

# 00-9159(L)

00-9180(con), 00-9231(xap), 00-9239(xap) & 00-9240(xap)

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**IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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MARCELLA LANDELL,

*Plaintiff-Appellee,*

DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC.-POLITICAL COMMITTEE, NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH, VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE AND VERMONT RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

*Plaintiffs-Appellees-Cross Appellants,*

v.

WILLIAM H. SORRELL, 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, ROBERT L. SAND AND DEBORAH MARKOWITZ,

*Defendants-Appellants-Cross-Appellees,*

(Caption continued on inside cover)

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT**

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**REPLY/ RESPONSE BRIEF FOR THE INTERVENORS-DEFENDANTS-APPELLANTS-CROSS-APPELLEES**

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*Intervenor-Defendants-Appellants-Cross-Appellees.*

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## SUMMARY OF ARGUMENT

### Reply Brief

Plaintiffs' arguments portray a political world in which the only relevant currency is money. In this world, the only significant question posed by spending limits is whether they may disadvantage the tiny, select handful of candidates who are able to raise and spend the very highest amounts of money on political campaigns.

This is the wrong lens through which to examine the reforms enacted by Vermont. Indeed, plaintiffs entirely ignore the most essential precondition for any effective political campaign. No campaign, no matter how well-funded, can be truly effective if the targets of all the spending – the citizens – no longer believe in the integrity of their government. No campaign can be effective if citizens no longer believe that their vote has any significance compared to the dollars wielded by wealthy special interests. Focusing exclusively on whether the highest-spending candidates will be competitively disadvantaged by spending limits, plaintiffs are unable to explain what these candidates are competing for. Under any vision of democracy worthy of the name, our political system must offer more than the right of the highest-spending candidates to compete for the opportunity

of doling out governmental favors to the interests capable of bankrolling the most expensive campaigns.

These core insights are at the heart of the campaign reforms enacted by Vermont. As demonstrated in the Brief for the Intervenors-Defendants-Appellees-Cross-Appellants (“Intervenors’ Opening Brief”), Vermont enacted limits on candidates’ campaign spending to further the compelling state interests of deterring corruption, ensuring citizens’ confidence in government, preserving the time of officeholders to carry out their duties as representatives, and fostering vigorous, competitive electoral participation.

Contrary to plaintiffs’ assertions, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) does not impose a *per se* bar against spending limits that serve these interests. *See* Part II, *infra*. Plaintiffs also err in asserting that Vermont’s spending limits are too low to permit effective campaigns. The district court’s findings to the contrary were based not only on the substantial quantitative analyses of spending patterns over three recent election cycles, but also on the testimony of witnesses – including many of the plaintiffs themselves – confirming that the spending levels are more than adequate for vigorous, effective campaigns in Vermont. As demonstrated below, the Landell plaintiffs’ assertions concerning the nature of an

“effective” campaign in Vermont, and the funds needed to run such a campaign, distort the record in this case. *See* Part II, *infra*.

Plaintiffs also have failed to carry their burden of demonstrating that they have standing to challenge many of the spending and contribution limits established by Act 64. *See* Part III, *infra*. Contrary to their assumption, Article III standing is not granted “in gross”; a plaintiff who is interested only in running for a seat in the Vermont House does not have standing to challenge the limits on spending in campaigns for Governor. The live controversy required for Article III jurisdiction is missing with respect to many of the challenged provisions in this case.<sup>1</sup>

### **Response to Cross-Appeal**

As demonstrated in Part IV, *infra*, Act 64’s limits on contributions to candidates, § 2805 (a) and (b), were crafted by elected legislators familiar with Vermont’s political realities. After extensive hearings, these officeholders found that elected officials give preferential response and

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<sup>1</sup> Plaintiffs also misapprehend the law and the factual record in this case in arguing that Act 64’s limits on contributions to and by political parties and its limits on out-of-state contributions are unconstitutional. Intervenors adopt by reference the Reply Brief of the State Defendants on these points, pursuant to Fed. R. App. P. 28(i).

access to large donors, and that large contributions pose real threats to public confidence in the state's electoral system. Exh. Volume-I at E-0095-96.

To deny the state's interest in curbing the influence of large contributions, plaintiffs ask the Court to discount a host of experienced witnesses who testified before the Legislature or at trial. Many, like Senate President Pro-Tem Peter Shumlin, were veteran politicians and successful fundraisers, sickened by the growing clout of money in the Vermont state house. During deliberations on the law, Shumlin confessed to a Senate panel, "I've got to tell you that I wish I could walk up and down this hall now as President Pro Tem and tell you that I know with a clear conscience that I'm not making decisions that are based upon that whole lot of money I raised." Exh. Volume-I at E-0291. If the state is not entitled to act in response to a problem so sharply and authoritatively identified, it is hard to imagine when the state's interest would be sufficient.

The contribution levels are appropriately tailored to limit contributions that are "considered by the legislature, candidates and officials to be large contributions," while allowing candidates to raise enough money to run effective campaigns. Act 64 Findings, Exh. Volume-I at E-0096. In asking the Court to second-guess the judgment of Vermont's elected lawmakers as to the contribution levels needed for effective campaigning,

plaintiffs ignore the Supreme Court’s admonition that courts have no “scalpel to probe” the level at which a contribution limit should be set. *Buckley*, 424 U.S. at 21; *Nixon v. Shrink Missouri Gov’t PAC*, 120 S.Ct. 897, 900 (2000). Deference to the legislature’s choice of an appropriate limit is required unless the limit is “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Shrink*, 120 S.Ct. at 909. The record decisively refutes any such conclusion as to the contribution limits enacted by Vermont.

Like the limits on individual contributions, the limits on contributions to and by political committees (PACs) are fully constitutional. *See* Part V, *infra*. Such limits have repeatedly been upheld against First Amendment challenge. In the absence of such limits, Vermont would be unable to achieve its goal of stemming the corrupting influence of large donations on the political process. Similarly, the provisions of 17 V.S.A. § 2809, which regulate “related expenditures” that are “intentionally facilitated, solicited or approved” by a candidate for office are entirely consistent with *Buckley*, which upheld similar limits on “coordinated expenditures.” 424 U.S. at 36-37, 46-47. *See* Part VI, *infra*. As *Buckley* recognizes, there would be little point in limiting the amounts that a donor may contribute directly to a

candidate, if the same donor were free to pay the candidate's campaign bills in unlimited amounts. *Id.*

Finally, while the district court was correct to find that all of the limits described above are constitutional under the First Amendment, the plaintiffs' lack of standing provides an alternative ground for upholding the district court's judgment rejecting plaintiffs' challenge to many of these provisions. Part VII, *infra*.

**I. "INDEPENDENT REVIEW" IS BALANCED AGAINST THE REQUIREMENTS OF FED. R. CIV. P. 52(a) IN FIRST AMENDMENT CASES.**

Plaintiffs mistake the appropriate standard of review, citing *Bery v. City of New York* for the principle that the court is now required "to make an independent examination of the record as a whole without deference to the factual findings of the trial court." 97 F.3d 689, 693 (2d Cir. 1996). *Bery*, however, cannot stand for the proposition that *no deference* is due a trial court's factual findings in First Amendment cases, because the Court there did not identify any factual finding made by the district court with which it disagreed. Rather, the *Bery* court reversed the lower court on the ground that it had applied an overly restrictive *legal* analysis of what types of expression are protected by the First Amendment. *Id.* at 696. Courts of

Appeal need not defer to factual findings made by a lower court whose legal analysis is entirely misplaced, but that does not mean that appellate courts may simply substitute their own factual findings for those of the district judge in the absence of legal error.

The proposition that appellate courts owe no deference at all to lower court fact-finding in First Amendment cases is clearly inconsistent with Supreme Court and Second Circuit precedent. *See Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499-500 (1984) (“Our standard of review must be faithful to both Rule 52(a) and the rule of independent review”); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (credibility determinations reviewed for clear error); *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 780 (2d Cir. 1991) (court must “give considerable deference to the district court’s credibility assessments and to its determination as to what inferences should be drawn from the evidence in the record”); *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1343 (2d Cir. 1991) (applying “clearly erroneous” standard to extent district court resolved disputed questions of fact at hearing). *See also Coogan v. Smyers*, 134 F.3d 479, 484 (2d Cir. 1998) (distinguishing between issues subject to *de novo* review and those reviewed for clear error).

The special constitutional obligation to review certain factual findings in First Amendment cases has arisen out of the need to ensure that the speech at issue is “of a character which the principles of the First Amendment . . . protect.” *Rankin v. McPherson*, 483 U.S. 378, 386 (1987) (citations omitted); *see also Bose*, 466 U.S. at 514 n. 31. This obligation does not extend to the numerous subsidiary factual findings made by the court which resolve witness credibility and competing factual inferences about the campaign and electoral process in Vermont.

**II. VERMONT’S LIMITS ON CANDIDATE EXPENDITURES ARE CLOSELY DRAWN TO SERVE COMPELLING STATE INTERESTS AND SHOULD BE UPHELD.**

**A. On the Record in this Case, Spending Limits Are Justified by Vermont’s Compelling Interest in Deterring the Reality and Appearance of Corruption.**

As demonstrated in Intervenor’s Opening Brief at 16-23, Vermont’s spending limits are closely drawn to serve the compelling state interest in deterring corruption and the appearance of corruption. Plaintiffs offer nothing to refute the clear evidence in this record, *see* Opening Brief at 17-23, that contribution limits alone have not worked in stemming corruption and the potential for corruption, arguing instead that *Buckley* bars consideration of this interest as a basis for spending limits.

Plaintiffs fail to rebut Intervenors’ key argument that *Buckley* rejected the anti-corruption rationale as a matter of *fact*, rather than as a matter of *law*. See Opening Brief at 9-10, 17. That is a critical distinction. If the necessity of spending limits to deter corruption was rejected as a matter of fact, rather than of law, then upholding the constitutionality of Vermont’s spending limits does not require that *Buckley* be overruled. See Opening Brief at 15-16. Here, the factual record firmly establishes – as the district court found, 118 F. Supp. 2d at 482-83 – that contribution limits alone have proved inadequate to deter corruption. Cf. *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (First Amendment should not impose standard of scrutiny “so rigid [as to] become a straitjacket that disables Government from responding to serious problems.”).

The post-*Buckley* Supreme Court cases cited by plaintiffs, Landell Brief at 47-48; Randall Brief at 53-54, do not establish that limits on candidate’s campaign expenditures are unconstitutional *per se*. *Colorado Republican Campaign Committee v. FEC* (“*Colorado Republican I*”), 518 U.S. 604 (1996), *FEC v. National Conservative Political Action Committee* (“*NCPAC*”), 470 U.S. 480 (1985), and *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (“*MCFL*”), deal with expenditures made by organizations or

political parties *independently* of any candidate’s campaign. Even if, *arguendo*, the cited decisions were read to reject the anti-corruption interest as a matter of law with respect to independent expenditures,<sup>2</sup> limits on *candidates’* expenditures stand on a different footing. *See* Opening Brief at 56-57, and authorities cited therein. Vermont’s Act 64 does not impose limits on expenditures made by individuals and organizations independently of candidates or their campaigns, and does not run afoul of the decisions which have invalidated such limits.

*First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and *Citizens for Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), also cited by plaintiffs, do not deal with candidate elections at all, but with advocacy on referenda and initiatives. Elections that do not involve candidates do not implicate the risk of candidate-related financial corruption, *Bellotti*, 435 U.S. at 790, and the holdings of these decisions simply do not address restrictions on spending in candidate elections.

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<sup>2</sup> *Colorado Republican I* also indicates that the Court’s ruling was dependent on the factual record before it. In discussing the lack of coordination between the candidate and the source of the expenditure, the Court said: “[the lack of coordination] prevents us from assuming, *absent convincing evidence to the contrary*, that a limitation on political parties’ independent expenditures is necessary to combat a substantial danger of corruption of the electoral system.” 518 U.S. at 617-18 (emphasis added).

