are any a parent corporation, a subsidiary or affiliate of corporations that have done so.

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**OPINIONS AND ORDERS BELOW**

The original decision of the District Court finding 17 V.S.A. §§ 2801-2809 constitutional in part and unconstitutional in part, was entered on August 10, 2000. The court’s opinion is reported as *Landell v. Sorrell*, 118 F.Supp.2d 459 (D.Vt. 2000), and is reprinted in the Appendix (“App.”) at App. 21a-89a. The Second Circuit panel decision affirming the District Court judgment in part and vacating it in part, and remanding for further proceedings was entered on August 7, 2002. That opinion, 300 F.3d 129 (2nd Cir. 2002), was withdrawn and is not reprinted in the appendix. On August 18, 2004, the Second Circuit issued an amended opinion, 382 F.3d 91 (2nd Cir. 2004), which is reprinted at App. 90a-312a.

Rehearing and rehearing *en banc* were denied on February 11, 2005. App. 313a-314a. The *Order* denying the petition was twice subsequently amended to reflect that the rehearing petition was denied by a vote of 6-5. The second *Order* contains the separate concurring and dissenting opinions of the circuit judges, and is reprinted at App. 315a-344a.

**JURISDICTION**

The Second Circuit’s amended decision reversing in part and affirming in part the District Court’s decision was entered on August 18, 2004. On February 11, 2005, that court entered an order denying plaintiffs’ petition for rehearing *en banc*. This Court has jurisdiction under 28 U.S.C. § 1254.

**CONSTITUTIONAL AND STATUTORY PROVISIONS**

The First Amendment to the United States Constitution provides that “Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. amend. I, § 1.

1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) is set out in full in the Appendix to the petition. App. 1a-20a.

### **STATEMENT OF THE CASE**

This is a First Amendment challenge to Vermont’s comprehensive campaign finance law, 1997 Vt. Laws P.A. 64 (codified at 17 V.S.A. §§ 2801 et seq.) (“Act 64”). Vermont’s law was adopted in 1997 with the “express intent” of challenging *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and became effective the day after the November 1998 election. Act 64 challenged *Buckley* by imposing mandatory, unprecedented limits on the amount of money candidates for statewide or legislative office may lawfully raise or spend on their campaigns. These spending limits apply to all candidates, even those who spend their own funds or obtain contributions from legal sources. The Act broadly defines an expenditure to include various personal and in-kind expenses, and limits the right of political organizations to make independent expenditures supporting candidates by presuming that certain expenditures are coordinated with the candidate. The Act also imposes the lowest contribution limits in the country, which are enforced on a per-election-cycle basis. The limits apply equally to political parties and committees. A separate provision limits the amount of money candidates can raise from out-of-state sources.

This case arises from three separate lawsuits filed in 1999 and 2000, which were consolidated in the district court. The plaintiffs in these consolidated matters are involved in various capacities in Vermont electoral politics and include a sitting legislator seeking re-election, candidates for future offices, political parties and political committees, and

individual contributors and listeners. A number of individuals and advocacy groups were allowed to intervene as defendants in support of the Act. After a ten-day bench trial in May and June, 2000, the district court upheld many of the challenged provisions, but enjoined enforcement of the candidate spending limits, the candidate contribution limits as applied to contributions from political parties, and the restriction on out-of-state contributions. App. 24a-26a.

All parties appealed the district court's decision to the Second Circuit. The case was argued there in May of 2001 and an initial 2-1 opinion was issued in August, 2002, in which the court upheld in large part both Act 64's contribution and expenditure limits. App. 95a. After Plaintiffs filed a motion for rehearing, the panel withdrew this opinion. *Id.* Two years later the same divided panel of the court of appeals again upheld most of the provisions of Act 64, but remanded to the district court to decide whether the expenditure limits were narrowly tailored to advance the State's interests. App. 96-97. Plaintiffs' motion for rehearing *en banc* was denied, 6-5, generating three separate dissenting opinions on the issue whether *en banc* hearing should have been granted. App. 315a. Petitioners now seek *certiorari* in this Court.

### **Vermont's Act 64**

*Spending Limits.* Act 64 limits all candidate spending during a two-year election cycle.<sup>1</sup> 17 V.S.A. § 2805a. App. 6a-7a. Candidates for statewide office are restricted to varying amounts depending upon the position sought, with the candidate for governor limited to \$300,000; the lieutenant

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<sup>1</sup> Both the spending limits and the contribution limits adopted by Vermont depart from the federal model and the laws in virtually every other state because they apply on a two-year election cycle basis, rather than a per election basis – regardless of whether a candidate has a primary. *See* 17 V.S.A. §§2801(9), 2805(a), 2805a(a). App. 2a, 4a-5a, 6a. Only candidates for governor and lieutenant governor have the option of receiving public financing for their campaigns, provided they receive a certain number and amount of “qualifying contributions” and adhere to various other restrictions. *See* 17 V.S.A. § 2851-2856. App. 14a-19a.

governor to \$100,000; and candidates for other statewide offices to \$45,000. *See* 17 V.S.A. § 2805a(a)(1)-(3). App. 6a. Candidates for state senator and county office are limited to spending \$4,000, with senate candidates permitted an additional \$2,500 per seat in multi-seat districts. *Id.* Candidates for state representative in single-member districts can spend no more than \$2,000, and those in two-member districts no more than \$3,000. 17 V.S.A. § 2805a(a)(5). App. 6a.

Act 64 defines candidate “expenditures” to include a “payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value ... for the purpose of influencing an election.” 17 V.S.A. § 2801(3). App. 1a. The breadth of this language is indisputable, and was chosen purposely to ensure that limits could not be avoided. Given its ordinary meaning the language includes the value of the use of personal phones, computers, offices, rooms in residences, paper, pencils, personal automobiles, etc. App. 211a. The evidence at trial and interpretative guidance provided by the Vermont Secretary of State, who is charged with administering the Act, supports a broad reading of the term “expenditure.” App. 211a-219a; Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont’s Campaign Finance Law (January 9, 2001). *Id.* Act 64 thus treats all manner of typical grassroots campaign activities, such as a candidate’s use of his/her own car and food provided by supporters at “meet the candidate” events, as campaign expenditures which count toward the applicable spending limits. Candidates, therefore, as well as their volunteers, may not drive their personal vehicles for campaign purposes without recording every mile driven and treating the costs of that driving as a campaign expenditure. App. 229a-232a, 241a-242a. The use of personal phone lines, the value of donated office space or professional services, and the costs of complying with the law are all considered to be “expenditures” under the Act. App. 225a-226a, 241a-242a. The spending limits — and the broad definition thereof — apply equally to candidates who exclusively use personal funds to finance their campaigns. 17 V.S.A. § 2805a(a). App. 6a.

