

Nos. 04-1528 et al.

IN THE
Supreme Court of the United States

NEIL RANDALL *et al.*,
Petitioners/Cross-Respondents,

v.

WILLIAM H. SORRELL *et al.*,
Respondents/Cross-Petitioners.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

**BRIEF OF
UNITED STATES SENATOR MITCH McCONNELL
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether Vermont's limits on candidate expenditures and campaign contributions are unconstitutional infringements on essential First Amendment freedoms.

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**BRIEF OF
UNITED STATES SENATOR MITCH McCONNELL
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS**

INTEREST OF *AMICUS CURIAE*¹

The question presented in this case is whether the First Amendment prohibits Vermont from placing severe restrictions on candidate expenditures and campaign contributions. The First Amendment is essential to the vitality and legitimacy of our political process. *Amicus*—a long-time advocate of First Amendment protection for political speech, and an official elected to federal office with a vital personal stake in the health of our political system—has a significant interest in the resolution of this question.

United States Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky and the Senate Majority Whip. He is also the former chairman and a current member of the Senate Rules and Administration Committee, which is the committee responsible for reviewing all proposed legislation related to federal elections. During his four terms in the Senate, Senator McConnell has been one of the Senate's foremost champions of vigorous political debate and has consistently argued that restrictions upon free speech are constitutionally doubtful and will undermine popular participation in government. *See, e.g.*, Mitch McConnell, *In Defense of Soft Money*, N.Y. TIMES, Apr. 1, 2001, § 4, at 17; Mitch McConnell, "*Reform*" *Hurts Freedoms*, USA TODAY, Mar. 23, 2001, at A16.

¹ Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or his counsel made a monetary contribution to the preparation or submission of this brief.

Senator McConnell's strongly held beliefs about the meaning of the First Amendment and the importance of robust political debate led him to challenge the constitutionality of the Bipartisan Campaign Reform Act of 2002 shortly after its enactment. *See McConnell v. FEC*, 540 U.S. 93 (2003). He also has participated as *amicus curiae* in several other cases contesting the validity of restrictions on political speech.² Senator McConnell's position as a United States Senator and his extensive experience with campaign finance legislation give him unique insight into the constitutional infirmities presented by the 1997 Vermont Campaign Finance Reform Act.

STATEMENT

1. All campaign finance restrictions are constitutionally suspect, because political speech is at the heart of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 425 (1988). In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court held that the government's generalized interest in removing corruption and the appearance of corruption from politics can support restrictions on campaign *contributions*, but is insufficient to justify limitations on candidate *expenditures*. *Id.* at 55. As the Second Circuit recognized, Vermont lawmakers passed the 1997 Vermont Campaign Finance Reform Act ("Act 64"), Vt. Stat. Ann. tit. 17, §§ 2801-2883, with the specific intention of

² *See* Brief of United States Senator Mitch McConnell as *Amicus Curiae* in Support of Appellant, *Wis. Right To Life, Inc. v. FEC* (No. 04-1581); Brief of Senator Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Senatorial Committee, as *Amici Curiae* in Support of Respondents, *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000) (No. 98-963); Brief of Washington Legal Foundation, Fair Government Foundation, Allied Educational Foundation; U.S. Senators Alfonse M. D'Amato, Mitch McConnell; U.S. Representatives Henry J. Hyde, Bob Livingston, Joe Barton, Bob Walker; Bill Frenxel and Eugene McCarty, as *Amici Curiae* in Support of Petitioners, *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 614 (1996) (No. 95-489).

“provok[ing] a test case to overrule *Buckley* with regard to expenditure limits.” Pet. App. 201a.

Act 64 includes restrictions on speech that extend well beyond what *Buckley* sanctioned. The Act limits all candidate expenditures during a two-year election cycle. Vt. Stat. Ann. tit. 17, § 2805a. The spending limits vary from \$2,000 for a state representative in a single-member district to \$300,000 for governor. *Id.* Incumbent spending is limited to 85-90% of these limits depending upon the office sought. *Id.* § 2805a(c). The Act defines candidate “expenditures” broadly to include “anything of value[] paid . . . for the purpose of influencing an election [or] advancing a position on a public question,” *id.* § 2801(3), which even encompasses the use of a candidate’s own car and telephone, and also money spent complying with the Act. Pet. App. 225a-226a, 229a-232a, 241a-242a. A candidate cannot avoid the Act’s spending limits by resorting to personal funds: The Act applies equally to candidates who finance their campaigns with political contributions and to those who rely exclusively upon their own funds. Vt. Stat. Ann. tit. 17, § 2805a(a).

Act 64 considers an expenditure by any noncandidate to be “related”—and therefore attributable to a candidate’s expenditure limit—where 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.” Vt. Stat. Ann. tit. 17, § 2809(c). The Act creates a rebuttable presumption that expenditures made by a political party or PAC are “related” if they primarily benefit six or fewer candidates. *Id.* § 2809(d). The cost of rebutting the presumption is assessed against the candidate’s expenditure limit, even if the candidate prevails. Pet. App. 225a-226a.

