

No. 04-1530

In The
Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, ET AL., *Petitioners*,

v.

WILLIAM SORRELL, ET AL., *Respondents*.

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

REPLY BRIEF FOR PETITIONERS

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June 23, 2005

Despite the fact that this Court has warned that contribution limits that are too low are unconstitutional, the Second Circuit upheld Vermont's extraordinarily low contribution limits of \$200-\$400 per election cycle. That holding conflicts with the decisions of other circuit courts striking down comparable limits. Because of the conflict with the other circuits and with this Court, review of the contribution limits is warranted. In addition, the Act's presumption of coordination conflicts with the decisions of the other circuits and with this Court and certiorari as to this issue should be granted. Finally, all of the parties agree that certiorari should be granted to review whether the Act's expenditure limits are unconstitutional, so no further comment on this issue is warranted. Act 64 is a comprehensive campaign finance scheme and the limits on contributions and expenditures should be reviewed together.

1. Contrary to State's Contention, There Is A Conflict Regarding Contribution Limits Among the Circuits.

The State misstates the contribution issue by arguing that "[t]he Petitioners concede that there is no split among the circuits on the question of whether limits on contributions to candidates may be upheld under the First Amendment," but only ask the Court to "clarify" the law. Sorrell Br. in Opp. 25.¹ It is well-settled that contribution limits *may* be upheld by the courts, and there is no disagreement among the circuits regarding this broad concept. This is not the question presented. The question presented asks whether Vermont's \$200-\$400 contribution limits violate the First Amendment *because they are unconstitutionally low*. Pet. i.

This Court has explained that not all contribution limits will be upheld. Rather, contribution limits must be set at a level that prohibits only large contributions and allows for effective advocacy,

¹ Refers to Response and Partial Opposition to Petitions for Writs of Certiorari filed by Sorrell, *et al.*, joined by Vermont Public Interest Research Group, Inc., *et al.* in the arguments regarding contribution limits.

and it is upon this standard that there is conflict among the circuits. Respondents, missing the point, state “[t]here is nothing unclear about the applicable standard for evaluating contribution limits.” Sorrell Br. in Opp. 26. This Court has set forth the standard; the issue arises because some courts have heeded this Court’s admonition that contribution limits can be too low to be constitutional while others appear willing to uphold limits regardless of their amount or the effects they have on campaigning.

In addition to misstating the issue by framing it in a manner far too broad, Respondents claim that there is no conflict among the circuits, because “[a]ll of the courts considering limits on contributions to campaigns since this Court’s decision in *Shrink* have upheld the limits.” Sorrell Br. in Opp. 26 (referring to *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000)). Respondents have merely provided a reason for the conflict. The circuit courts, since *Shrink*, have read *Shrink* as permitting *all* contribution limits, irrespective of their size, which conflicts with those circuits that have found some contribution limits to be unconstitutionally low.

Respondents cite the Ninth Circuit’s decision in *Montana Right to Life Ass’n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003) in an attempt to bolster their claim that there is no conflict between the Ninth and Second Circuits. In that case, the Ninth Circuit upheld Montana’s contribution limits of \$400, \$200, and \$100 *per election*. Those amounts were *doubled* when the candidate participated in a contested primary, making the limits for those candidates \$800, \$400, and \$200 per election cycle. In addition, the court pointed out that while the legislation at issue decreased contributions from PACs and individuals, it allowed for substantial contributions to candidates from political parties, in the amounts of \$15,000, \$5,000, \$2,000, \$800, and \$500, depending on the office. *Id.* at 1094. Thus, the *Eddleman* decision is entirely consistent with the Ninth Circuit’s decision in *California ProLife Council PAC v. Scully*, 989 F. Supp. 1282 (E.D. Calif. 1998), *aff’d*, 164 F.3d 1189 (9th Cir. 1999), which upheld a preliminary injunction enjoining

contribution limits because the limits were too low to be considered narrowly tailored. The Ninth Circuit has struck down contribution limits as too low and has only upheld limits significantly higher than Vermont's. Hence, there is a conflict between the decisions of the Ninth and Second Circuits, and review should be granted.

Respondents also cite *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000) for the proposition that there is no longer a conflict between the Eighth and Second Circuits. Sorrell Br. in Opp. 27. The Eighth Circuit, on remand from the Supreme Court, upheld Missouri's contribution limits of \$1,075, \$525, and \$275. *Adams*, 204 F.3d at 842. However, those limits were *per election* and, when doubled, were \$2,150, \$1,050, and \$550 per election cycle. Moreover, the contribution limits provided for an inflation adjustment provision, which Act 64 does not include.² Therefore, the Eighth Circuit's decision in *Adams* is consistent with its prior decisions striking down much lower contribution limits. *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995) (invalidating \$100-\$300 per cycle limits); *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998) (enjoining \$100-\$300 per election limits). The Eighth Circuit has struck down limits comparable to those of Act 64, and has only upheld contribution limits that were substantially higher than Vermont's. Thus, there is a conflict between the Eighth and Second Circuits.