Related Expenditures. Vermont's spending limits must be reviewed in the context of the "related expenditure" provision, which counts certain expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (thus counted against the candidate's permissible budget). 17 V.S.A. § 2809. App. 8a-10a. Spending is "related" when it is "intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." 17 V.S.A. § 2809(c). App. 8a. The broad definition of "expenditure" applies to related expenditures as well, and the language requiring intentional "facilitation," "solicitation" or "approval" has been given a broad interpretation by those charged with enforcing the act. App. 222a-223a, 308a-312a. Spending by individual supporters may be treated as a "related expenditure" when it exceeds \$50. 17 V.S.A § 2809(b). App. 8a.

Act 64 creates a rebuttable presumption that expenditures made by political parties or political action committees are, in fact, "related" (i.e., coordinated) expenditures – thus counting as both contributions and candidate spending – if they primarily benefit six or fewer candidates. Candidates may bring a petition in state court seeking determination as to whether particular third party expenditures should be considered related. 17 V.S.A. § 2809(e). App. 9a. Until such proceedings are resolved, however, candidates act at their peril. Furthermore, the cost of rebutting the statutory presumption is charged against the candidate's spending limit, which is apparently the case even if the candidate succeeds in establishing that the presumption does not apply. App. 225a-226a.

Contribution Limits. Act 64 also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than \$200 from a single source,

political party or political action committee. 17 V.S.A. § 2805(a). App. 4a-5a. Slightly higher limits apply to candidates for state senate or county office (\$300) and candidates for statewide office (\$400). *Id.* Political action committees and political parties may accept no contribution greater than \$2,000. *Id.* For the purpose of all these contribution limits, a political party's state, county and local branch (and national and regional affiliates of the party) count as a single unit. 17 V.S.A. § 2801(5). App. 2a. These limits apply to all cash, in-kind, and "related" contributions, following the broad definitions described above. The single limit applies during an entire 2-year general election cycle whether or not the candidate faces a primary. Under these limits, the Democratic and Republican candidates for governor in Vermont can accept no more than \$400 each (in cash, in kind or "related"), every two years, from their respective parties. 17 V.S.A. § 2805(a). App. 4a-5a.<sup>2</sup>

### **The Proceedings Below**

The State's witnesses at trial opined that the State should be able to regulate campaign spending and political speech in much the way a public utility is regulated. App. 195a. In keeping with this philosophy, they lent their support at trial to pervasive regulation of campaign finance and a vision of an "old fashioned" politics where low cost, grass roots campaigning ruled the day. Defendants' witnesses repeatedly testified that they preferred "down home," "traditional," or "old fashioned" campaigns; yet, even these "old fashioned" methods of campaigning are subject to regulation – and limitation – under Act 64. App. 198a, 229a-232a.

Plaintiffs argued in response that it is not constitutionally appropriate for the State of Vermont to

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<sup>2</sup> Other provisions of Act 64's comprehensive scheme were not challenged by the petitioners, with one exception. Act 64 limits to 25% the amount of money candidates and political organizations can raise from out-of-state sources. 17 V.S.A. § 2805(c). App. 5a. The court of appeals unanimously affirmed the district court's ruling that this provision was unconstitutional. Accordingly, that issue is not presented by this petition.

determine how, or how much, candidates should campaign. Under the broad definition of “expenditure” set forth in Act 64, nearly anything a candidate or contributor does will be counted towards the respective limits. Indeed, by defining the term so broadly, Vermont has side-stepped the debate over the relationship between money and speech in the campaign finance context. Once a candidate has reached the mandatory spending limit, she cannot even drive her own car to the village square to give a speech, or to go door-to-door campaigning. App. 197a. Relying on *Buckley*, plaintiffs argued below that it is for the candidate to determine how many mailings to send, how many doors to knock on, how many ads to run, and how often to drive to the village green to meet with voters.

*Spending Limits.* The district court enjoined enforcement of candidate spending limits on the strength of *Buckley*. The court of appeals divided 2-1 on this critical issue. In a decision directly at odds with the Sixth and Eighth circuits, *see* p. 13, *supra*, the panel majority concluded that this Court’s holding in *Buckley* “does not operate as a *per se* bar to expenditure limits; rather, *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests.” App. 91a.

The majority found that Vermont’s spending limits were supported by two government interests that it regarded as compelling, at least in tandem: limiting the time that candidates spend on fundraising and addressing the corrosive effect of public cynicism on the electoral process, which the Second Circuit characterized as a form of corruption. App. 144a-146a.

The majority next turned to the issue of whether the spending limits established by Act 64 allow for “effective advocacy.” Using a test developed in the contribution limit context, the court found that the expenditure limits were not “so radical in effect” as to “drive the sound of a candidate’s voice below the level of notice.” App. 152a-157a (quoting *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 397 (2000)). Although the court of appeals recognized that there was conflicting evidence submitted at trial, it reviewed historical

data from “average” races in which spending was reported under the prior law, and found many candidates spent within the limits of the new law. Thus, according to the majority below, most candidates would not be hampered by the new limits. App. 153a-154a.

Finally, the majority considered whether the Act’s expenditure limits were narrowly tailored to advance the State’s asserted interests. Because it could not determine whether other, less restrictive alternatives could achieve the same goals of preserving candidate time and diminishing public cynicism, the court remanded the case to the district court for further proceedings. App. 164a-168a.