Further, the statute struck down in *Bellotti* was not a spending *cap*, but an absolute *ban* on any spending by corporations in most ballot initiative campaigns. Even so, and despite the heightened protections applicable to advocacy on referenda, the Supreme Court in *Bellotti* suggested that on a different factual record the expenditure ban could be upheld:

If appellee’s arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic process, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.

435 U.S. at 789-790, citations and footnote omitted.

The Landell Brief states that *Nixon v. Shrink* “recently reiterated *Buckley*’s holding that spending limits are unconstitutional direct restraints on speech.” Landell Brief at 47. That misstates the holding of *Shrink*. Justice Souter’s decision for the majority in *Shrink* studiously declined to take on any issue beyond the constitutionality of Missouri’s contribution limits under *Buckley*. 120 S. Ct. at 909. Its discussion of the Court’s past treatment of the constitutionality of campaign expenditure limits, an issue not before the Court in *Shrink*, is *dicta*.

In sum, none of plaintiffs’ authorities forecloses the constitutionality of limits on candidate campaign spending when the record – unlike that in *Buckley* – demonstrates that limits on candidate contributions are insufficient to deter corruption and the appearance of corruption. *Kruse v. City of*

*Cincinnati*, 142 F.3d 907, 919 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). The record here demonstrates that Vermont's spending limits are necessary to serve that compelling interest, and should be sustained.

**B. The Compelling State Interest in Preserving the Time of Elected Officials to Govern is a New and Different Governmental Interest Not Addressed in *Buckley*.**

Just as *Buckley* left the door open to a new factual record demonstrating the need for spending limits as an anti-corruption measure, so too did it leave the door open for consideration of new, compelling state interests not directly addressed in *Buckley*. As demonstrated in the Opening Brief at 23-26, Vermont enacted spending limits to further its compelling interest in preserving the time of elected officials to carry out their official duties. *See also Landell v. Sorrell*, 118 F. Supp. 2d 459, 468 (D. Vt. 2000).

Contrary to plaintiffs' contention, the *Buckley* Court was not presented with and did not address this interest as a basis for enacting limits on candidates' overall spending. In making that argument, plaintiffs rely on the majority opinion in *Kruse*, 142 F.3d 907. That Court's reasoning in rejecting this important state interest, however, was entirely circular. Rather than establishing that *Buckley* had rejected this distinct state interest *as a*

*basis for* spending limits, the Sixth Circuit merely stated that the interest must be rejected because *Buckley* struck down spending limits:

The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.

*Id.* at 916-917. The *Kruse* court's discussion simply does not advance the analysis, because it neglects the fact that *Buckley* did not directly consider the state interest in preserving the time of elected officials to govern.

Significantly, the concurring judge in *Kruse* specifically disagreed with the majority on this point, noting that *Buckley* should not be read to foreclose the constitutionality of spending limits if the record demonstrated that limits were tailored to preserve the time of officeholders for governing. *Kruse*, 142 F.3d at 920 (Cohn, D.J., concurring) ("It may be possible to develop a record to establish that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties . . . is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest."). *See also* Opening Brief at 24.

The state interest in preserving the time of elected officials to govern clearly is distinct from an interest in holding down campaign spending merely because it is deemed wasteful or excessive. The former is based not

on an arbitrary view of how much spending is “too much,” but instead on the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government. “Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives.” Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281, 1283 (1994). *Buckley* did not address this issue and should not be read as foreclosing states from protecting the time of officeholders to govern by instituting reasonable campaign spending limits.

Moreover, although the pressures of fundraising for Vermont offices are not yet as intense as those experienced by federal candidates, Vermont should not be required to wait until its legislature is composed solely of full-time fundraisers before taking action. *Cf. Munro v. Socialist Workers’ Party*, 479 U.S. 189, 195-96 (1986) (rejecting requirement that “a State’s political system sustain some level of damage before the legislature could take corrective action” in regulating ballot access).

**C. Vermont’s Spending Limits Will Further the State’s Compelling Interest in Assuring Electoral Competition and Fostering Political Equality.**

The Randall plaintiffs contend that unlimited spending poses no threat to equal political access in Vermont because it is relatively inexpensive to run for election in Vermont. Randall Brief at 58 (“ . . . many candidates without means are able to run effective campaigns.”).<sup>3</sup> While it is true that effective campaigns can at present be run inexpensively in Vermont, *see* Opening Brief at 26-34; *infra* at Part II.D., that does not mean that Vermont lacks a significant interest in establishing overall limits on campaign spending. Even though effective campaigns in Vermont do not require immense expenditures, the Vermont Legislature was confronted with evidence that the “war chest” strategy typical of campaigns at the federal level and in other states was beginning to take hold in Vermont as well. *See* Opening Brief at 37-40; 43-44. Like other states, Vermont was beginning to see candidates raising greater and greater amounts, often from industry groups with interests in Vermont’s legislative agenda, not because of the

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<sup>3</sup> Intervenors’ Opening Brief, 35-45, explains why spending limits are necessary to protect the fundamental goal of political equality, and fully addresses the Randall plaintiffs’ contention that *Buckley* forecloses this argument. *Id.* at 45-54.

demands of adequate communication with the electorate, but solely to avoid being out-spent by an opponent. *Id.*

Indeed, precisely because campaign costs are relatively low in Vermont, spending limits will not hobble effective campaigns. Instead, they will simply free prospective candidates from the burden of raising limitless funds to remain competitive, thus breaking the spiral of ever-increasing fundraising before it has reached a level that will permanently damage the character of Vermont politics. Surely Vermont need not wait until persons of modest means are entirely excluded from running for state office before taking action.

*NAACP v. Jones*, 131 F.3d 1317 (9th Cir. 1997), *cert. denied*, 525 U.S. 813 (1998), cited by the Randall plaintiffs, Brief at 60 n.5, is inapposite. *NAACP v. Jones* merely held that the state was not constitutionally *required* to provide public financing for state election campaigns. The decision did not confront the issue presented here: whether a state may voluntarily act to protect equal access to the political system by establishing reasonable spending limits. There are many compelling interests that states are entitled to recognize even though they are not constitutionally compelled to do so. For example, states may ban electioneering near a polling place consistent with the First Amendment,

*Burson v. Freeman*, 504 U.S. 191 (1992), although they are not constitutionally required to do so.

Finally, to support their contention that spending limits are unnecessary, the Randall plaintiffs cite testimony by Senator Ready and Senator Rivers that they are accessible to all their constituents regardless of donations. Randall Brief at 58. Both these witnesses, however, were candid enough to point out that access is likely to mean something different to a major donor than to an ordinary citizen. *See* Tr. IX-166-67 (Ready) (noting that if she had only one hour a night to return telephone calls, donors who had supported her would get their calls returned first, and that large donors are more likely to get their calls returned from the Senate floor); Tr. VII-58-59 (Rivers) (describing time spent at fundraising events that give donors special access to elected officials); *see also infra* Part IV.

**D. The Record Overwhelmingly Supports the District Court’s Finding that Vermont’s Spending Limits Are Closely Drawn and Will Foster Effective Campaigns.**

As shown in the Defendant-Intervenors’ Brief, 26-34, and in the State’s Brief, 42-54, the record overwhelmingly demonstrates that candidates will be able to communicate effectively with voters and run vigorous campaigns under Act 64’s spending limits. *See also Landell*, 118 F. Supp. 2d at 471. Contrary to plaintiffs’ contentions, the district court’s

findings were based not only on analyses of average spending levels, but on testimony of individual witnesses – including many of the plaintiffs themselves – confirming that vigorous, effective campaigns can be run under Act 64’s limits. Plaintiffs’ myopic focus on a tiny subset of the highest-spending races cannot overcome the extensive evidence that the limits are appropriately tailored.

**1. Plaintiffs’ focus on only the highest-spending elections is inherently flawed.**

The Landell plaintiffs err in contending that the only relevant universe of elections for examination is the handful of elections in one election year – 1998 – that were “targeted” by the Republican party. “Targeting” means that these are the races to which the party decided to direct the most resources. *See also* Randall Brief at 34 (arguing that spending limits are too low because of impact on high-spending candidates). To say that the handful of races to which the most resources are devoted are those that will be most affected by spending limits is nothing more than a tautology. And to claim that only these races should be considered because they are the only races “in play” simply begs the question of why so few election contests would be deemed “in play.”

The record overwhelmingly confirms that higher and higher spending levels will simply deter more and more potential challengers from entering

the political arena. Opening Brief at 37-45. While that might indeed increase the leverage of party leaders who wish to decide which select group of candidates will be viable in a given year, Vermont should not be required to embrace such a limited vision of democracy. A candidate field that has been so narrowed before a single vote has been cast is not the reflection of a healthy political system.

George McNeill’s testimony about the VRSC’s “targeted” races illustrated how spending can be a product of the “prisoner’s dilemma” described in Intervenor’s Opening Brief at 38. In explaining one of the factors behind the large expenditures of a “targeted” candidate, he observed:

the other fear was, which we did not know at the time . . . how much money the other challenger in the race, Judy Murphy, was going to spend. . . . [T]he fear was that there would be an extraordinary amount of money spent on her campaign through donations from outside Vermont.

Tr. II-77.<sup>4</sup> Similarly, McNeill asserted that Republican candidate John Bloomer needed to spend large amounts in Rutland County in order to

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<sup>4</sup> A number of the Republican candidates McNeill identified as potentially harmed by spending limits actually *lost* their election in 1998 to candidates who outspent them. For example, Susan Sweetser and Dennis Delaney lost their Chittenden County senate races while being outspent by James Leddy and Janet Munt, who both won. Exh. Volume-VII, at E-2355, Col. H. Similarly, Republican candidates Harvie, Welch and Tully all lost their races for Windsor County senate seats after being outspent by incumbent Ben Ptashnik. *Id.* at E-2358, Col. H. It is difficult to argue that these candidates

overcome powerful opponents such as Steve Howard, Tr. II-145, while Howard testified that *he* needed to spend large amounts in order to overcome his opponents' advantages in that race. Tr. IV-177-178. Thus, when plaintiffs point to 16 "targeted" House races and 12 "targeted" Senate races where candidates spent in excess of the new limits in 1998, Landell Brief at 54, they are merely describing races in which all of the candidates may have been amassing war chests precisely because they knew that their opponents' spending was potentially unlimited. *See also* Landell Brief at 9 ("an effective campaign must have sufficient funds to respond to an opponent, especially if that opponent is also well funded.")

It adds nothing to the analysis for plaintiffs to declare that only the select handful of races they rely upon should be deemed "competitive." They merely ask the Court to assume that "competitive" races are those in which the most money was spent.<sup>5</sup> These assumptions are unwarranted.

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would have been harmed had their opponents *not* been able to outspend them.

<sup>5</sup> The circularity of these assertions is apparent. According to the Landell plaintiffs, "the focus must be on competitive races where running effective campaigns are necessary." Landell Brief at 13. We know this because "In competitive races, an effective campaign can contribute to the outcome." *Id.* And how will we recognize when a race is competitive? Plaintiffs again have an answer: "[c]ompetitive races are where effective campaigns are most often conducted and where effective campaigns can have an impact." *Id.* at 14.

Indeed, nine House challengers defeated incumbents in 1998 while spending less than \$2,000, and two of them spent less than \$500. Exh. Volume-III at E-0945 (Gierzynski Report).<sup>6</sup> It defies logic to suggest that these races should not be deemed “competitive,” and yet plaintiffs would leave them out of the analysis simply because they were not high-spending races.

Accordingly, to avoid a distorted view of the effect of Act 64’s spending limits, it is important to examine the effect across all elections. The defendants’ expert, Professor Gierzynski, analyzed three election years – 1994, 1996, and 1998 – and did not arbitrarily exclude either the most expensive or least expensive elections, but properly based his conclusions on examination of all elections. Indeed, courts’ analyses of the impact of campaign reform laws in other cases typically include consideration of averages based on all the data rather than a select subset. *Daggett v. Comm. on Governmental Ethics and Election Practices*, 205 F.3d 445, 461 (1st Cir. 2000) (noting, *e.g.*, that “the average House candidate would lose only approximately \$778 and Senate candidate \$5,694” under challenged contribution limits); *id.* at 460 ( “in 1998 the average [Maine] Senate

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<sup>6</sup> And these are only the low-spending races in which challengers *won*; there are others in which low-spending challengers have run close races. *See* Exh. Volume-V at E-1836-37 (Fiorillo) (lost his election for House to two incumbents by 80 or 90 votes after spending around \$1800).

candidate incurred expenses of \$18,445 and the average House candidate \$4,725”); *Florida Right to Life v. Mortham*, Case No. 98-770-Civ-Orl-19A, Slip Op. at 19 (M.D. Fla. March 20, 2000) (noting figures showing that “candidates for [Florida] state legislative seats raise, on average, \$250,000 for their campaigns, while candidates in state house races raise, on average, \$108,000”).