Respondents state that since there are only one and a half months between the primary and general elections in Vermont, they "practically blend together" and "the need for a separate limit for primary election contributions" is alleviated. Sorrell Br. in Opp. 27. The District Court explained that the legislature rejected "having two different regulatory regimes for primary and general elections"

² The Vermont bill provides that "The *expenditure* limitations contained in this section shall be adjusted for inflation by increasing them based on the Consumer Price Index." 17 V.S.A. §2805a(e) (emphasis added).

so that candidates could have the freedom to decide how to spend their funds. App. 60a.³ The fact that Vermont has chosen one regulatory scheme for the primary and general elections is irrelevant. What is relevant is that Vermont's limits, unlike those upheld by the Eighth and Ninth Circuits, do not account for the cost of two elections (a primary and a general election).

Respondents also point out that this Court has rejected requests for writs of certiorari in *Eddleman*, *Frank*, and *Alaska*. Sorrell Br. in Opp. 26.⁴ This comes as no surprise since the limits in those cases ranged from \$2,150 to \$400 per election cycle.

2. The Second Circuit's Decision Conflicts With This Court's Warning That Contribution Limits That Are Too Low Are Unconstitutional.

Chief Judge Walker, in his opinion dissenting from the Second Circuit's denial of rehearing *en banc*, described Act 64's contribution limits as "laughably low" and expressed "serious doubts" as to whether they are constitutional. App. 330a-331a. He noted that Vermont's contribution and expenditure limits are "set so low and in such a fashion that only a desire to protect incumbents can explain them." App. 331a. He criticized the Second Circuit panel majority for giving too little deference to *Buckley* and too much deference to Vermont's legislature. *Id.* Even Justice Breyer, he explained, who has proposed giving legislators more freedom to legislate in the campaign finance arena, warned against deferring to lawmakers if that deference risks constitutional evils such as

³ Refers to the Appendix attached to Petition for A Writ of Certiorari filed by Randall, et al.

⁴ *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 47 (2004); *Frank v. City of Akron*, 290 F.3d 813 (6th Cir. 2002), *cert. denied*, 537 U.S. 1160 (2003); *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000).

“permitting incumbents to insulate themselves from effective electoral challenge.” *Id.* (quoting *Shrink*, 528 U.S. at 402 (Breyer, J., concurring)).

Respondents claim that the assertion that Vermont’s contribution limits “violate the principles of *Buckley* and *Shrink* . . . is meritless.” Sorrell Br. in Opp. 28. However, this Court instructed in both *Buckley* and *Shrink* that contribution limits that are too low are unconstitutional. Contribution limits that are so low that they create “a system of suppressed political advocacy” are unconstitutional. *Shrink*, 528 U.S. at 396. Limits that are so low that they “prevent candidates . . . from amassing the resources necessary for effective advocacy” would “impose serious burdens on free speech.” *Buckley v. Valeo*, 424 U.S. 1, 21 (1976). Without a doubt, there is merit in inquiring whether Vermont has set limits so low as to be unconstitutional.

The record is replete with evidence that Act 64’s contribution limits are too low to permit effective campaigning. George McNeill, a fundraising and candidate recruitment consultant for the Republican Legislative Election Committee, testified that many candidates in Vermont state senate and house races in 1998 would have been unable to run effective campaigns under Act 64’s contribution limits. Tr. II-73-101.⁵ He testified that of the twenty-one house races targeted by the Republican party, nineteen would not have been able to run effective campaigns under the Act. Tr. II-99. Of the fourteen targeted senate races, ten would have been unable to run effective campaigns under the Act’s contribution limits. *Id.* For example, Gerald Morrissey would have lost one-quarter of his contributions revenue under the Act’s limits, and could not have effectively campaigned for state senate because he had to overcome an “entrenched senator.” Tr. II-76. A candidate for Chittenden County senate, Dennis Delaney, would have been

⁵ Refers to Trial Transcript.

unable to mount an effective campaign under the Act's contribution limits because Chittenden County is the largest county in Vermont and the expenses are much higher than in other races. Tr. II-80. Ruth Harvie could not have effectively campaigned for the state senate under the limits because advertising for mass media in her district is expensive and "[y]ou have to spend a lot of money on small, individual newspapers." Tr. II-84-85. Joseph Tully, a "relative newcomer" would have been unable to "get the name recognition and the issue recognition that he was able to get" under the Act's limits. Tr. II-87-88. Patricia Welch, who had "been out of the political scene for five to six years" would have been prevented from acquiring the name recognition necessary for an effective campaign under Act 64's contribution limits. Tr. II-89. "When you are running for a senate race, you really have to rely on mass media to get your name, your issues and your face out there." *Id.* Harvey Smith could not have effectively campaigned under the Act. In his district, to get full coverage he would have to advertise in more than one newspaper and on two or three radio stations. Tr. II-91. "You can't advertise on just one [radio station] because you just don't get the coverage." *Id.* If \$2000 had been removed from David Brown's campaign funds under the Act's contribution limits, "you would have been taking advertising, whether in the newspapers, TV or lawn signs. . . [or] walking banners. . . you couldn't have run an effective campaign against someone of [the incumbent's] stature with this kind of money." Tr. II-92. McNeill testified that he did not believe that the contributions in those races that would have been lost under Act 64's limits could have been replaced. Tr. II-99-100.