Judge Winter forcefully dissented from both the majority’s assessment of the evidence and its legal conclusions. App. 190a-194a. At the most fundamental level, he disagreed with the majority’s view that the constitutionality of spending limits remains an open question after *Buckley*. App. 207a, 258a. Like the Sixth and Eighth Circuits, Judge Winter took the position that any re-examination of that issue must come from this Court. App. 258a-265a. In addition, he noted that the record did not, in fact, support the majority’s assertion that fundraising in Vermont was unduly burdensome on candidates and officeholders. As Judge Winter recognized, it is easy to state that candidates spend too much time fundraising, but “it is not a testable proposition.” App. 274a. That is because,

[t]here is often no dividing line between donors and “ordinary citizens” who support a candidate or between fundraising and other campaign events. Meetings with supportive voters can often be described as either “fundraising” or as “person-to-person contact with voters” depending upon the point to be made.

*Id.* Moreover, as Judge Winter explained, incumbents and challengers are not similarly situated. Incumbents typically need less money to ensure re-election and can raise it more

easily. Thus, what is perceived as a burden by one candidate may be perceived as a necessity by another.<sup>3</sup>

Judge Winter also sharply criticized the majority's reliance on "average" spending to determine whether Vermont's spending limits would impair a candidate's ability to engage in "effective advocacy." As Judge Winter pointed out, the use of an average inevitably obscures the critical difference between contested races and uncontested races. An amount that may be sufficient for a candidate who is running unopposed may be grossly insufficient for a candidate who faces both a hotly contested primary and general election. Historical data shows that in contested elections significantly more money had been spent than would be allowed under the new limits. App. 236a-240a. As Judge Winter further observed, any comparison with historical spending rates needs to take into account the expanded definition of a covered expenditure under Act 64, including related expenditures, which the majority did not do.<sup>4</sup> App. 233a-234a. Fundamentally, Judge Winter pointedly disagreed with the majority that the test for effective advocacy developed in the contribution limit context – the "level of notice" standard - had any applicability to the constitutionality of spending limits. Where a *direct* restriction on speech is concerned, the First Amendment requires that a candidate be allowed to achieve more than just a "level of notice." App. 282a-285a.

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<sup>3</sup> Act 64 does attempt to ameliorate the incumbent's advantage by providing that incumbents running for re-election may only spend 85% or 90% of the standard limits, depending on the office sought. 17 V.S.A. § 2805a(c). App. 7a. The evidence at trial showed that the legislature chose these percentages arbitrarily, with no empirical basis. As Judge Winter pointed out in his dissent, the benefits of incumbency are not so easily overcome. App. 275a, 285a-286a.

<sup>4</sup> Witnesses at trial testified that the one-size-fits-all approach ignores geographic differences between districts, and a candidate with a physical disability might find traditional door-to-door campaigning difficult or impossible. Overriding issues of the day such as education finance or civil unions affect the manner, intensity, and cost of campaigns. App. 243a-245a. In the case of legislative candidates, legal assistance alone could literally exhaust all the expenditures allowable under the act. App. 235a.

And, unlike the majority, Judge Winter saw no need for a remand to explore less restrictive alternatives. That issue was decided by *Buckley*, which held that spending limits are not the least restrictive means of advancing the government's interest in preventing corruption or its appearance. 424 U.S. at 58-59. Judge Winter explained, moreover, that it was "self-evident" that the State could, if it chose, promote its asserted interests through "a combination of public and private funding with low contribution limits." App. 193a-194a, 292a, 300a. In a sharply worded dissent from the *Denial of Rehearing En Banc*, five members of the court expressed their total agreement with Judge Winter's analysis that *Buckley* categorically rejects candidate expenditure limits and his conclusion that a remand was completely unnecessary. App. 323a, 328a. The dissenting judges were unusually critical of the majority's decision to ignore *Buckley*'s holding and to "provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject." App. 341a.

*Related Expenditures.* Plaintiffs had no quarrel below with the basic premise that third party spending which is *actually* coordinated with a candidate can constitutionally be treated as a contribution to that candidate. Such a provision serves to avoid evasion of contribution limits that would otherwise apply. Plaintiffs challenged the presumption contained in § 2809(d), however, because it presumes that certain independent expenditures are coordinated and automatically treats them as expenditures by the candidate, placing the burden on the candidate (or contributor), at their peril, to disprove such treatment. *See* 17 V.S.A. §2809(e) (civil proceedings in state court); §2806 (criminal penalties). App. 7a-9a. The district court upheld the related expenditure provision of § 2809(d) as to contributions, relying on the theory that the presumption of coordination was rebuttable. App. 85a. The district court struck down the provision treating related expenditures as candidate expenditures after deciding that limits on candidate expenditures were *per se* unconstitutional. *Id.*

A majority of the court of appeals found no constitutional problem with the related expenditure provision as applied to contributions, much for the same reason found by the district court. Giving the statutory language a narrow reading, the court reasoned that a candidate could rebut the presumption of coordination in any enforcement proceeding by simply testifying that he or she had not “facilitated,” “solicited,” or “approved” the expense. App. 184a. However, the majority remanded the question of related expenditures as it affects a candidate’s spending limit, because the district court, having held spending limits unconstitutional, had not separately analyzed this issue. App. 168a.

In dissent, Judge Winter would have found § 2809(d) unconstitutional because it places an undue burden on candidates to disprove coordination of independent expenditures under a regime where the costs of defending oneself also counted against the limits. App. 222a-225a. Judge Winter also found the narrowing construction adopted by the majority to be contrary to advice given by Vermont’s Secretary of State, who is charged with administering the law. App. 225a, 308a-312a. As such, the related expenditure provision would work untold mischief and chill much protected political speech by requiring candidates, parties, and supporters to speak and act only at their peril. App. 222a-225a, 289a.

Contribution Limits. The district court upheld the contribution limits as to individuals and political committees, finding that they advanced the State’s interest in preventing corruption or its appearance. App. 52a-62a, 77a-80a. The court struck down the limits as applied to political parties, finding the \$200, \$300 and \$400 amounts to be so low that they would essentially remove political parties from their traditional, historical role in elections. App. 72a-76a (“Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper.”). The court of appeals, relying on *Federal Election Comm’n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 480-482 (2001) (*Colorado II*), felt there was no basis to distinguish between political parties and individuals or other organizations.