In *Shrink*, the Supreme Court rejected the contention, similar to that advanced by plaintiffs here, that any reduction in the funds available to run a candidate’s campaign creates a violation of that candidate’s First Amendment rights. The Court in *Shrink* was willing to assume, for the sake of its decision, that the campaign contribution limits at issue there would affect respondent Fredman’s ability to run an effective campaign, but held that the constitutionality of the limits could not be judged based on such a narrow focus. “[A] showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*.” 120 S. Ct. at 900; *see also id.* at 913 (Breyer, J., concurring) (campaign finance laws will always have an adverse impact on some candidates). *Cf. Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 214-215 (1997) (examining national averages to determine whether FCC’s must-carry regulations unduly burdened First Amendment rights, and

turning aside cable companies' argument that a burden affecting any substantial number of cable operators rendered the regulations invalid).

Plaintiffs' reliance on the work of their expert, Clark Benson, is unavailing. Benson analyzed only one election year (1998), and omitted from his analysis, even in that year, 130 House candidates and 25 of the 70 Senate candidates, primarily those who spent less than \$500 on their elections. Tr. III-90, 92. Benson acknowledged that "as a data analyst" he "would much have preferred" to look at three election cycles. *Id.* at 90. Benson also acknowledged numerous other omissions and mistakes in categorizing figures that detracted from his analysis. *See, e.g., id.* at 112-114, 143-145. The district court's decision to credit Professor Gierzynski's more comprehensive approach, rather than Mr. Benson's limited analysis, is entitled to deference.

The same error infects plaintiffs' assertion that "Vermont's spending limits were exceeded by 57% of the senate campaigns and 30% of the house campaigns that filed reports in 1998" and that "27% of senate campaigns and 10% of house campaigns reporting that year spent more than double the new limits. Exh. at VII, E-2351." Landell Brief at 50. While plaintiffs contend that these figures compare unfavorably with those cited in a footnote in *Buckley*, 424 U.S. at 20 n.21, they are relying on Mr. Benson's

flawed data, which arbitrarily exclude from analysis all of the low-spending campaigns.

**2. Examination of individual campaigns, as well as overall averages, fully supports the reasonableness of the spending limits.**

The district court's findings, and the evidence below, were based not only on the statistical analyses of past spending levels in Vermont elections, but also on individual campaigns – many of them *plaintiffs'* campaigns – which confirmed that the spending limits are set at a level fully adequate for running an effective campaign.

With respect to Vermont House elections, plaintiff Donald Brunelle's *maximum* expenditure in any of his past House campaigns was \$1,007. In one year, he ran successfully while spending \$437. Exh. Volume-V at E-1755. Brunelle did not testify that his past campaigns were ineffective; to the contrary, he testified there was “no question in my mind” that the voters understood his views and those of his opponents, and chose to support his opponents. Exh. Volume-VII at E-2700. Plaintiff George Kuusela spent a *maximum* of \$1,550 on his past House campaigns; the new limits allow him to spend \$3,000, nearly double that amount. Tr. III-7-8, 26. There is no evidence that Kuusela could even raise campaign funds in excess of \$3,000. Further, although plaintiff Steve Howard criticized the spending limits for

House races, he himself ran a successful race for the House as a 22-year-old, non-incumbent candidate in 1994, while spending only \$1,700. Tr. IV-158, 187.

While plaintiffs attach significance to the fact that challengers tended to outspend incumbents on average in House races, they disregard the critical point: the spending of *both* groups of candidates is consistently below the spending limits of Act 64. Exh. Volume-III at E-0963, E-0991.

With respect to the Vermont Senate, the conclusions evident from Professor Gierzynski's analysis of past spending levels are also fully supported by the testimony of individual witnesses, including plaintiffs' witnesses. William Meub, a witness called by plaintiffs, testified that he spent only \$6,000-\$7,000 in his Rutland County Senate race in 1990, and that that was enough to get his message out to voters. Tr. IV-48-49, 51; *see Landell*, 118 F. Supp. 2d at 472. In fact, Meub testified, with \$1,000 a candidate can mount an effective campaign on cable television in Rutland County. Tr. IV-51. Under Act 64, non-incumbent candidates in three-seat districts like Rutland County will be able to spend \$9,000, far more than plaintiffs' witness deemed necessary for his own race.

Plaintiffs attempted to overcome Meub's testimony by bringing forward another witness, Steve Howard, who had also run for Senate in

Rutland County. Howard spent about \$24,000 in his 1998 Rutland County race, Tr. 162-163, and claimed he would have needed \$30,000 - \$50,000 to wage an effective campaign.<sup>7</sup> The district court's decision to treat the testimony of one plaintiff witness, William Meub, as more reliable on the issue of Vermont Senate campaign costs than that of another plaintiff, Howard, *see Landell*, 118 F. Supp. 2d at 472, is clearly the kind of credibility determination to which this Court owes deference.

Testimony from plaintiffs' witnesses also confirmed that statewide campaigns could be run effectively under the limits. For example, plaintiffs' witness Darcie Johnston acknowledged that Jim Douglas had run an "effective" statewide campaign against Patrick Leahy for U.S. Senate while spending under \$200,000, Tr. I-134-135, and that John Carroll had run an "effective" statewide campaign against Bernie Sanders for U.S. Congress in

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<sup>7</sup> When the Landell plaintiffs contend that \$30,000 - \$50,000 is the amount generally needed for a challenger to run an effective Vermont senate campaign, they are distorting the record, because they are citing only Howard's estimate of the amount *he* would have needed to win his 1998 Senate election in Rutland County. Landell Brief at 54; *cf.* Tr. IV-171, 205. Moreover, Howard's expenses were unusually high because he decided to spend much of 1998 running another candidate's gubernatorial campaign *in Massachusetts*, and to hire paid campaign staff to run his own campaign simultaneously -- an unusual expense for a Vermont legislative campaign. Tr. IV-202-204 (Howard).

1994, Tr. I-135, although Carroll also spent only slightly over \$200,000.

Exh. Volume-IV at E-1462.

**3. Plaintiffs’ “objective” definition of an effective campaign does not establish that Vermont’s limits are unconstitutionally low.**

While contending that Vermont’s spending limits are insufficient to permit an “objectively” defined effective campaign, the Landell plaintiffs themselves seem unable to decide upon their preferred definition of an “effective” campaign. At one point, they assert that an “effective” campaign is “widely regarded” as one in which “the candidate succeeds in delivering 4 to 5 messages to 80% of potential voters,” Landell Brief at 51. Elsewhere, they say that “an effective campaign requires communicating a minimum of 4 to 5 messages at least 4 to 5 times each with *each* potential voter” (emphasis added). Contrast this with the testimony of the primary witness they cite for this proposition, Darcie Johnston, a Virginia resident who asserted that a candidate for *statewide* office needs to communicate “[n]ot more than three to four” messages to voters, Tr. I-99 (Johnston) (emphasis added). Indeed, this very witness suggested that the figure of four or five was really a *maximum*, citing the view that “actually you tend to lose voters’ interest” after that point. Tr. I-99-100.

Of course, there is no quarrel about the fact that candidates need to communicate with voters. But there was overwhelming evidence from

persons familiar with elections for Vermont state office – unlike Johnston – that such communication can be carried out inexpensively in Vermont state elections.

This was supported even by plaintiffs’ witnesses such as George McNeill. McNeill did not testify that the only effective methods of getting messages to voters were expensive. When he was asked to identify the means of running an effective campaign, he identified a variety of methods, most of them very inexpensive:

*You can use lawn signs. You can use direct mail. You can use radio, TV, depending on where you are. You can do forums. You can do debates. You can do door to door.”*

Tr. II-72 (emphasis added).<sup>8</sup> A voter who each day drives by a lawn sign saying “Vote Jones for Lower Taxes” receives the candidate’s message more than five times in just one week. *See also* State Defendants’ Opening Brief at 44-45 (noting witnesses’ testimony, including that of plaintiffs, describing the prevalence of inexpensive methods of reaching voters in Vermont);

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<sup>8</sup> After McNeill gave this testimony, plaintiffs’ counsel, obviously dissatisfied, prompted him to express agreement with Johnston’s testimony that an effective campaign should be defined as one in which a candidate gets “three to four messages out” through “about five contacts . . . per voter.” Tr. II-72. The district court was certainly entitled to take into account the “canned” nature of this exchange in deciding how much weight it deserved. But even taking plaintiffs’ “objective measure” at face value, the important point is that these desired contacts can be made through very inexpensive means.

Randall Brief at 58 (“many candidates without [financial] means are able to run effective campaigns” in Vermont).

Numerous additional witnesses with years of personal experience in Vermont politics confirmed that the limits established by Act 64 will permit vigorous and fully effective campaigns for the House, Senate, and Vermont statewide offices. This testimony was described in the State Defendants’ Opening Brief at 42-55, and the Intervenors’ Opening Brief at 26-34, and will not be repeated here. It is absurd for the Landell plaintiffs to describe the State’s and Intervenors’ witnesses as persons with little knowledge of the realities of running campaigns in Vermont. Landell Brief at 12. The district court, with extensive familiarity with Vermont politics, obviously disagreed. *Landell*, 118 F. Supp.2d at 470, 472 (crediting testimony that candidates can run effective campaigns under Act 64).<sup>9</sup> The district court's findings on this issue are entitled to deference.

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<sup>9</sup> Plaintiffs relied heavily on the testimony of witnesses such as Kathleen Summers, who has never lived in Vermont, never served in office in Vermont, and began involvement in her very first Vermont election campaign shortly before the trial; and Darcie Johnson, who has worked on only one Vermont state campaign and draws her experience from her work on campaigns for U.S. Senate and House of Representatives. Tr. IV-99, Tr. I-119-121. The State and Intervenor witnesses, on the other hand, had extensive experience working in Vermont state campaigns. For example, Senator Cheryl Rivers, a lifelong resident of Vermont, has served in the Senate for the past ten years, where she chairs the Finance Committee. In addition to her five Senate campaigns, she has worked on numerous other

Further, the testimony demonstrates that certain types of inexpensive contacts with voters are more effective than any number of repetitions of more expensive but passive communications such as television ads. Direct voter contact by a candidate or a political party – in contrast to passively viewing an advertisement – significantly increases voters’ participation, their interest in the election, their concern about the outcome and their ability to place the candidates on ideological scales. Tr. X-56-57, 61-62; Exh. Volume-III at E-1338-62 (Gross report). *See also* Intervenors’ Brief at 31-33; State’s Brief at 35-40. George McNeill acknowledged that voters in many districts expect to see personal campaigning, such as door-to door campaigning and passing out literature, and that this is an important way that candidates can be effective and get their issues, their name and their philosophy out. Tr. II-127-128. *See also* Exh. Volume-V at E-1841-E-1842 (Fiorillo); Tr. VII-17-18 (Young).

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Vermont campaigns including Jerome Diamond’s, Madeline Kunin’s, and Peter Welch’s campaigns for governor; and Donald Hooper’s and Deborah Markowitz’s campaigns for Secretary of State. Tr. VII-53-55. Senator Elizabeth Ready had been a State Senator for 12 years, was running for statewide office at the time of trial, and is a lifelong resident of Vermont. Tr. IX-83. *See also* Tr. V-12-13 (describing campaign experience of Donald Hooper); Exh. Volume-IV at E-1343 (campaign experience of Peter Brownell); Tr. VIII-19 (campaign experience of Peter Smith); Tr. IX-42 (campaign experience of Gordon Bristol). These are only some of the experienced witnesses who testified that the contribution and spending limits will permit effective campaigns for Vermont office.