McNeill testified that Act 64 has harmed the ability to recruit candidates to run for office. He explained that prospective candidates, after being invited to the statehouse and having Act 64 explained to them, told him, "I have decided not to do this. This is too complicated. I don't think I can raise the money to do this." Tr. II-65. Act 64's limits not only prevent effective campaigning by candidates, they also have a chilling effect on individuals deciding whether to run for office.

William Meub, who has run for governor and state senate in Vermont, testified that the \$400 contribution limit to gubernatorial candidates would prohibit him from amassing the resources he needed to mount an effective campaign. Tr. IV-36. He also observed that the contribution limits drain candidates' time, making it difficult to campaign. "What you have done [by imposing the \$400 limit] is you have required an increased amount of time fundraising, at much lower levels, so that the candidate really can't be effectively out there campaigning. . . ." *Id.* Meub further testified that the contribution limits are "a huge disadvantage" for challengers because they limit the acquisition of seed money from close friends. Tr. IV-40.

Sharon Toborg, treasurer of the Vermont Right to Life Political Committee and the Vermont Right to Life Fund for Independent Political Expenditures, testified that the organization would no longer be permitted to give candidates a mailing list if the value of the list exceeded the contribution limits. Tr. IV-140. The District Court expressed concern that the contribution limits would prevent parties from contributing mailing lists to candidates. "I raise an obvious concern because the political parties have traditionally done this. . . I would like you to think about, address that particular issue, because essentially if you literally apply Act 64 to those lists, there's no way that a political party could ever share names of supporters with their candidates." Tr. IV-142-143. Such lists are an important way to communicate a candidate's message to voters and to obtain donations necessary to run an effective campaign.

Review of this constitutional question, in light of the conflict among the circuits and the conflict with this Court, should be granted.

3. Act 64 Is A Comprehensive Campaign Finance Scheme and Its Interrelated Contribution and Expenditure Limits Should Be Reviewed Together.

The Second Circuit described Act 64 as a "comprehensive

campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections.” App. 98a. The Act’s provisions were drafted to work together in regulating Vermont’s campaign finances. This Court in *Buckley*, in its discussion as to whether the contribution limits at issue discriminated against non-incumbents, stated that the “overall effect of the contribution and expenditure limitations . . . could foreclose any fair opportunity of a successful challenge.” *Buckley*, 424 U.S. at 31 n.33. This Court did not express an opinion regarding the effects “resulting from the full sweep of the legislation as enacted” only because it struck down the expenditure limits, making such an analysis unnecessary. *Id.* As in *Buckley*, Vermont’s Act 64 is “comprehensive reform legislation,” *id.* at 7, and should be considered by this Court as a whole.

The contribution limits should also be reviewed because the expenditure limits were enacted, in part, as the legislative antidote to the time problem caused by the Act’s extraordinarily low contribution limits. As Chief Justice Walker noted, the Second Circuit has “given its blessing to circular, self-justifying legislation.” App. 330a. “[T]he Vermont law’s contribution limits increase demands on candidates’ time, and the expenditure limits are then justified on the basis of time pressures that the law itself has intensified.” *Id.* at 331a.

4. This Court Should Grant Review of Act 64’s Presumption of Coordination.

Respondents deny that there is a conflict between the Second and Eighth Circuits in regard to the presumption of coordination. They argue that the Eighth Circuit’s decision in *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999), striking down a presumption of coordination, does not conflict with the Second Circuit’s decision upholding such a presumption. Respondents attempt to distinguish the cases, characterizing the provisions as “very different” and the Iowa statute as “far more

burdensome.” VPIRG Br. in Opp. 28.⁶ Respondents insist that Act 64’s presumption “places no burden on a candidate to take any particular action in response to an independent expenditure.” VPIRG Br. in Opp. 29. Respondents are incorrect that candidates suffer no burden under this provision. Candidates are forced, upon an enforcement action or lawsuit filed by an opponent, to attempt to repudiate that an expenditure was made on their behalf, even though there is absolutely no evidence of control, cooperation, or prearrangement by the candidate. This places a severe burden on candidates, draining their time and limited campaign funds (especially in light of the Act’s expenditure limits), and chilling what should be protected speech. The Second Circuit’s decision upholding this presumption directly conflicts with the Eighth and First Circuits and with this Court’s decisions requiring some showing of control, cooperation, or prearrangement with a candidate before an expenditure may be treated as coordinated with the candidate’s campaign.

CONCLUSION

This Court should grant certiorari for all three of the questions presented.

⁶ Refers to Respondent-Intervenors’ Brief In Response And Partial Opposition To Petitions For Writs of Certiorari filed by Vermont Public Interest Research Group, Inc., *et al.*, joined by Sorrell, *et al.* in the arguments regarding Act 64’s presumption.

10

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