App. 177a-181a. Accordingly, the court reversed the district court and upheld the constitutionality of all Act 64's contribution limits. App. 168a-181a.

In so holding, the court again relied on evidence from "average" contributions in prior elections. App. 170a. The court ignored plaintiffs' evidence that such historical averages are constitutionally inapt and would harm many candidates in contested elections. The evidence at trial showed that a significant percentage of legislative candidates would be prevented from running effective campaigns under the \$200 and \$300 limits, and that the governor's race would be significantly impacted by the \$400/every 2-year limit. The limits would have their greatest effect on seriously contested elections, and will harm challengers the most. Although Judge Winter did not dissent from the court's holding on contribution limits, Chief Judge Walker, in his opinion dissenting from the denial of rehearing *en banc*, was especially critical of the court's holding. He characterized the contribution limits as "laughably low... [and when considered in combination with expenditure limits]... are set so low and in such a fashion that only a desire to protect incumbents can explain them." App. 330a-331a. The majority wholly failed to consider the contribution limits in combination with the expenditure limits or to discuss how they are inevitably tied to the State's goal of curbing campaign spending.

The court of appeals similarly overlooked the fact that the district court's finding that limits this low still allowed for effective campaigning was inevitably tied to that court's ruling that the limits on party contributions to candidates were unconstitutional. The district court's order allowed political parties to make larger contributions to candidates and thus moderated, to some extent, the effect of the low individual contribution limits. App. 72a-76a.

### **REASONS FOR GRANTING THE WRIT**

The decision below represents the first federal appellate ruling since *Buckley*, to uphold candidate expenditure limits.

Its reasoning is inconsistent with a core holding in *Buckley*, which was left undisturbed by this Court's more recent holding in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 134 (2003). This case therefore raises issues of obvious national importance. If the constitutional rules governing political campaign financing are now to be changed, the responsibility lies with this Court. That is especially so because the decision below also creates at least two separate circuit conflicts on vital issues of First Amendment law. Finally, the decision below approved contribution limits that are significantly lower than any this Court has ever approved, thus highlighting a continuing ambiguity about the appropriate First Amendment standards to apply in this context.

1. In upholding the candidate expenditure limits imposed by Vermont's campaign finance law, the Second Circuit assumed that the appropriate constitutional measuring stick is whether those limits "drive the sound of a candidate's voice below the level of notice." App. 153a. That text, borrowed from this Court's discussion of contribution limits, has never previously been used by any court to determine the appropriate amount of candidate speech in a political campaign. Nor should it be in a constitutional democracy committed to the principle that "debate on public issues should be uninhibited, robust, and wide-open..." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

Under this Court's jurisprudence, contribution limits are justified by the State's compelling interest in avoiding corruption or the appearance of corruption. Once contribution limits are set at a suitable level, however, that interest is fully satisfied. Acknowledging that fact, the Second Circuit instead purported to justify Vermont's expenditure limits on the basis of an all encompassing definition of corruption attributed to unlimited campaign spending, and noted that the limits would relieve political candidates from the burden of excessive fundraising and provide incumbents with more time to focus on their official duties. Aside from the irony that the burden of political fundraising in Vermont has been most significantly

enhanced by the unreasonably low contribution limits set by the legislature, the First Amendment does not permit the State to decide how much speech is enough for either candidates or voters. A remand should not be required to reaffirm this essential First Amendment value.

2. Because the decision below departs so dramatically from *Buckley*, it is not surprising that it also creates a direct conflict with at least two other circuit courts. Specifically, both the Sixth and the Tenth Circuits have held that, unless and until *Buckley* is overruled, it stands as a bar to the type of spending limits upheld by the Second Circuit in this case. *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004). In contrast to the Second Circuit, the Sixth and Tenth Circuits have each concluded as a matter of law that expenditure limits cannot be upheld under *Buckley* on the basis of the public's dissatisfaction with the electoral process or the demands on candidate time attributed to the increased need for fundraising. Only this Court can resolve that dispute.

3. The Second Circuit decision raises a separate conflict in the lower courts about the permissible use of statutory presumptions to automatically treat independent expenditures as contributions to – and expenditures by – a candidate. Although that issue was partially resolved in *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996) (“*Colorado I*”), the Courts of Appeal are in conflict over whether the holding in that case can be avoided if the presumption is not strictly conclusive. The court below upheld Vermont's related expenditure provision – that automatically categorizes certain political party and political committee expenditures as coordinated – as a means of avoiding evasion of the State's contribution and expenditure limits. The court distinguished this Court's decision in *Colorado I* because the statute contains a provision that allows the party or candidate to rebut the presumption of coordination in any adversarial proceeding subsequently brought. However,

in *Iowa Right to Life Committee, Inc v. Williams*, 187 F.3d 963 (8th Cir. 1999), the court struck down a far less onerous disclosure statute that automatically attributed independent expenditures to candidates unless the candidate filed a statement disavowing any affiliation with the expenditure. The decision below is thus in direct conflict with the Eighth Circuit in *Williams* as to the application of *Colorado I* to presumptions of coordination.

4. The State of Vermont has also exceeded the bounds of permissible regulation of campaign contributions. The State's contribution limits are the lowest and most oppressive in the country. They arbitrarily apply on a per cycle basis and apply equally to political parties and political committees. One of the principal functions of these quintessential political organizations is to aggregate small contributions in order to finance candidates of their choice. These organizations are effectively and unnecessarily shut out of the electoral process, especially when the limits are considered in tandem with the related expenditure provision discussed above. The limits are especially onerous because all state and local political parties are considered a single entity for purposes of the statute.