Vermont voters themselves place far more importance on inexpensive sources of information than on paid advertisements. Ninety percent of Vermont voters see newspaper coverage as an important source of information about candidates (including 57% who say it is very important), while 80% say debates are important (59% very important). Paid newspaper ads, by contrast, are rated as important by only 46%, including just 11 percent who say they are very important, and materials received by mail are rated important by 58%, with only 16% saying they are very important. Exh. Volume-III at E-0846-0847 (Lake Declaration).

The final point ignored by plaintiffs is that effective political campaigns cannot be conducted, even with unlimited funds, if most eligible voters are so distrustful of and alienated from the political process that they see no point in voting. The Intervenor's Opening Brief extensively canvassed the record evidence establishing that high-spending campaigns are often detrimental to the goal of an informed, politically active citizenry, Opening Brief at 30-34, and that unlimited spending serves to discourage electoral competition and destroy citizens' faith in the efficacy of their vote, *id.* at 37-44. Restoring citizens' faith that their government is controlled by the votes of average citizens and not the dollars amassed from the wealthiest interests is the fundamental pre-condition for any effective political

campaign. Vermont's spending limits are closely drawn to serve that critical goal and should be upheld by this Court.

### **III. PLAINTIFFS HAVE NOT DEMONSTRATED STANDING TO CHALLENGE SEVERAL PROVISIONS STRUCK BY THE DISTRICT COURT.**

#### **A. The Court Lacks Jurisdiction to Rule on the Constitutionality of a Provision Unless At Least One Plaintiff Has Standing to Challenge that Specific Provision.**

Intervenors have documented Plaintiffs' lack of standing to challenge certain sections of Act 64 which were ruled unconstitutional by the district court, including the expenditure limits on statewide, state senate, and county-wide campaigns found at § 2805a(1)-(4), and the limits on out-of-state contributions to political committees at 2805(c). Opening Brief at 60-76. Plaintiffs mischaracterize Intervenors' argument as being that "*each* plaintiff must have standing to challenge *each* sub-provision of the statute." Randall Brief at 112. Intervenors simply argue that the court lacks jurisdiction to consider those provisions of law which are not challenged by *any* plaintiff with standing, a principle firmly entrenched in constitutional jurisprudence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing is an "indispensable part" of a plaintiff's case, which at an "irreducible constitutional minimum" requires that plaintiff must have

suffered an injury to a legally protected interest). Plaintiffs cite no authority in support of the novel proposition that because a group of plaintiffs has standing to challenge one legislative provision, they may also challenge another, separate, provision for which they lack standing. The Supreme Court has rejected this notion:

[S]tanding is not dispensed in gross. If the right to complain of *one* administrative deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.

*Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) (emphasis original).

Plaintiffs also misrepresent Defendants’ and Intervenors’ position – and the trial record – when they say that Defendants’ witnesses testified that the various provisions “would only be truly effective together.” Randall Brief at 118. Defendants, Intervenors, and their witnesses have consistently maintained that the various provisions each independently play an important role in addressing legitimate state interests, and have never asserted that the invalidity of one should lead all the provisions to be struck down. Tr. X-194 (Kitzmiller); Tr. IX-231 (Pollina); Tr. VIII-94 (Smith). The provisions at issue in this lawsuit are fully severable and, therefore, standing to challenge each provision must be established independently. Opening Brief at 62-65.

Plaintiffs' lack of standing to reach certain claims may leave the constitutionality of some provisions of Act 64 untested, but this is appropriate where no injury has been shown. "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Lewis*, 518 U.S. at 349.

Intervenors' Opening Brief discusses the threshold showing of concrete, particularized injury necessary to establish standing. Opening Brief at 61, 66-67. With respect to the provisions described below, nothing in plaintiffs' response briefs identifies any plaintiff who has satisfied the applicable legal requirements. *See, e.g., In Re United States Catholic Conference v. Baker*, 885 F.2d 1020, 1023-24 (2d Cir. 1989); *and see United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992).

**B. No Plaintiff has Standing to Challenge the Expenditure Limits on Statewide Races at § 2805a (1)-(3).**

Only Steven Howard asserts a personal injury from the expenditure limits on statewide races. He claims that the spending limit, in part, discouraged him from running for the office of state auditor, Tr. IV-177-178, and that he "hopes to run for state office again." Randall Brief at 15.

However, on cross-examination Howard acknowledged that one of the reasons he did not run was his desire to focus on his business and on helping his friends get elected. Tr. IV-212-13. This does not carry Howard's burden of demonstrating that he would have run for auditor in the absence of spending limits.

Howard also claimed that his past campaign debt further handicapped him under the new spending limits. Tr. IV-178. However, he was free to assume this debt personally rather than have his campaign assume it. Finally, Howard presented no concrete plans to run for office in the future. A "hope" that he might do so is clearly insufficient to establish standing. Even were Howard to have suffered injury sufficient for him to challenge the expenditure limits applicable to a race for state auditor, that would not establish the Court's jurisdiction to strike down the limits for other statewide offices. No plaintiff in this case was running or planning to run for governor, lieutenant governor, secretary of state, state treasurer or attorney general at the time of trial, and none can claim any injury from the expenditure limits for those races. While VRSC and Marcella Landell claim they should be able to assert third party standing to challenge these provisions, that claim is legally untenable, as discussed below in Part E.

**C. No Plaintiff has Standing to Challenge the State Senate or Countywide Expenditure Limits at § 2805a (4).**

The sole plaintiff who ran for state senate or countywide office in 2000, Donald Brunelle, made only unsubstantiated assertions that he would be injured by the expenditure limit in his race for State Senate.

Intervenors' opening brief highlights the fact that in his past races for State Representative, Brunelle spent far less than Act 64's limits *for that office*.

Intervenors' Brief at 69. Thus Brunelle's assertion that he had the ability and need to spend far more than Act 64's limits in his race for state senate lacks credibility. Under Act 64, Brunelle could spend \$16,500 to run for a Chittenden County Senate seat. There was absolutely no evidence that Brunelle was capable of raising this amount, much less the \$27,000 he claimed to need.

At the time of the trial, John Patch was still considering whether to be a candidate for the Vermont Senate in 2000. Ultimately, Patch did not run for a seat in the Senate.<sup>10</sup> The evidence does not show that Patch has ever

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<sup>10</sup> The Randall plaintiffs claim that Patch decided not to run because of the limits imposed by Act 64. Randall Brief at 12. Nowhere in the record, however, does it indicate that Act 64's limits led to Patch's decision not to run for office. The only reason he gave at trial was, "There's some -- some things that are going on right now that -- that might preclude me from making that decision." Tr. II-179. The Randall plaintiffs' reliance on information that is not contained in the record cannot confer standing to Patch to raise this claim.

been a candidate for any Vermont elected office in the past. His claim to injury from § 2805a(4) is conjectural, and certainly not “actual or imminent,” and thus does not provide standing. *Lujan*, 504 U.S. at 560.

**D. No plaintiff has Standing to Challenge the Limit on Out-of-State-Contributions to Political Committees at § 2805(c).**

Intervenors noted that no plaintiff has standing to challenge this provision, as none of the Randall plaintiffs is a PAC or an out-of-state donor, and the Landell plaintiffs have not challenged this provision. Opening Brief at 69-706. Neither the Randall nor the Landell response brief contests this. Therefore, no party has standing to litigate it.

**E. Plaintiffs do not have Standing to Raise the Claims of Third Parties.**

The Landell plaintiffs argue that plaintiffs Landell and VRSC have standing to challenge the spending limits at 17 V.S.A. § 2805a, although neither is a candidate and thus neither is subject to this provision. As discussed in Intervenors’ opening brief at 70-76, these plaintiffs have not shown that they can overcome the formidable barriers to establishing third-party standing.

Landell asserts standing as a “listener” to represent absent candidates. As summarized in Intervenors’ opening brief, case law requires that to establish such standing, a plaintiff must point to specific speech from a

particular speaker that will be compromised by the challenged provisions. Intervenors' Brief at 75-76. Thus, plaintiffs' reliance on *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) is misplaced. In that case, the plaintiff identified a specific speaker who attested that, but for the statute at issue, he would advertise certain specific information.

Landell fails to point to specific speech from a specific speaker that will be compromised by these provisions. Exh. Volume-VII at E-2662-E-2668. In the past, Landell received candidate information from a variety of news outlets and directly from the candidates. Exh. Volume-VII at E-2642, E-2646, E-2649-2650, E-2652, E-2654-2659, E-2690-2691. Landell fails to show with particularity that she will not be able to receive such candidate information in the future. Exh. Volume-VII at E-2662-2668. Furthermore, she fails to recognize that Vermont Right to Life's endorsements of candidates and their voter guides are independent expenditures that will not be affected by these provisions. Exh. Volume-VII at E-2664-E-2668. If Landell's allegations were sufficient to establish listener standing, then standing would extend to every citizen in Vermont, because every citizen could speculatively allege that she might hear additional speech in the absence of limits.

In support of their claim that the VRSC has standing to challenge the spending limits, plaintiffs merely assert that the party's associational purpose is advanced through its candidates. Landell Brief at 66. They do not address intervenors' arguments that (1) there was no barrier to participation in the lawsuit by Republican candidates; (2) the VRSC's ability to associate with its candidates is not affected by the spending limits; (3) no candidate for state legislature complained to the VRSC about these provisions; and, (4) a good portion of the Republican party actually supported Act 64 and some members even participated in its legal defense as witnesses for the State. *See* Opening Brief at 75.

Plaintiffs mistakenly cite *Buckley*, 424 U.S. at 22, in support of their argument. This portion of *Buckley* says that a \$1,000 limit on independent expenditures *by an association* "precludes most associations from effectively amplifying the voice of their adherents." It does not, as plaintiffs imply, refer to limits on candidate spending or contribution limits as restricting an association's speech. *Id.* Plaintiffs' reliance on *Buckley*'s citation of *NAACP v. Alabama*, 357 U.S. 449, 458 (1958), cited at 424 U.S. at 12 n. 10, is equally misplaced. The *NAACP* Court allowed the organization to raise the claims of its members because there was a clear barrier to the members' participation in the suit. 377 U.S. at 459. VRSC

has not shown that its members face any threat of harassment preventing them from suing on their own behalf; indeed, a Republican candidate for governor testified at the trial, but chose not to join the lawsuit. Tr. IV-25 (Meub).

#### **IV. VERMONT'S LIMITS ON CONTRIBUTIONS FROM INDIVIDUALS ARE CONSTITUTIONAL.**

##### **A. The Contribution Limits Are Justified by the State's Interest in Avoiding the Reality and Appearance of Corruption.**

The extensive record compiled before the Vermont legislature and at trial presents an extremely strong justification for Vermont's enactment of contribution limits: large contributions undermine the public confidence in Vermont's political system and they have, at times, had an improper influence on Vermont legislators. Moreover, the public perception that an electoral system is susceptible to abuse is itself an evil which justifies contribution limits. *See* State Defendants' Reply Brief Part I.A.<sup>11</sup>

The threshold for proving the state's interest is not a high one; the quantum of evidence necessary to support an asserted interest "will vary up and down with the novelty and plausibility of the justifications raised," and

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<sup>11</sup> Intervenors incorporate by reference the State Defendants' discussion of the individual contribution limits, State Defendants' Reply Brief at Part I. FED. R. APP. P. 28(i).

the dangers of corruption arising from large contributions “are neither novel nor implausible.” *Shrink*, 120 S.Ct. at 906.

In finding that the evidence in this case supports the state’s interest, the district court had the benefit of an extensive legislative history documenting painstaking deliberation, with months of testimony before legislative committees. *See* State Defendants’ Reply Brief at Part I.B; Exh. Volume-I at E-0187 *et seq.*; Exh. Volume-II at E-0412 *et seq.* During the period leading up to the law’s enactment, the Vermont press extensively reported on questionable campaign transactions that aroused public concern over the improper influence of big donors. Exh. Volume-III at E-0746 *et seq.*

Trial evidence affirmed the legislature’s judgment. Numerous witnesses testified that candidates’ reliance on large campaign contributions had undermined public confidence in Vermont’s political system. The district court noted that such testimony even came from several of plaintiffs’ own witnesses. 118 F. Supp. 2d 459, 469; *see also* Tr. II-66-72 (Meub); Tr. II-207 (Patch); Tr. IV-220 (Howard); Tr. IV-259 (Randall); Exh. Volume-VII at E-2706 (Brunelle); Tr. III-25-26 (Kuusela).