Act 64 also sharply restricts contributions to candidates from a single source, a political party, or a PAC, with limits

ranging from \$200 to \$400 depending upon the office sought. Vt. Stat. Ann. tit. 17, § 2805. Because Act 64's expenditure and contribution limits apply on the basis of a two-year election cycle, the limits encompass expenditures and contributions for *both* a primary and general election. *Id.* §§ 2805, 2805a. These consolidated limits apply even where a candidate has a contested primary but his general election opponent does not. *Id.*

2. This case arises from three lawsuits challenging Act 64's constitutionality. Pet. App. 24a. The plaintiffs include a sitting Vermont state legislator, individuals who plan to seek Vermont political office, political parties and PACs, individual campaign contributors, and members of the Vermont electorate. Pet. App. 50a-51a. After a ten-day bench trial in 2000, the district court upheld many of the Act's challenged provisions, but enjoined enforcement of the expenditure limits as well as the limits on contributions from political parties. Pet. App. 24a-26a.

The district court's decision was appealed by all parties to the Second Circuit, which in August 2002 issued a 2-1 opinion sustaining almost all of Act 64's challenged provisions, including its expenditure limits. Pet. App. 95a. The court subsequently withdrew its opinion and then issued another 2-1 decision that again upheld most of the challenged provisions, while remanding the case for the district court to determine whether Act 64's expenditure limits are narrowly tailored. Pet. App. 96a-97a.

Although Vermont asserted five governmental interests in support of Act 64's expenditure limits, the Second Circuit considered only the first two: Vermont's purported interests in "avoiding the reality and appearance of corruption in elective politics and government" ("the anticorruption interest") and in "assur[ing] that candidates and officeholders will spend less time fund-raising and more time interacting with voters and performing official duties" ("the time-protection

interest”). Pet. App. 145a.³ Contending that “the *perception* of corruption was an important part” of the anticorruption interest, Pet. App. 128a (emphasis in original), the court concluded that “Vermont has proven the strength of this interest, and its relationship to unlimited campaign spending.” Pet. App. 135a. The court nevertheless acknowledged this anticorruption interest was insufficient to sustain Act 64’s expenditure limits because *Buckley* had “reject[ed] the anticorruption interest” in this regard. *Id.* The Second Circuit therefore expanded its inquiry to consider Vermont’s time-protection interest. Noting that the “*Buckley* Court . . . alluded to this time-protection interest only in passing,” Pet. App. 137a, the court deemed the time-protection interest to be compelling because “the pressure to raise large sums of money greatly affects the way candidates and elected officials spend their time.” The court opined that, “without spending limits, the contribution limits would exacerbate the time problem.” Pet. App. 143a.

Notwithstanding *Buckley*’s invalidation of expenditure limits, the Second Circuit concluded that when the anticorruption and time-protection interests are “considered in tandem,” they are “sufficiently compelling to support [Ver-

³ The five interests put forward by Vermont were:

- (1) “avoiding the reality and appearance of corruption in elective politics and government”;
- (2) “assur[ing] that candidates and officeholders will spend less time fundraising and more time interacting with voters and performing official duties”;
- (3) promoting “electoral competition” and “protecting equal access to political participation”;
- (4) “bolster[ing] voter interest and engagement in elective politics”;
- (5) “enhanc[ing] the quality of political debate and voters’ understanding of the issues.”

Pet. App. 127a.

mont's] expenditure limits." Pet. App. 144a, 145a. Because the record was inadequate to determine whether the expenditure limits are narrowly tailored, however, the Second Circuit instructed the district court on remand to resolve "whether the legislature might have chosen . . . another type of regulation . . . that would still achieve the goals we sanction and yet impinge less on the First Amendment rights of candidates and voters." Pet. App. 164a.

Turning to Act 64's contribution limits, the court concluded that these restrictions are compatible with the First Amendment because they are "closely drawn" to the anticorruption interest and comparable to "similar limits upheld in Maine and Missouri." Pet. App. 169a-170a. The court also upheld the constitutionality of Vermont's related expenditures provision, rejecting the argument that the provision is impermissibly vague and unduly restrictive of political parties' and PACs' activities. Pet. App. 181a-182a.

Judge Winter dissented from the panel majority's holding that Act 64's expenditure limits serve a compelling governmental interest and that the Act's restrictions on political parties are constitutional. Pet. App. 190a (Winter, J., dissenting). Emphasizing that "great caution is in order where incumbent legislators pass laws affecting their electoral fate," he was troubled by the panel majority's excessive deference to the Vermont legislature, which "exceed[ed] even that accorded to decisions of an administrative body." Pet. App. 206a-207a.