The Second Circuit misread this Court's decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 as giving governments the green light to establish contribution limits at minimal – even nominal – levels so long as they allow for “effective advocacy.” That misstates the standard by half. To be valid, the limits must first be “closely drawn” to match the State's interest in preventing corruption or its appearance. *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 162 (2003). The Vermont limits do not meet that standard because they were primarily adopted to correspond to expenditure limits that are themselves constitutionally suspect and unquestionably low. As a result, the contribution limits are set at unrealistic levels that will choke off many healthy sources of campaign funds from a candidate's supporters, including from the very same political organizations that have historically provided financing for candidates. Moreover, the adoption of limits on a

per cycle basis will arbitrarily favor some candidates, particularly incumbents, over others. The decision below opens the door to unrestrained control over how political campaigns are financed and the role of political parties and committees. The Court should intervene to provide further guidance in this critical area of the electoral process.

**I. This Case Raises Important Issues of National Significance Concerning the Scope of Permissible Regulation of Candidate Expenditures**

Where core First Amendment principles are at stake, courts must bring a healthy skepticism to claims that candidates and non-candidates spend too much time and money on the political process. *Buckley*, 424 U.S. 1. The central holding in *Buckley* is that while it is permissible to limit campaign contributions, spending money on one's own speech must be permitted. Despite changes in the composition of the Court, that holding has stood the test of time. *See Colorado II*, 533 U.S. at 441.

Because expenditure limitations necessarily restrict political expression at the core of the electoral process and the First Amendment, they can survive a constitutional attack only if justified by a compelling State interest, *Colorado I*, 518 U.S. at 609; *Federal Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 251-52 (1986), and narrowly tailored to serve that interest, *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985). Conversely, limits on contributions have been treated as a less direct restraint on speech and subject to less exacting scrutiny. *See Shrink*, 528 U.S. at 378 (regulation of contributions must be "closely drawn to match a sufficiently important interest"). The doctrinal distinction between contributions and expenditures was affirmed in *Colorado II*, 533 U.S. at 441-442, and even more recently in *McConnell*, 540 U.S. at 134.

The basis for the distinction between expenditures and contributions was set forth in *Buckley*. "[R]estriction[s] on the amount of money a person or group can spend on political

communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” 424 U.S. at 19. The *Buckley* court explained that it was subjecting the Act’s expenditure limitations to “the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.” *Id.* at 44-45. By contrast, the Court wrote in *Buckley*, “[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” *Id.* at 21. Accordingly, contribution limits have come to be analyzed under a somewhat more deferential standard.

After drawing this distinction, the Court held that the danger of actual or perceived *quid pro quo* corruption that flows from a system of unregulated campaign contributions justified reasonable limits on contributions, but that the restrictions on candidate spending and independent expenditures could not be sustained by that interest or any of the other interests that the challenged statute purportedly advanced. Applying the exacting scrutiny that is applicable to government regulation of speech, 424 U.S. at 39, 44-45, the Court rejected the argument that expenditure limits were necessary, (1) to prevent corruption of candidates, or the appearance of corruption; (2) to reign in spiraling campaign costs; or (3) to “level the playing field.” *Id.* at 39-57.

The Court’s post-*Buckley* cases have adhered to the view that restrictions on candidate spending or independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and represent substantial, direct restraints on the quantity and diversity of political speech. For this reason, the Court’s post-*Buckley* cases have consistently rejected attempts to regulate expenditures under various pretexts that have been asserted to allegedly preserve the integrity of the electoral process. See *Colorado I*, 518 U.S. at 615-19 (rejecting attempts to regulate political party expenditures to combat a substantial danger of corruption to the electoral system since lack of coordination

between the party and candidate precluded the type of *quid pro quo* corruption thus far identified as the only justification sufficient to impose expenditure limits and despite purported danger of unlimited party spending); *National Conservative PAC*, 470 U.S. at 491-97 (political committee expenditures); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down restriction on corporate expenditures to influence ballot measure).<sup>5</sup>

The panel opinion in this case departs from almost thirty years of Supreme Court precedent, and introduces an element of uncertainty into the regulation of campaign finance at a time when state and local governments are comprehensively re-examining the issue for the first time since *Buckley* was decided.

Even assuming that it is theoretically possible to justify some form of spending limits through the enactment of a law that is narrowly tailored to serve a compelling government interest, it is up to this Court to establish the constitutional boundaries of such regulation in an area that touches so directly on fundamental First Amendment freedoms.

The Second Circuit attempted to avoid the precedential import of *Buckley* by redefining the State's anti-corruption rationale in terms of public cynicism and the corrosive effects on the electoral process attributed to the need to raise campaign funds. The court asserted that *Buckley* had not fully considered this issue or the subsidiary issue of whether an expenditure law could be justified by the State's alleged interest in reducing the time spent on fundraising.

In fact, *Buckley* speaks much more directly to these issues than the Second Circuit acknowledged. The *Buckley* Court categorically rejected the argument that the spending of money legally raised by candidates poses a risk of *quid pro quo* corruption. 424 U.S. at 55-56. For this reason, the Second Circuit expressed serious doubt whether the State's anti-

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<sup>5</sup> The only exception thus far upheld by the Court for regulation of political expenditures involved political expenditures by corporations and labor unions. See *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell*, *supra*.

corruption interest is sufficient *by itself*. App. 135a. Despite its reservations, the court relied on this interest anyway by linking it with the State’s separate interest in freeing candidates from the demands of fundraising attributable to the drive for campaign funds. It is doubtful, however, that that interest is sufficient to satisfy *Buckley*, or even that it is distinct from the broader interest rejected in *Buckley* of controlling the costs of campaigns. Addressing arguments very similar to those raised here, the Court held that the interest in “reducing the allegedly skyrocketing costs of political campaigns” is not compelling or sufficient enough to justify restrictions on campaign spending. *Buckley*, 424 U.S. at 57.

[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for government restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign.

*Id.* (footnote omitted). See also *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (rejecting attempt to shape views of political party in an effort to bring party more to the center).<sup>6</sup> If

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<sup>6</sup> The prediction that spending limits will necessarily reduce the amount of time that candidates spend raising money is misguided. The expenditure limits have been adopted in tandem with the lowest contribution limits in the country. The majority below recognized that such low contribution limits would actually require candidates to spend more time fundraising, thus in a circular way justifying the Act’s low spending limits as well. App. 150a-151a. In his dissent

that rule of law is now to be changed, it can only be done by this Court. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).<sup>7</sup>

Even if the *new* form of corruption relied upon below is distinct from the interests considered in *Buckley*, the court below compounded its error by unnecessarily remanding the case to determine whether the expenditure limits adopted by the legislature were narrowly tailored to serve those interests. *Buckley* has already established that spending limits are not the least restrictive means of advancing the State's interest in preventing corruption or its appearance. *Buckley*, 424 U.S. at 58-59. In reaching this conclusion, the Court considered a number of factors that apply equally in this case.