State legislators testified to their first-hand observations of the influence wielded by large contributions. For example, Senator Cheryl Rivers testified that she was unable to attract co-sponsorship to a bill on

labeling of genetically engineered food because, she was told, the Democrats could not afford to lose the food industry as a source of donations. Tr.VII-67-71; *see also* Tr. VII-72-74 (Rivers gave favorable treatment to film industry donor seeking tax exemption); Tr. IX-88-95, 100-04 (Ready on influence of slate industry donors over development permit exemption); Exh.Volume-III at E-0785 and E-0787 (press accounts of slate donations); Exh.Volume-V at E-1765 (summary of slate donations); Tr. IX-104-12 (Ready on influence of beverage industry donors in failure of legislature to expand bottle deposit bill); Exh.Volume-V at E-1766 (summary of beverage industry donations); Tr. V-54-58 (Tobacco Institute checks to legislators after vote on anti-tobacco measure caused perception of payoff); Tr. VII-62-63 (same); Exh.Volume-V at E-0805-10 (newspaper reports of same); Tr. V-60-62 (Hooper testimony that donations are likely to influence legislators' positions on "soft issues," where they do not have strong positions). *See also* State Defendants' Reply Brief, Part I.B.

Anthony Pollina, a consultant for the Vermont Public Interest Research Group (VPIRG) and a candidate for Governor, testified that VPIRG members saw the need for campaign finance reform after observing that large donors appeared to have influenced several pieces of legislation important to VPIRG. Tr. VII-147-57; Tr. IX-175-76, 193-98; *see also* Tr.

V-183-84 (David Friedman) (voter perception that influence of pharmaceutical medical industry money contributed to derailing health care reform); Tr. VIII-23-26 (Smith); Tr. IX-56-58 (Bristol); Tr. X-162-63 (Kitzmiller); Exh. Volume-V at E-1843-44, E-1847 (Fiorillo trial deposition); Tr. VII-41-42 (Young); Tr. VIII-24-26, 28-38 (Smith).

Professor Thomas Stratmann testified, based on his analysis of contributions and voting behavior, that often large contributions are made with the intention of influencing legislative votes (a “legislative strategy”), rather than helping an ally get elected (an “electoral strategy”). Stratmann’s research also showed that campaign contributions can affect legislators’ voting behavior. Tr. VI-146-70; Exh. Volume-IV at E-1533; Exh. Volume-V at E-1548, E-1559, E-1576, and E-1587.

Plaintiffs’ expert Dr. John Lott himself acknowledged that campaign contributions increase in relation to the benefits contributors can expect from government. Tr. III-202. According to his forthcoming study, “[t]he more favors the government has to give out, the more resources that people will spend to obtain those favors.” Exh. Volume-VI at E-2202.

The trial evidence thus proves that the legislature’s concern over the corrupting influence of large contributions was anything but illusory. If the

evidence in *Shrink* was sufficient, the support for the state’s interest in the record here is beyond question.

**B. The Individual Contribution Limits Are Adequately Tailored to Meet the State Interest of Avoiding the Reality or Appearance of Corruption.**

The *Buckley* and *Shrink* decisions directly addressed the degree to which contribution limits must be tailored to meet the state’s asserted interests. Legislative determinations as to the precise dollar amounts for contribution levels are entitled to deference. *Shrink*, 120 S.Ct. at 908-09; *Buckley*, 424 U.S. at 21 (courts have no “scalpel to probe” the amount at which a limit should be set to achieve its purpose). This is because “appropriate limits” will vary based upon the circumstances existing in each jurisdiction involved. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597, 620 (Alaska 1999), *cert. denied*, 120 S.Ct. 1156 (2000) (“*AkCLU*”).

Deference to the legislature is required unless it can be shown that the limitation is “so radical in effect as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Shrink*, 120 S.Ct. at 909.<sup>12</sup>

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<sup>12</sup> This holding of the *Shrink* court negates an interpretation of *Buckley* which several courts had employed to strike contribution limits under a narrow tailoring standard. *See Day v. Holahan*, 34 F.3d 1356 (8<sup>th</sup> Cir. 1994); *Russell v. Burris*, 146 F.3d 563, 571 (8<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1001 (1998).

**1. The limits are calibrated to affect contributions that give rise to the perception and reality of corruption.**

The numerous accounts of corruption and the appearance of corruption in the legislative and trial record, described in Part IV.A, *supra*, all took place while the previous \$2,000 per cycle limit on individual contributions was in effect. It is absurd, then, for plaintiffs to assert that “there was no evidence that pre-existing \$1000 [per election] limits were inadequate to deter corruption.” Randall Brief at 79.

Under the limits in effect prior to Act 64, a sole contributor could have funded an average campaign for representative, and a large portion of a state senate campaign. Businesses and individuals were allowed to contribute up to \$2,000 in an election cycle; at the same time, the average House campaign spent less than \$2,000 and a State Senate campaign averaged about \$7,000. Exh. Volume-III at E-0990-91.

Contributions far lower than the maximum permitted previous to Act 64 have caused officeholders to grant favorable access and consideration. Senator Ready testified that slate industry donors who made \$500 donations appeared to get preferential consideration in a development permit law. Tr. IX-88-95, 100-04; Exh. Volume-III at E-0787; Exh. Volume-V at E-1765. Donald Hooper testified that as an elected official, he remembered who his

large contributors were, including those who contributed \$500. Tr. V-23-30; *see also* Tr. VII-42 (Young) (\$1,000 contributor will be “listened to”).

Legislators and the public perceive contributions greater than those allowed by Act 64 to be large. *See* Tr. VII-18-21 (Young); Tr. VII-80 (Rivers); Tr. IX-226 (Pollina); Tr. VIII-23-24 (Smith). Many of plaintiffs’ witnesses testified to the same. *See* Tr. II-201 (Patch) (contributions over one hundred dollars are very large); Tr. III-23 (Kuusela); Exh. Volume-VII at E-2641 (Landell); Tr. IV-253 (Randall).

In fact, few Vermonters could afford to make donations at the levels permitted before Act 64’s enactment. Census data indicates that in 1996 the median household income in Vermont was \$32,358. Exh. Volume-V at E-1740-41. A \$2,000 contribution would thus represent more than two-thirds of a typical household’s monthly gross income -- before taxes.

**2. The contribution limits will not hinder the ability of candidates to amass the resources necessary for effective advocacy.**

Plaintiffs wrongly assert that the degree of scrutiny given a contribution limit depends on the extent to which it restricts speech and association. Landell Brief at 115, 122-123. It is clear that all contribution limits are examined under the same scrutiny; even a contribution limit involving “‘significant interference’ with associational rights” is

constitutional if it is “‘closely drawn’ to match a ‘sufficiently important interest,’ though the dollar amount of the limit need not be ‘fine tun[ed]’.” *Shrink*, 120 S.Ct. at 904, citing *Buckley*, 424 U.S. at 25 and 30. Under the *Shrink* standard, contribution limits infringe upon candidates’ speech rights only when they are set so low that they “drive the sound of a candidate’s voice below the level of notice.” 120 S.Ct. at 909. Assessing the effect of Vermont’s individual contribution limits, the district court found that “the more credible evidence” showed that effective campaigns could be run under the new limits. 118 F. Supp. 2d 459, 470.

An abundance of testimony from candidates, campaign managers, and past and present government officials familiar with Vermont state elections supported the court’s finding. Plaintiffs’ witness Mark Snelling testified that the \$400 contribution limit in statewide races would permit a candidate to raise \$300,000 to \$400,000, and that candidates for those offices would not have their voices drowned out at those levels. Tr. I-42, 67-68. Former Secretary of State Hooper also testified that the \$400 limit would permit an effective campaign, Tr. V-22, as did former Lieutenant Governor and Congressman Smith, who also said that a \$300 contribution limit for State Senate was adequate. Tr. VIII-53-54. *See also* Tr. V-141 (David Friedman);

Tr. IX-61 (Bristol); Tr. IX-136 (Ready); Exh. Volume-IV at E-1384-85 (Brownell trial deposition).<sup>13</sup>

Professor Gierzynski, analyzing campaign finance disclosure reports filed with the Vermont Secretary of State for statewide, State Senate and State House races in 1994, 1996, and 1998, found that most candidates would have lost little or no revenue. *See* Exh. Volume-III at E-0973, E-0975, E-0977. This data is discussed more fully in State Defendants' Reply Brief at Part I.C.

Gierzynski's data overstates, if anything, the effects of Act 64's limits, since it is based on:

*“worst-case” scenario statistics, which consider the historical funding pattern and discount any contribution made over the limit . . . . These statistics, however, do not account for adaptations in human behavior and the likelihood that patterns will change to recoup whatever may be lost. Thus, the only picture that we can create by utilizing past statistics is one which likely overpredicts the resultant loss of contributions. Indeed, with such a bellwether, the flock would never go anywhere.*

*Daggett*, 205 F.3d at 460 (emphasis added). Clearly, under Act 64, candidates will adjust their fundraising methods to broaden their base and

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<sup>13</sup> Plaintiffs go outside the record to assert that Governor Howard Dean and his Republican challenger Ruth Dwyer were each able to raise about \$900,000 in the 2000 Governor's race. Randall Brief at 36 n.2. Since these amounts were raised under Act 64's limits, it is difficult to argue that fundraising will be adversely affected.

obtain more donations within the new limits. Plaintiffs' witnesses acknowledged as much. *See e.g.*, Tr. IV-84 (Summers); Tr. IV-73-74 (Meub).

The fact that contribution limits might require candidates to seek funds from a greater number of persons does not make the limits impermissible. The *Buckley* Court wrote of the limits upheld in that case:

The overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression.

*Buckley*, 424 U.S. at 21-22. The same is true here. And, as Donald Hooper explained, the focus on small contributors may energize citizens:

I think that it would be energizing. I think that it would require candidates to go outside the existing framework ... you develop a much more vibrant following ... of people who were attentive, people who were in effect placing small bets rather than trying to get those large contributions or those thousand or two thousand

Tr. V-119; *see also* Tr. V-137, 144-45, 166-67 (David Friedman), Tr. VII-80 (Rivers), Tr. VIII-52-53, 63, 95 (Smith), Tr. IX-137 (Ready), Tr. X-186 (Kitzmiller), Tr. IX-58-59 (Bristol).

**3. The limits will not unfairly disadvantage any candidate or group of candidates.**

Plaintiffs argue that the contribution limits disadvantage challengers and minor party, non-wealthy, and “non-traditional” candidates, which they define to include female, gay and minority candidates. Tr. IV-174 (Howard). Yet plaintiffs presented no evidence to show that such candidates are more likely to have access to large donors than their major party, incumbent, wealthy and “traditional” opponents. Indeed, the credible evidence showed the opposite. The district court correctly found that plaintiffs had not proven that any specific group of candidates was disproportionately affected by the contribution limits. 118 F. Supp. 2d at 480.

The evidence demonstrated that “non-traditional” candidates welcome, rather than fear, the contribution limits. Representative William Lippert, for example, who is an openly gay legislator and led the fight for Vermont’s civil unions bill, supported Act 64. *See* Exh. Volume-I at E-0106; Tr. IV-221. Senator Rivers testified that Act 64 will not disadvantage women, gay or non traditional candidates. Tr. VII-86. Senator Ready, a single mother, was a non-traditional candidate and non-incumbent in her 2000 race for State Auditor. Yet she testified that Act 64 would help her rather than harm her because it would limit the traditional candidates’ receipt

of traditionally large contributions. Tr. IX-144-45. Plaintiff Howard himself voted for the reform measure. Exh. Volume-I at E-0106.