Judge Winter perceived that Act 64 "limits or prohibits a vast range of ordinary political activities," Pet. App. 191a, and identified the Act's adverse impact on grass-roots political activity (Pet. App. 228a), candidate speech (Pet. App. 233a), challengers (Pet. App. 245a), the press (Pet. App. 250a), and party affiliates (Pet. App. 253a). He further recognized that *Buckley* had conclusively foreclosed the use of the anticorruption interest to support expenditure limits, and

offered specific evidence from the *Buckley* record to demonstrate that the time-protection issue was also “fully before the Court in *Buckley*” and therefore had been rejected as a basis for imposing expenditure limits. Pet. App. 258a, 265a. Finally, Judge Winter objected to the narrow-tailoring remand because “vastly less restrictive alternatives”—including a system of combined public and private campaign funding—“are so obvious that a remand is unnecessary.” Pet. App. 292a, 300a.

Plaintiffs petitioned for rehearing en banc, which the Second Circuit denied. See *Landell v. Sorrell*, 406 F.3d 159, 160 (2d Cir. 2005). The denial prompted four separate dissenting opinions, which were joined by a total of five judges. *Id.*⁴ Three concurrences in the denial of rehearing en banc were also filed. *Id.* Notably, three of the seven judges concurring in the denial acknowledged that Act 64 is in tension with this Court’s existing campaign finance precedent. See *id.* at 165, 167 (Sack and Katzmann, JJ., concurring in the denial of rehearing en banc); *id.* at 164 (Calabresi, J., concurring in the denial of rehearing en banc). Indeed, Judge Calabresi candidly acknowledged a desire to encourage this Court to revisit its holding in *Buckley* that an interest in equalizing electoral spending is not a sufficient basis for expenditure limits. See *id.* at 162, 165 (Calabresi, J., concurring in the denial of rehearing en banc) (“*Buckley*, by fiat, declared the state’s explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. . . . I believe . . . a reconsideration [of *Buckley*] to be essential.”).

⁴ Because Petitioners’ Appendix was produced before the final amended version of the order denying rehearing en banc was filed, it does not contain Judge Calabresi’s opinion concurring in the denial of rehearing or Judge Raggi’s opinion dissenting from the denial. Pet. App. 317a.

SUMMARY OF ARGUMENT

Free speech is the essence of self-government, and thus all restrictions on political speech must be subject to searching judicial scrutiny. Act 64's expenditure and contribution limits silence the speech of both voters and candidates, and therefore cannot be reconciled with *Buckley* or with the First Amendment principles on which that decision rests.

The Second Circuit's conclusion that the anticorruption and time-protection interests taken together are sufficient to support Act 64's expenditure limits flatly contradicts *Buckley*'s holding. Indeed, Vermont's alleged time-protection problem is caused by its exceedingly low contribution limits, which require candidates to approach numerous small donors to raise essential campaign funds. Because Vermont's campaign finance restrictions have generated its perceived time-protection problem, the State cannot rely upon its interest in remedying that problem to justify its expenditures limits. Moreover, as in *Buckley*, Act 64's contribution limits and disclosure provisions more than fully address any legitimate anticorruption interest Vermont may have.

In upholding Act 64's expenditure limits, the Second Circuit *sub silentio* broadened the anticorruption interest to encompass the "equalization" rationale explicitly rejected in *Buckley*. This Court should reaffirm this aspect of *Buckley* because the compelled equalization of political speech is inconsistent with the First Amendment's fundamental commitment to free and robust debate on public issues. Whereas the First Amendment promotes a competitive and uninhibited marketplace of political ideas, Act 64 subordinates this principle in favor of a vague effort to equalize the quantity of political speech among various groups.

Furthermore, Vermont's campaign finance laws embody incumbent self-protection. Act 64 cannot withstand close judicial scrutiny because it accomplishes very little of what it claims and has the principal effect of benefiting incumbents.

For example, contrary to Vermont's assumption that Act 64's contribution limits reduce the access and influence of large donors, the Act actually has the opposite effect. The most efficient way to raise funds under the Act is for candidates to pursue only those donors willing to give the maximum authorized contribution, and thus to quickly reach the low expenditure limits, which marginalizes the majority of Vermont contributors.

Ultimately, Act 64's expenditure limits, contribution limits, and related-expenditure provision are incompatible with the fundamental political freedoms guaranteed by the First Amendment, and should be invalidated in their entirety.

ARGUMENT

I. ACT 64 IS BARRED BY THIS COURT'S HOLDING IN *BUCKLEY*.

The First Amendment embodies this Court's "profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Nowhere is this commitment stronger than in the realm of political speech, which constitutes "the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *Buckley* therefore cautioned that it "is wholly foreign to the First Amendment" to "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. Act 64's expenditure and contribution limits are squarely barred by *Buckley*'s admonition.

A. Act 64 Is Premised Upon Inappropriate Governmental Interests.

1. In *Buckley*, this Court considered a First Amendment challenge to provisions of the Federal Election Campaign Act ("FECA") that imposed unprecedented limitations on political contributions and expenditures. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). FECA prohibited individual campaign con-