First, the government's interest was largely alleviated by the Act's contribution limits and disclosure requirements. *Id.* Vermont's contribution limits are the lowest in the country, and its disclosure laws are some of the strictest. The panel gives short shrift to this evidence and in effect concludes that the judgment made in *Buckley* about the efficacy of those less restrictive measures was wrong.

Second, *Buckley* specifically relied on data showing expenditure ceilings would have resulted in a reduction in the scope and spending of a number of House and Senate campaigns and substantially limited the overall expenditures of the two major party presidential candidates. *Id.* at 20 n. 21, 55 n. 62. The record in this case shows that the expenditure limits would have had at least as significant an impact in both legislative and statewide elections as the evidence established in *Buckley*. As emphasized in Judge Winter's dissent, the website for the Vermont Secretary of State shows very plainly that candidate expenditures have far exceeded the expenditure limits in the three state-wide elections that have been held since

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from denial of rehearing en banc, Chief Judge Walker recognized that a statute cannot be justified "based on problems that the statute itself creates." App. 331a.

<sup>7</sup> The assertion that expenditure limits will spare candidates the burden of fundraising does not apply to candidates who spend their own money. Rather, the principal rationale for limiting their expenditures seems to be a desire to "level the playing field." *Buckley* rejected this interest as justification for spending limits on the candidate's use of his or her own funds. 424 U.S. at 52-54.

the law was first enacted. App. 235a-240a.<sup>8</sup> Petitioners do not believe that “effective advocacy” is or should be the governing standard for expenditure limits, but the expenditure limits adopted by Vermont and approved by the Second Circuit fail to reach even this minimal threshold for key competitive races.

The problem with Vermont’s expenditure limits is exacerbated by the fact that the limits are adopted on a *per two-year cycle* basis. This approach fails to account for the cost of a contested primary, or worse, a candidate who spent up to his limit during the primary and who must face in the general election an opponent, especially an incumbent, who faced no primary opponent. Witnesses from both the Democratic and Republican parties testified that this provision may affect who runs in certain elections by creating incentives to avoid contested primaries. Finally, Vermont’s limits have to be understood in the context of the broad definition of “expenditure” and the related expenditure provision contained in 17 V.S.A. § 2809(a)-(d).<sup>9</sup> The related expenditure provision not only counts third party expenditures that are *in fact* coordinated towards the candidate’s expenditure ceiling, but also presumptively treats political party and political committee expenditures as contributions to the candidate and as candidate expenditures. App. 8a-9a. The presumption attaches if the expenditure benefits six or fewer candidates. Even though the candidate has no control over these expenditures, they count

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<sup>8</sup> Although the district court enjoined enforcement of the expenditure limits, it adopted defendants’ data showing how the limits would have effected previous elections in Vermont based on historical spending patterns. The court’s finding focused only on average spending for legislative and statewide office. App. 235a-240a. The Court made no attempt to isolate or measure the impact of the limits on elections that were competitive or considered “in-play”. App. 239a-240a. The cost of these elections deviates from the average considerably. In the last two gubernatorial elections in Vermont, the major party candidates reported expenditures in amounts that were double or almost triple Act 64’s limits. App. 239a. Moreover, even a third party candidate for Governor exceeded the limits in the 2000 election. *Id.*

<sup>9</sup> Candidate spending is defined to include “anything of value,” including a candidate’s use of the family car or home phone, donated professional services, the value of favorable press coverage and the costs of complying with the law. App. 211a, 225a-226a.

toward his or her spending ceiling. As such, the historical averages relied on by both the district court and the court of appeals grossly understate the true level of candidate “spending” as defined by Act 64. App. 233a-240a.

Above all else, the Court concluded in *Buckley* that “the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy” whether the source of his money is personal wealth or funds raised from legal contributions. *Buckley*, 424 U.S. at 54. The Court of Appeals’ decision erroneously proceeds on the assumption that First Amendment protections for campaign speech have been watered down and that the judgments made in *Buckley* are no longer valid. Just the opposite is true. The Court’s campaign finance jurisprudence on this issue has been remarkably constant and has unfailingly affirmed the holding in *Buckley*. The State is obviously dissatisfied with *Buckley*. Its quarrel is with this Court, however. Only this Court can provide the relief the State seeks.

## **II. The Second Circuit Decision Upholding Candidate Expenditure Limits and Upholding the Regulation of Independent Expenditures by Political Parties and Committees Is in Conflict with the Decisions of Other Courts of Appeals**

### **A. The Circuit Conflict Involving Limits on Candidate Expenditures**

Not surprisingly, the Second Circuit decision stands in direct conflict with recent decisions of the Sixth and Tenth Circuits. On the strength of the holding in *Buckley*, both courts categorically rejected the imposition of expenditure limits and the main arguments advanced by the State and adopted by panel below. See *Kruse*, 142 F.3d 907; *Homans*, 366 F.3d 900.

In *Kruse*, the court held that the erosion of public trust attributed to unlimited campaign spending cannot be severed as a ‘new’ form of corruption that the Supreme Court has not considered. *Kruse*, 142 F.3d at 916. The court held that any

problems that flow from unlimited candidate spending are an outgrowth of the problems of actual or perceived corruption and the inequalities of private economic power rejected in *Buckley*, and therefore cannot provide separate justification for expenditure limits. *Id.* In contrast to the Second Circuit, the Sixth Circuit assumed that this Court had these considerations in mind when it observed, in *Buckley*, that “no governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by the ceiling on campaign expenditures.” *Kruse*, 142 F.3d at 916.<sup>10</sup> *See Suster v. Marshall*, 149 F.3d 523, 532 (6th Cir. 1998) (expenditure limits imposed on judicial candidates could not be justified by State’s interest in reducing the influence of otherwise lawful campaign contributions on judicial decisions). *See also, New Hampshire Right to Life Comm. v. Gardner*, 99 F.3d 8, 10-19 (1st Cir. 1996) (rejecting argument that independent expenditure limits could be justified by corrosive effect of money on the electoral process).