Nor does any evidence suggest that minor parties will be unfairly affected by the limits. Rather, the evidence supports the common sense understanding that minor party candidates have less access to large donors than their opponents on the Republican and Democratic ticket. Confirming this, Vermont Libertarian Party (VLP) Chairman Scott Berkey testified that the VLP has never received contributions at levels larger than the \$2000 limits. Tr. II-27-29.

Berkey himself spent only \$100 in his 1998 State Senate campaign, Tr. II-32, while his incumbent opponent spent \$13,663. Tr. II-34. Berkey could not identify any VLP candidates who have been able to outspend their opponents when spending was unlimited and contribution limits were higher. Tr. II-36. The other VLP candidate to testify, Neil Randall, ran on the Republican ticket as well, Tr. II-37, undercutting his claim to disadvantage from the law based on minor party status. Randall, like plaintiff Steven Howard, has been a successful fundraiser, Tr. IV-250, but he has no more inherent right than Howard to continue to harvest contributions which are large enough to raise corruption concerns.

Plaintiffs also fail to prove that that challengers are particularly disadvantaged by the contribution limits. This notion was rejected in *Buckley*, which, as the *Shrink* court notes, “found no support for the proposition that an incumbent’s advantages were leveraged into something significantly more powerful by contribution limitations applicable to all candidates . . .” 120 S. Ct. at 905 n.4; *Buckley*, 424 U.S. at 32-33; *accord*, *Daggett*, 205 F.3d at 461 (rejecting same argument).

For the most part, Professor Gierzynski found no systematic difference between the impact of the contribution limits on incumbents and non-incumbents. Exh. Volume-III at E-0954-55. In nearly every legislative race that Gierzynski examined, either incumbents had raised more money in amounts over the limits than had challengers, or the difference was minimal. Exh. Volume-III at E-0975, E-0978. Both defendants’ and plaintiffs’ witnesses testified that incumbents have greater access to large contributors than do challengers. Tr. IX-127 (Ready); Tr. IV-252 (Randall); Tr. I-210 (Garahan).

The fact that the most successful fundraisers will be more greatly affected by the limits than candidates with few large donors is not a reason to invalidate the law. Any regulatory system will affect some individuals more than others, but a “showing of one affected individual does not point

up a system of suppressed political advocacy that would be unconstitutional under *Buckley*.” *Shrink*, 120 S.Ct. at 909.

Plaintiffs’ arguments boil down to the notion that candidates should be allowed unlimited access to large contributions in order to compensate for any particular disadvantage they face. Were this a legal entitlement, no contribution limits could stand. There is no principled boundary to plaintiffs’ demands, since a candidate could claim to compensate for his disadvantages more effectively with contributions in \$10,000 increments than \$2,000 or \$200 increments. The state cannot be asked to ensure that the limits have no effect on the most successful fundraisers – for then the limits would have no effect at all.

**4. Vermont’s contribution limits will not unconstitutionally affect the associational rights of donors.**

The Supreme Court has held that contribution limits only minimally affect the speech rights of contributors. *Buckley*, 424 U.S. at 21; *see also Shrink*, 120 S.Ct. at 903-904. Neither do contribution limits greatly impact donors’ associational rights. *Buckley*, 424 U.S. at 22; *see also Shrink*, 120 S.Ct. at 904. To infringe on donors’ associational rights, a contribution limit must be “so radical in effect as to render political association ineffective,” and “render contributions pointless.” *Shrink*, 120 S.Ct. at 909, quoting *Buckley*, 424 U.S. at 21.

The district court properly found that the “vast majority” of contributors would not be affected by the limits. 118 F. Supp. 2d at 470. Professor Gierzynski’s data showed that only a very small percentage of contributions in the past three electoral cycles would have been affected. Tr. VI-39-42; Exh. Volume-III at E-0968 and E-0979. Numerous witnesses for both sides testified that contributions at the new \$200-\$400 level are meaningful to Vermont contributors. See e.g., Tr. II-171-72 (Nelson); Tr. IV-101 (Summers); Tr. IV-254-55 (Randall); Exh. Volume-VII at E-2687 (Landell); Tr. V-20 (Hooper); Tr. V-137-38 (David Friedman); Tr. IX-47 (Bristol); Tr. IV-73-75 (Meub).

In sum, the *Buckley* and *Shrink* standards set a high hurdle for those seeking to invalidate contribution limits. They must show that the state’s asserted interest in preventing corruption or its appearance is illusory. They must show that the limits are so radical in effect as to stifle candidate speech and frustrate political association. The trial record demonstrates that plaintiffs have not cleared this hurdle, and that the contribution limits are constitutional in their design and effect.

## V. VERMONT'S LIMITS ON CONTRIBUTIONS TO AND FROM PACS ARE CONSTITUTIONAL.

### A. The Limits on Contributions to Political Committees Are Constitutional.

The constitutionality of limits on contributions to PACs has been firmly established by the Supreme Court. *Buckley*, 424 U.S. at 38 (upholding federal aggregate limit of \$25,000 on individual contributions to candidates, PACs, and political parties); *California Medical Association v. Federal Election Commission*, 453 U.S. 182, 199 (1981) (plurality opinion) (“*Cal-Med*”) (upholding \$5,000 federal limit on individual contributions to multi-candidate PACs); *id.* at 203-04 (Blackmun, J., concurring in part and concurring in the judgment); *accord*, *Kentucky Right to Life v. Terry*, 108 F.3d 637, 648-49 (6<sup>th</sup> Cir. 1997), *cert. denied*, *Kentucky Right to Life v. Stengel*, 522 U.S. 860 (1997) (upholding aggregate limit of \$1,500 on contributions to permanent committees, equivalent to PACs); *Florida Right to Life v. Mortham*, No. 98-770-Civ-Orl-19A, slip op. at 21-23 (upholding \$500 limit on contributions to political committees); *AkCLU*, 978 P.2d 597 (upholding \$5,000 limit on contributions to “groups”); *North Carolina Right to Life v. Leake*, 108 F. Supp. 2d 498, 514-516 (E.D.N.C. 2000) (denying preliminary injunction against limits on contributions to and from PACs).

Plaintiffs argue that the protected speech rights of contributors to PACs are infringed by this limit. However, as already explained, *supra* at Part II.B.4, the Supreme Court has directly rejected the idea that a donor speaks through his or her contribution. *Buckley*, 424 U.S. at 21. Contribution limits, in addition, only minimally affect donors' associational rights. *Id.* at 22; *see also Shrink*, 120 S.Ct. at 903-904. This is true of contributions to PACs as well as contributions to candidates:

If the First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign organization which advocates the views and candidacy of a particular candidate, the rights of a contributor are similarly not impaired by limits on the amount he may give to a multicandidate political committee[.]

*Cal-Med*, 453 U.S. at 197 (plurality opinion).

Plaintiffs' arguments that PAC contributions do not carry a risk of corruption have also been rejected by the Supreme Court. In upholding limits on contributions to PACs, the Supreme Court has recognized that the state interest in deterring corruption or the appearance of corruption would be impaired if PACs could be used to evade individual contribution limits. *Buckley*, 424 U.S. at 35-36; *Cal-Med*, 453 U.S. at 198-99; *accord, Kentucky Right to Life*, 108 F.3d at 648-49 (holding that limit on contributions to PACs prevents evasion of individual contribution limits); *AkCLU*, 978 P.2d at 624 (same).

The record in this case demonstrates that the Vermont legislature was justifiably concerned that unlimited contributions to PACs would allow evasion of individual contribution limits. Plaintiff Jeffrey Nelson testified that because of Act 64's limits on contributions to candidates he had switched his contributions to the Republican Legislative Election Committee (RLEC) and to the Republican Party. Tr. II-160. In 1998, before the limits went into effect, Nelson donated no money to any PAC and only \$660 to the Vermont Republican Party. In 2000, when candidate contribution limits were in effect, he donated \$1,500 to RLEC and \$2,000 to the Republican Party. Exh. Volume-V at E-1900 and E-1901. Without the \$2,000 cap on contributions to political committees, Nelson or any other donor who had given the maximum candidate contribution could also channel unlimited amounts to various PACs, which in turn could support the donor's favored candidate(s).

Plaintiffs argue that because PACs and individuals are subject to the same limits on contributions to candidates, there is no potential to use PACs to circumvent the individual contribution limits. Randall Brief at 107-108 and 110. In effect, the Randall plaintiffs argue that a state must choose between limiting a PAC's contributions to candidates, or limiting individuals' contributions to PACs, but is constitutionally forbidden to limit

both. There is no authority for this argument; there is nothing unusual about regulatory schemes that place limits on both. *See Kentucky Right to Life*, 108 F.3d at 648-49 (upholding aggregate limit of \$1,500 on contributions to permanent committees and \$1,000 limit on committee and individual contributions to candidates). Experience teaches that leaving contributions to any one political entity unlimited opens the door to evasion of limits. Tr. IX-220 (Pollina). PAC political advocacy takes many forms; for example, political parties in Vermont use legislative PACs to support their parties' candidates. In the absence of any limit on contributions to PACs, anyone who has made the maximum donation to candidate Jones could then provide unlimited funding to the Jones-for-Governor PAC, whose only purpose might be to further the election of Jones, and to one or more party PACs that could also funnel additional funds to support the candidate.<sup>14</sup> The effectiveness of the individual limits would be undermined under such a scenario. *See Landell v. Sorrell*, 118 F. Supp. 2d at 473 (“[C]andidates who receive money from PACs almost always know where the money comes

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<sup>14</sup> This problem is not eliminated by the provision against earmarking of contributions at 17 V.S.A. § 2805(e), as the intent of donors and PACs in channeling money will likely never be known to authorities. Just as the existence of bribery and disclosure laws does not eliminate the state's interest in addressing corruption through contribution limits, *Buckley*, 424 U.S. at 27-28, the existence of an anti-earmarking provision does not eliminate the state's interest here.

from and why it was given.”); *cf. Cal-Med*, 453 U.S. at 199 n.19 (plurality opinion) (noting potential for corruption and evasion of limits if one donor could dominate political committee through unlimited donations).

Act 64’s limit of \$2,000 on contributions to PACs is adequately tailored to address the state’s legitimate interest in addressing the reality and appearance of corruption. The Supreme Court in *Shrink* corrected a misperception among lower courts that *Buckley* required narrow tailoring of contribution limits. Rather, the court held that a contribution limit must not be “so radical as to render political association ineffective, drive the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Shrink*, 120 S.Ct. at 909. Pre-*Shrink* decisions which employ a stricter standard to strike limits on PAC contributions are no longer good law on that point. *See Day v. Holahan*, 34 F.3d 1356 (8<sup>th</sup> Cir. 1994) (pre-*Shrink* decision striking \$100 limit on contributions to PACs); *Russell v. Burris*, 146 F.3d 563, 571 (8<sup>th</sup> Cir. 1998) (pre-*Shrink* decision striking limit of \$200 on contributions to PACs), *cert. denied*, 525 U.S. 1001 (1998).

The \$2,000 limit is well within the Legislature’s broad discretion. Under the limits in effect before passage of Act 64, a donor could give a PAC \$3,000 per election, or a total of \$6,000 per election cycle. These amounts are extremely large in the context of Vermont campaigns. *See Part*

IV.B.1, *supra*. While ameliorating the potential for actual or perceived corruption inherent in such large contributions, the \$2,000 limit was set at a level that would not curtail PAC expression. Indeed, while the House Local Government Committee had provided that PACs, as well as candidates and political parties, could not receive donations over \$200, that limit was raised to \$2,000 for PACs by the House Ways and Means Committee. Exh. Volume-I at E-0035 and E-0043. A legislative determination that \$2,000, rather than \$6,000 or \$200, is a reasonable limit for contributions to PACs is precisely the type of determination that a court has no “scalpel to probe” under the principles of *Buckley*. 424 U.S. at 30 (internal quotation omitted).