The Sixth Circuit in *Kruse* also rejected the contention that expenditure limits are needed to reduce the amount of time candidates spend raising money, and relatedly, to achieve the broader objective of “combating the demonstrated corrosive effects on the democratic process of uncontrollable campaign spending.” 142 F.3d at 916. The Court reasoned that to the extent *Buckley* did not already foreclose the argument:

The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns ... [B]ecause the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an

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<sup>10</sup> While not separately addressed by the Supreme Court, one of the interests specifically advanced by the government in *Buckley* was the “alienation from and disillusionment in the election process by this country’s citizens.” *Kruse*, 142 F.3d at 916 (quoting from the Court of Appeals decision in *Buckley v. Valeo*, 519 F.2d 821, 913 (D.C. Cir. 1975)).

officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

*Id.* at 916-917.

The panel decision below also conflicts with the decision of the Tenth Circuit Court of Appeals in *Homans v. City of Albuquerque, supra*. In *Homans*, spending limits were defended on the grounds that they were necessary to deter corruption, including the circumvention of contribution limits, and to free candidates from the demands of raising unlimited campaign funds. The court rejected the argument that the constitutionality of spending limits remains an open question to be determined by the facts of each case. The court held that “under *Buckley*, such restrictions cannot be supported as a matter of law.” *Homans*, 366 F.3d at 914. In addition, the Tenth Circuit held that “prevention of corruption ... was specifically rejected by *Buckley* as a sufficient reason to limit direct campaign spending,” and that the proffered interest of relieving elected officials of the demands of fundraising was “neither new nor compelling, nor are the spending caps tailored narrowly to serve them.” *Id.* at 914.<sup>11</sup>

### **B. The Circuit Conflict Involving the Regulation of Independent Expenditures by Political Parties and Committees**

Not content to limit candidates' own spending, Act 64 also seeks to encompass many independent expenditures within its spending and contribution limits. Pursuant to 17 V.S.A. 2809(d), expenditures by political parties or political committees that benefit six or fewer candidates are automatically treated as “related expenditures” and count toward the organization’s contribution limits as well as the candidate’s expenditure limit. App. 9a. The statutory

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<sup>11</sup> Although Judge Tymkovich’s opinion is styled as a concurrence, it was joined by Judge O’Brien and therefore constituted the majority opinion with regard to the substantive constitutional analysis of the spending limits at issue. *Homans*, 366 F.3d at 902, 914 n. 1.

presumption is not strictly conclusive and leaves open the possibility of showing that the expenditure was, in fact, *not* coordinated. Nevertheless, political organizations that spend as little as \$200-\$400 on completely independent expenditures act at their own peril if they spend (or contribute) an additional amount on behalf of a legislative or gubernatorial candidate.

Because of the constitutional difference between independent expenditures and “contributions,” it is not constitutionally permissible for the State of Vermont to presume that the former is the latter by counting them as contributions. *Colorado I, supra*. The panel below distinguished that decision because of the availability of an affirmative defense allowing for rebuttal. The court upheld the related expenditure provision because it serves to prevent avoidance of the contribution limits – even though it cited no evidence that spending by political parties and political committees has been used in this fashion in Vermont. App. 183a-184a. The holding directly conflicts with the decision reached by the Eight Circuit Court of Appeals. *Iowa Right to Life Committee, Inc. v. Williams*, 187 F. 3d 963.

In *Williams* the court invalidated a disclosure statute that required candidates to file a statement within 72 hours disavowing any independent expenditure made on their behalf. If the candidate did nothing the expenditure was automatically presumed to be approved by candidate and treated as an expenditure by the candidate for purposes of disclosure. Relying on *Colorado I*, the court first observed that “simply calling an independent expenditure a ‘coordinated expenditure,’ or presuming such, cannot make it so.” *Id.* at 967-68. The court then held that the fact that the candidate can disavow that the expenditure was coordinated or made without his knowledge does not cure the constitutional objection because an entirely independent expenditure is automatically presumed to be a coordinated expenditure. *Id.* at 967. The court held that the presumption “eliminat[es] the independent nature of the speech and thus diminish[es] its value.” *Id.* In view of the provision’s presumptive treatment of independent expenditures as coordinated, and absent any evidence that the statute is

necessary to combat corruption, the court concluded that the statute was not narrowly tailored to serve that interest. *Id.* at 968.

The Vermont statute is significantly more restrictive than the disclosure statute considered in *Williams* because it places a direct restraint on speech by automatically counting independent expenditures as contributions and expenditures for purposes of the limits. The court's analysis below is limited to its determination that the statute does little more than regulate coordinated expenditures and upholds it on the strength of this Court's decision in *Colorado II*. The panel does not even undertake the careful First Amendment analysis required to determine if the related expenditure provision is narrowly tailored to advance the State's interest.

The opinion acknowledges that "accused" candidates and political parties may be required to testify in an adversarial proceeding to rebut the presumption. App. 183a-184a. The court fails, however, to even discuss how the related expenditure provision burdens First Amendment rights or how the cost of defense would erode a candidate's available spending limit. App. 226a. The effect of the statutory presumption is that political organizations and candidates must act at their own peril when engaging in lawful campaign spending. A political party that independently sends out a mailing endorsing its candidate for Governor, and costing a modest \$500, will have exceeded the allowable contribution limit and be completely foreclosed from making any additional expenditures or direct contributions. Moreover, both the party and the benefiting candidate are presumed to have committed a crime under Vermont law. The statute works to make all political party and political committee expenditures suspect in the eyes of prosecuting authorities and subject to scrutiny (and perhaps abuse) by overzealous authorities or opponents. The risk of prosecution "hovers over [candidates and political organizations] like the proverbial sword of Damocles" and imposes a heavy burden on political speech. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 881 (1997). Moreover, the Act's presumption that the independent expenditures of

political parties and committees are coordinated is by definition not narrowly tailored since the statute's purpose is already served adequately by the same statutory provision that properly treats *coordinated* expenditures as contributions. 17 V.S.A. § 2809(c). App. 8a. More importantly, the opportunity to rebut the presumption does not constitute the sort of narrow tailoring that would save an otherwise unconstitutional statute, particularly in the absence of any evidence of improper coordination. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. at 881.