Furthermore, data from the 1994, 1996 and 1998 elections in Vermont show that PACs received extremely few contributions over the \$2,000 limit; between two and six donations were over the limit each year, amounting to only 0.4% to 1.9% of all contributions received by PACs. Exh. Volume-III at E-0968 (Gierzynski report, Table 2). The sole plaintiff which is a PAC and makes contributions to candidates for office, the Vermont Right to Life Committee-Political Committee (VRLC-PC), has never received individual donations over \$2,000 and could not do so because it is constituted as a federal PAC. Tr. IV-138 (Sharon Toborg).

**B. The \$2,000 Limit on Contributions to PACs May Constitutionally Be Applied to PACs That Make Independent Expenditures.**

Plaintiff Vermont Right to Life Committee – Fund for Independent Expenditures (VRLC-FIPE) argues that application of Act 64’s \$2,000 contribution limit to those PACs which engage solely in independent expenditures amounts to an unconstitutional restriction on the independent expenditures themselves.<sup>15</sup> This ignores the distinction between contributions and expenditures delineated in *Buckley*, 424 U.S. at 58-59, the *Cal-Med* plurality, 453 U.S. at 197 (plurality opinion), and *Shrink*, 120 S.Ct. at 903-904. As discussed above, these cases affirm that a contributor does not “speak by proxy” through the recipient of his donation, and that a restriction on contributions is not equivalent to a restriction on speech by a candidate – or, by extension, a political committee. Nowhere has it been held that a PAC’s speech is entitled to greater protection than a candidate’s speech, which is protected under *Buckley* and *Shrink* and yet

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<sup>15</sup> In the past, VRLC-PC made independent expenditures as well donations to candidates. In order to position itself to challenge to Act 64, VRLC-PC created a new entity the day before filing its amended complaint, VRLC-FIPE. Exh. Volume-VII at E-2437 and E-2438. However, nothing prevents VRLC-FIPE from holding a meeting and, with the stroke of a pen, changing its by-laws to make direct contributions to candidates with its funds.

“significantly unimpaired” by contribution limits. *Shrink*, 120 S.Ct. at 904, interpreting *Buckley*, 412 U.S. at 19-21.

Justice Blackmun’s concurrence in *Cal-Med* would have applied a “rigorous standard of review” to contribution limits. 453 U.S. 182 at 202-203. While he found the PAC contribution limits at issue in *Cal-Med* to be constitutional even under this more exacting scrutiny, he observed in dicta that “this analysis suggests that a different result would follow” if limits on contributions to independent expenditure PACs were considered. 453 U.S. 182, 202-203. However, the subsequent *Shrink* decision negates Justice Blackmun’s position that contribution limits are subject to heightened scrutiny. 120 S.Ct. at 904; *see also North Carolina Right to Life v. Leake*, 108 F. Supp. 2d at 517 (noting that Justice Blackmun’s position in *Cal-Med* has been negated by the *Shrink* decision).

The fact that a PAC makes only independent expenditures does not change the analysis.<sup>16</sup> In a similar, recent case, a district court responded to

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<sup>16</sup> Sitting on the Court of Appeals panel that decided *Cal-Med*, then-Judge Kennedy wrote that the effect of contribution limits in restricting money spent by independent expenditure PACs should not be given serious consideration in evaluating the constitutionality of the contribution limits. 641 F.2d 619, 626 n.5 (9th Cir. 1980) (Kennedy, J.), *aff’d*, 453 U.S. 182 (1981).

the arguments of the plaintiff independent expenditure PAC that contribution limits stifled expression:

[Plaintiff] NCRLC-FIPE essentially questions the usefulness of the Buckley Court's distinction between contributions and expenditures. *Shrink Missouri* has recently confirmed that this distinction is still alive and well. And indeed, if NCRLC-FIPE is in fact a political committee, those who wish to contribute money to this group have neither their speech nor their associational rights substantially infringed.

*North Carolina Right to Life*, 108 F. Supp. 2d at 517 (denying preliminary injunction against limit on contributions to independent expenditure PACs). The Court went on to note that in addition to contributing to the plaintiff independent expenditure PAC, donors could give to as many other PACs as they wished; that neither the quantity nor content of the donors' speech was constrained; and that donors' associational rights were not substantially infringed, since in addition to their contribution they remained free to assist PACs with their time and in other ways. *Id.* The court also observed that the independent expenditure PAC could solicit funds from as many donors as it wished. *Id.* For these reasons, a limit on contributions to an independent expenditure PAC "does not appear to be different in kind from other contribution limits that have been upheld." *Id.* at 518. All of this is equally true of VRLC-FIPE and its donors.

Unlimited contributions to an independent expenditure PAC could defeat individual contribution limits in the same manner as other PAC contributions. *Id.* at 516. As noted above, a candidate who had made the maximum donation directly to Governor Jones could then make unlimited donations to the Jones-for-Governor PAC. Governor Jones would know precisely who had supported him in this manner. Plaintiffs' contention that independent expenditures are entirely incapable of implicating concerns about the reality or appearance of corruption ignores the fact that such expenditures are express advocacy on behalf of candidates, and not issue advocacy, which has been given greater First Amendment protection. For example, the Supreme Court has upheld *direct* restrictions on corporate independent expenditures in candidate campaigns while striking down restrictions on corporate expenditures in ballot initiative campaigns. *Compare Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (upholding state law forbidding corporations from using general treasury funds for independent expenditures in candidate elections), *with First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down state law forbidding corporate expenditures in ballot initiative campaigns).

It bears emphasis that the limits at issue here are limits on *contributions* to PACs, not limits on expenditures by PACs. Plaintiffs'

reliance on *FEC v. NCPAC* is therefore misplaced. That decision explicitly affirmed the distinction between a limit on contributions *to* a PAC – which was not at issue – and a limit on independent expenditures *by* a PAC, which the court held unconstitutional. “Unlike *California Medical Assn.*, the present cases involve limitations on expenditures by PACs, not on the contributions they receive....” *NCPAC*, 470 U.S. at 495. Similarly, *Colorado Republican I*, 518 U.S. 604 (1996), does not further the plaintiffs’ argument, since it struck FECA limits on political party independent expenditures, and not limits on contributions.

One district court has issued a preliminary injunction against a limit on contributions to independent expenditure PACs. *San Franciscans for Sensible Gov’t v. Renne*, No. C 99-02456 CW (N.D. Cal. Sept. 8, 1999), *aff’d*, No. 99-16995 (9<sup>th</sup> Cir. Oct. 20, 1999). However, that court appears to have misconstrued relevant Supreme Court precedent, citing *Cal-Med*, *NCPAC*, and *Colorado Republican* in support of the assertion that “the Supreme Court has indicated that making contributions to PACs and political parties, which make only independent expenditures and neither make contributions to, nor coordinate their expenditures with, candidates or candidate-controlled committees, is highly protected speech and may not be regulated.” *Id.* at 14. As discussed above, and as noted in *Leake*, none of

these cases supports this proposition. In addition, the appellate court in *Renne* went out of its way to say that it was expressing no opinion on the merits of the constitutional challenge, affirming the injunctive relief solely because it did not find an abuse of discretion. *San Franciscans for Sensible Gov't v. Renne*, No. 99-16995 (9<sup>th</sup> Cir. Oct. 20, 1999), Slip. Op. At 2.

Finally, the Randall plaintiffs devote two sentences to arguing that the limit on contributions to PACs is overbroad because it could affect groups which engage in issue advocacy. Randall Brief at 111-112. They did not plead this in their complaint. They never sought to amend their complaint to include it, and presented no evidence at trial to support the claim.

Accordingly, the plaintiffs are barred from raising this argument on appeal.

Even if they had properly pleaded this claim, the Randall plaintiffs are in no way injured by this provision and do not have standing to challenge it. In order to make a claim of overbreadth, a plaintiff must itself be affected by the law or regulation at issue, and may then claim that it would be unconstitutional in its effect on others even if not as applied to the plaintiff. *See Broaderick v. Oklahoma*, 413 U.S. 601, 610-614 (1982); *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Bordell v. General Electric Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991). The Randall group does not include any plaintiff who could conceivably come within the definition of a political committee.

The Landell plaintiffs, which do include two political committees, have never raised this claim. And even the Landell PAC plaintiffs do not include any committee formed solely for the purpose of engaging in issue advocacy. Therefore, no plaintiff with standing has properly brought this issue before the Court.

The fact that none of the plaintiffs is a PAC engaged solely in issue advocacy, or even has a segregated account from which issue advocacy is funded, also demonstrates that the argument is utterly invalid on the merits. There is no authority for the proposition that an entity which is actively engaged in electoral advocacy can obtain First Amendment immunity from all contribution limits simply by devoting some fraction of its activities to non-electoral activities.<sup>17</sup> That would make a complete mockery of any contribution limits.

**C. The Limits on Contributions by Political Committees to Candidates are Constitutional.**

*Buckley* upheld the constitutionality of the FECA's \$5,000 limit on contributions by political committees to candidates. 424 U.S. at 35-36. Act

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<sup>17</sup> For example, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 292 (1981), which struck down limits on contributions to a committee formed for the purpose of opposing a particular ballot measure, there was no indication that the plaintiff committee made contributions or expenditures in any candidate campaigns.

64 permits PACs to donate to candidates the same amount that an individual may donate. Plaintiffs, while apparently not arguing that the First Amendment requires PAC donations to remain entirely unlimited, contend that political committees are constitutionally entitled to make higher contributions to candidates than may be made by individuals. The district court correctly held that there is no such constitutional requirement, declaring, “Indeed, the anti-corruption rationale that supports limits on individual contributions is arguably even stronger when applied to PAC contributions.” *Landell v. Sorrell*, 118 F.Supp. 2d at 489. Similarly, other courts have routinely upheld contribution limits that apply equally to PACs and individuals. *See Daggett*, 205 F.3d 445 at 452, 462 (upholding limits of \$250 for legislative and \$500 for statewide campaigns applicable both to PACs and individuals); *Kentucky Right to Life*, 108 F.3d at 648 (upholding \$1,000 limit on contribution by permanent committee or individual to candidate); *Florida Right to Life*, No. 98-770-Civ-Orl-19A, slip op. at 20 (upholding \$500 limit on contributions by a political committee or an individual to a candidate).

Plaintiffs cite *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422 (8<sup>th</sup> Cir. 1995), as recognizing a candidate’s “constitutional right of access to organizational contributions that could not be taken away.”

Randall Brief at 105-106. But rather than addressing a limit on PAC contributions to candidates, that case invalidated a scheme wherein candidates refusing voluntary spending limits were barred from accepting *any* PAC contributions at all. *Id.* at 1424, 1426. *Cf. Gard v. Wisconsin State Elections Board*, 456 N.W. 2d 809 (Wis. 1990) (upholding scheme which imposed aggregate limit on total amount candidate may accept from all political committees combined, and rejecting argument that aggregate limit is tantamount to limit on amount candidate may spend), *cert. denied*, 498 U.S. 982 (1990)).

The record contains ample evidence of public concern over the growing influence of PACs in Vermont. For example, many newspapers reported on the large amount of PAC money flowing to candidates in the 1996 elections. Exh. Volume-III at E-0758, E-0780, E-0782, E-0800-0801. Other articles raised concern about the targeted support that Gov. Dean received in his 1994 campaign from PACs in the drug and health-related industries. Exh. Volume-III at E-0783 and E-0790-0793.

The trial record also supports the legislature's judgment that large PAC contributions can create the reality or appearance of corruption. Professor Thomas Stratmann testified that studies had shown (1) PAC contributions affected legislative outcomes on various agricultural issues,

and (2) while some PAC contributions were made in order to help friendly legislators gain election, other PAC donations were given with the intention of trying to influence legislative votes.<sup>18</sup> Tr. VI-146-170; Exh. Volume-IV at E-1533; Exh. Volume-V at E-1548, E-1559, E-1576, and E-1587.

Plaintiffs' own expert, Prof. Gerald Pomper, has testified before Congress that PAC contributions to candidates should be limited. He believes that contributions from labor and corporate PACs pose a particular danger of corruption and the perception of corruption. Tr. VIII-163; Exh. Volume-V at E-1609.

Because Act 64's limits on contributions by PACs to candidates are not "so radical as to render political association ineffective, drive the sound of a candidates' voice below the level of notice, and render contributions pointless," *Shrink*, 120 S.Ct. at 909, they are constitutional.