Vermont is attempting to do indirectly what is clearly prohibited from doing directly – curtail expenditures made totally independently of the candidate and his campaign. The majority opinion brushes aside this claim and the related allegation that the law will "chill" political organizations from engaging in protected speech. Individuals and organizations wishing to engage in expenditures may be reluctant to do so knowing that if they cannot successfully rebut the presumption, they will have violated the state's campaign finance laws and be subject to criminal prosecution. When political organizations and candidates are challenged under section 2809, they will be required to spend their limited resources in court. *See Massachusetts Citizens for Life*, 479 U.S. 238. These resources, of course, are counted against the organization's contribution limits and the candidate's expenditure limits. Moreover, for all the reasons advanced in Judge Winter's dissenting opinion, the related expenditure provision is fraught with vagueness, uncertainty, and the potential for untold mischief. App. 223a-226a. In the final analysis, the failure to respond to these failings in the law ignores the important First Amendment freedoms that this statute jeopardizes.

### **III. This Case Raises Important Issues of National Significance Concerning the Scope of Permissible Regulation of Campaign Contributions**

The framework for evaluating contribution limits requires the State to demonstrate that the restriction is "closely

drawn to match a sufficiently important interest.” *Shrink*, 528 U.S. at 387-388. This standard requires two key factual determinations. First of all, a limit can be valid only if it is closely drawn to serve a compelling state interest in combating “the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt.” *Id.* at 389-395. Secondly, the limit must not be so low that it prevents candidates from amassing the resources needed for effective advocacy. *Id.* at 397.

Unlike contribution limits that have been upheld elsewhere, Vermont’s were adopted in combination with an overly zealous legislative attempt to impose mandatory spending limits on candidates. As a result, the contribution limits are established at levels that directly correspond to expenditure limits which themselves are unrealistically low. In an opinion dissenting from the denial of rehearing *en banc*, Chief Judge Walker characterizes the contribution limits as “laughably low... [and when considered in combination with expenditure limits]... are set so low and in such a fashion that only a desire to protect incumbents can explain them.” App. at 330a-331a. Some candidates are limited to as little as \$200 from any contributor for an entire two-year election cycle – even the candidate’s political party, meaning that a contributor who gives her favorite candidate \$200 in a hotly contested primary is prohibited from providing any new assistance to the candidate in the general election. Even gubernatorial candidates can accept only \$400 every two years. Contributions from political parties are restricted still further as all the state, county, and town committees of a political party are treated as a single entity. Hence, the entire Republican, Democratic, or Libertarian Parties of Vermont, with all their local committees, may only give \$400 each to their gubernatorial nominee.

The record does not disclose any evidence to justify Vermont’s exceedingly low contribution limits. The State’s evidence and the district court’s findings are extremely thin, and miss the mark by failing to link the supposed problems with large contributions. While the State need not show money

for vote chicanery, it must at least make a case arising from the broader interest in the “threat [of] politicians too compliant with the wishes of large contributors.” *Shrink*, 528 U.S. at 389. No such case was made here. The legislative findings and trial testimony relied upon by the State loudly bemoan the evils of large contributions and the public’s suspicion of them, but very few examples are provided. Most incidents involved contributions that were low enough to have been permitted by these new limits. Despite having compiled extensive contribution data covering three election cycles, the State never identified the phantom contributors allegedly poisoning the system with large contributions – much less established a pattern or practice of corrosive large contributions.

The record amply demonstrates that these limits would radically reduce the funding of political campaigns. By setting its limits so low and applying them so broadly, Vermont makes it difficult for many candidates to raise necessary finances. By treating political parties and PACs as if they were individual contributors, moreover, the limits trample the weightier associational interests at stake when restricting the rights of individuals who come together for a common purpose. Instead of reigning in the special interests and industry groups that the public is concerned with, Vermont has taken a sledge hammer to the problem that will choke off “clean” money from the very sources that pose little or no risk of corruption and of which the public is far less suspicious. Nowhere will the impact be harder felt than in those elections where the candidate relies on these contributions for “seed money” to jumpstart his or her campaign or for a last hour infusion of cash in a close election where an additional mailing or media spot might make the difference. Political parties and House/Senate election committees uniquely fill this void. There is simply no justification for all but shutting these organizations from the process.

The panel opinion ignores this evidence and instead relies on the District Court findings that the reduced limits will not impede the ability of the “average” candidate to amass the funds necessary to finance his or her campaign. App. 169a-

171a. As plaintiffs have emphasized throughout, the profile of the average candidate relied upon by the State and endorsed by the lower court includes the dozens of candidates who raised little money because they ran unopposed or faced nominal opposition. Relying on the contributions made to these candidates skews the average, and masks the severe impact upon the candidates who actually need to communicate with their constituents. It is the competitive candidacies that are most affected by these limits, and these are the ones where a full debate of the issues is most critical. Each year, a handful of competitive elections determine the balance of power in the legislature.

Thus, while the limits may not effect all elections in all districts, it is hard to argue that the limits will not seriously impact candidates in statewide races and many House and Senate elections. The limits will seriously hamper candidates with contested primaries, and may change political behavior drastically by affecting who runs for office in a given year. The costs of television, radio and newspaper advertising have increased the expense of running an effective campaign and, Defendant's vision of Vermont politics -- that of "old fashioned", grassroots campaign methods -- may be enticing, but such vision cannot be legally imposed on all candidates. Vermont's new limits prevent candidates from "amassing the resources necessary for effective advocacy," *Buckley*, 424 U.S. at 21, and undermine "the potential for robust and effective discussion of candidates and campaign issues . . ." *Id.* at 29.

### CONCLUSION

For the reasons stated above, the Court should grant *certiorari*.

Respectfully Submitted,

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