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<sup>18</sup> The Landell plaintiffs acknowledge that "[e]conomic PACs tend to contribute to incumbents to maintain relationships with those most likely to be responsible for legislation that will affect the PAC's interests," *i.e.* a "legislative strategy," as opposed to following an "electoral strategy" of contributing to help elect particular candidates. Landell Brief at 34.

## **VI. VERMONT'S REGULATION OF "RELATED EXPENDITURES" IS CONSTITUTIONAL.**

As canvassed above, Part V, Vermont has a compelling interest in limiting the size of contributions to political candidates in order to deter the reality and appearance of corruption and assure public confidence in government. If campaign donors could evade limits on direct contributions simply by paying a candidate's bills for newspaper ads or other campaign expenses, without such expenditures counting as contributions to the candidate or expenditures by the candidate, the purpose of the limits would be defeated. Witnesses who testified at the legislative hearings on Act 64 repeatedly discussed the necessity of regulating such "related" expenditures in order to prevent evasion of the limits. Exh. Volume-I at E-0276-E-0279; Exh. Volume-II at E-0416-0421, E-0558-0566, E-0634-0638, E-0655.

For this reason, Act 64, like the FECA provisions upheld in *Buckley*, provides a mechanism for attributing to the candidate certain expenditures made by third parties. Specifically, 17 V.S.A. §2809 states that a "related campaign expenditure made on the candidate's behalf" will be counted as a contribution to the candidate and an expenditure by the candidate. A payment by a third party may be considered a "related campaign expenditure made on the candidate's behalf" *only* if the expenditure was "intended to promote the election of a specific candidate or group of candidates, or the

defeat of an opposing candidate or group of candidates” *and* was “intentionally facilitated by, solicited by or approved by the candidate or the candidate’s political committee.” 17 V.S.A. § 2809(c).<sup>19</sup>

As explained in Part A, *infra*, under the principles of *Buckley*, the coordinated payments regulated by 17 V.S.A. § 2809 fall within the scope of campaign activities that may be regulated by the State. As explained in Part B, *infra*, plaintiffs err in suggesting that political committees and political parties are entitled to a special constitutional exempt from any regulation of their related expenditures. Part C, *infra*, refutes plaintiffs’ further argument that the rebuttable presumption employed by 17 V.S.A. § 2809(d) is unconstitutional.

**A. *Buckley* and its Progeny Approve of the Regulation of Coordinated Expenditures as Contributions.**

*Buckley* itself considered and approved the regulation of expenditures that were made by third persons acting in coordination with the candidate. 424 U.S. at 36-37, 46-47. In upholding the FECA’s contribution limits, the Supreme Court recognized that “controlled or coordinated expenditures are

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<sup>19</sup> Under 17 V.S.A. § 2809(b), expenditures of less than \$50 on a candidate’s behalf are not considered expenditures by the candidate. Further, under 17 V.S.A. § 2809(d), an expenditure of less than \$100 for refreshments and related supplies at an event held to allow a candidate to meet personally with a group of voters is excluded from the definition of a “related expenditure.”

treated as contributions rather than expenditures under the Act,” in order to “prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.” 424 U.S. at 46, 47. As the Supreme Court stated:

If, as we have held, the basic contribution limitations are constitutionally valid, then surely these provisions are a constitutionally acceptable accommodation of Congress' valid interest in encouraging citizen participation in political campaigns while continuing to guard against the corrupting potential of large financial contributions to candidates.

424 U.S. at 36.

When an expenditure is approved or endorsed by the candidate, it amounts to a *de facto* contribution to the candidate. As the Supreme Court explained, the “ultimate effect [of coordinated expenditures] is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the [expense].” *Buckley*, 424 U.S. at 36-37. *See also Clifton v. FEC*, 114 F.3d 1309, 1311 (1<sup>st</sup> Cir. 1997) (“expenditures directed by or ‘coordinated’ with the candidate could be treated as contributions”); *United States v. Golland*, 959 F.2d 1449, 1452 (9<sup>th</sup> Cir. 1992) (upholding criminal conviction based upon expenditure that was made “in concert” with a candidate and was, therefore, considered a contribution).

The plurality decision in *Colorado Republican I* confirmed this understanding of *Buckley*:

The provisions that the [*Buckley*] Court found constitutional mostly imposed contribution limits – limits that apply both when an individual or political committee contributes money directly to a candidate *and also when they indirectly contribute by making expenditures that they coordinate with the candidate.*

518 U.S. at 610 (plurality opinion) (emphasis added); *id.* at 624-25.<sup>20</sup>

The *Colorado Republican I* plurality refused to permit regulation of what it concluded were party expenditures made, not in concert with candidates, but *independently* of candidates. The “constitutionally significant fact” that precluded regulation of the expenditures in that case was “the *lack of coordination* between the candidate and the source of the expenditure.” 518 U.S. at 617 (emphasis added); *see also Shrink*, 120 S.Ct. at 907.

*FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), is not to the contrary. While that court mistakenly<sup>21</sup> attempted to fashion a new category of coordinated expenditures – dubbed “expressive coordinated

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<sup>20</sup> The plurality did not address whether coordinated expenditures by political parties, in addition to those by individuals and political committees, should enjoy an exception to the standards set forth in *Buckley*. *Colorado Republican I*, 518 U.S. at 619-22. This question is addressed in Part B., *infra*.

<sup>21</sup> As explained above, *Buckley* establishes the propriety of government regulation of coordinated expenditures.

expenditures” – that might not be subject to regulation, *id.* at 85, it also verified the potential dangers of corruption inherent in coordinated expenditures, *id.* at 88.

Vermont’s provisions on “related campaign expenditures made on a candidate’s behalf” are consistent with the coordination case law just described. They seek, in a closely drawn manner, to guard against the same problems of corruption and its appearance identified in *Buckley* and *Colorado Republican I*. Section 2809 does not limit expenditures made independently of a candidate. Persons and organizations wishing to make expenditures, on their own, to promote a candidate are completely free to do so in any amounts they might desire. Only where such expenditures have been “intentionally facilitated by, solicited by or approved by the candidate or the candidate’s political committee” are they regulated by Act 64. 17 V.S.A. § 2809(c).

The Landell plaintiffs argue that 17 V.S.A. § 2809 is unconstitutional because it does not regulate “coordinated” expenditures, but instead regulates “related” expenditures, defined as those expenditures “intentionally facilitated by, solicited by or approved by the candidate or the candidate’s political committee.” Essentially, plaintiffs contend that because *Buckley* approved the regulation of “coordinated” expenditures, any statute

that goes beyond the word “coordinated” to provide some definition of what that might mean is facially unconstitutional.

This argument is unavailing.<sup>22</sup> There is nothing in *Buckley* that implies that the word “coordinated” provides the sole constitutional means of defining expenditures that should be attributed to the candidate. Indeed, under the current version of the FECA itself, the distinction between independent and coordinated expenditures turns on whether an expenditure is made “in cooperation, consultation, or concert, with” the candidate or his agents. 2 U.S.C. 441a(a)(7)(B)(i). Thus, FECA now uses words other than “coordination” to describe when an expenditure crosses the line and becomes a contribution.<sup>23</sup> Other states also have provisions using terms other than or in addition to “coordinated” to describe expenditures that

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<sup>22</sup> Significantly, the Randall plaintiffs make no argument that Vermont’s definition of “related expenditures” is facially unconstitutional. They argue only that the presumption applicable to political parties and committees that recruit or endorse candidates, § 2809(d), is unconstitutional. Randall Brief at 63-67. *See Part C, infra* (addressing § 2809(d)).

<sup>23</sup> The FECA provision at issue in *Buckley* was § 608(c)(2)(B) of FECA, which later was replaced by 2 U.S.C. § 441a(a)(7)(B)(i), the provision now at issue in *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (“*Colorado Republican II*”).

should be attributed to the candidate.<sup>24</sup> As the Randall plaintiffs acknowledge, “Under Vermont law, ‘related’ expenditures are the statutory equivalent of coordinated expenditures under FECA (and in most states) and are treated as contributions subject to the attendant limits on contributions.” Randall Brief at 97 n.22.

If anything, the test for coordination under Section 2809 establishes a higher bar than necessary to pass scrutiny under the Constitution. *Cf. Clifton*, 114 F.3d at 1311 (suggesting that coordination under *Buckley* merely requires “some measure of collaboration beyond a mere inquiry as to the position taken by a candidate on an issue”). Significantly, Vermont law establishes a weighty *mens rea* of intentional conduct. This standard regulates only those expenditures that the candidate has made a conscious decision to facilitate, solicit or approve. As the Administrative Rule interpreting Section 2809 provides, a candidate must have “some knowledge of the fact, or willful blindness toward the fact that the action will be used in

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<sup>24</sup> For example, under Washington law, “contribution” is defined to include “[a]n expenditure made by a person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a political committee, or their agents.” Wash. Rev.Code Ann. § 42.17.020(14)(a)(ii) (West 2000). Arizona law provides that an expenditure is not an independent expenditure (and thus is considered a contribution) if “[t]here is any arrangement, coordination or direction with respect to the expenditure between the candidate or the candidate’s agent and the person making the expenditure”, Ariz. Rev. Stat. Ann. § 16-901(14)(b) (West 2000).

connection with an activity or expenditure on the candidate's behalf." Exh. Volume-II at E-0737, Administrative Rule 2000-1.

Further, each of the elements of Vermont's definition of related expenditures clearly is facially constitutional under the principles established in *Buckley*. Expenditures that are "intentionally facilitated" by the candidate pose the same types of dangers identified in *Buckley*, 424 U.S. at 36-37 & 47, and the provision thus ensures that candidates and third parties are not skirting the contribution and expenditure limits of Act 64 through the ruse of "independent" expenditures that are, in fact, coordinated with the candidate. The statutory phrase is explained by Administrative Rule 2000-1(2) (b), which states: "'Intentionally facilitated' means for a candidate or the candidate's political committee to have consciously, and not accidentally, done an action to make the activity or expenditure possible." Exh. Volume-II at E-0737.

This portion of the definition must also be understood in the context of the overall *mens rea* requirement that the candidate must have "some knowledge of the fact, or willful blindness toward the fact that the action will be used in connection with an activity or expenditure *on the candidate's behalf*" – that is, to benefit the candidate. *Id.*, Administrative Rule 2000-1 (emphasis added); *see* § 2809(c) (expenditure must be "intended to promote

the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates”). Merely providing information about a candidate’s position in response to a general candidate questionnaire would not meet this standard, since the possibility that the information would result in an expenditure specifically benefiting him would be far too remote and contingent to charge him with the necessary *mens rea* (it would depend, for example, on how the candidates’ answers compared to all other candidates’ answers; whether, when and in what format the organization even decided to publicize the information; what audience it would eventually be directed to; and other factors unknown to the candidate).

Likewise, the “solicited” and “approved” provisions of Section 2809 do not require a great deal of discussion. Solicitation requires a direct or indirect effort by the candidate or her agent to procure the expenditure. Exh. Volume-II at E-0737, Administrative Rule 2000-1(2)(b). Approval requires that a candidate “have consciously, and not accidentally, taken any prior action or inaction that indicates permission or approval. *Simply knowing that an activity or expenditure is taking place does not, alone, constitute approval.*” *Id.* (emphasis added). Such expenditures pose all of the concerns about evasion of direct contribution limits that *Buckley* discussed. 424 U.S. at 36-37.

**B. Political Parties and PACs Are Not Entitled to An Exemption from Limits on “Related Expenditures.”**

The Supreme Court has granted a petition for writ of certiorari to review the judgment of the 10th Circuit majority which struck down as unconstitutional the FECA’s limits on political parties’ coordinated expenditures on behalf of candidates. *FEC v. Colorado Republican Federal Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (“*Colorado Republican II*”). The Supreme Court’s decision will, of course, be of relevance to plaintiffs’ argument that political parties are constitutionally exempt from any regulation of their coordinated expenditures. Intervenors explain briefly why such an exemption is inconsistent with the teachings of *Buckley* and *Shrink* and entirely unjustified on the record presented below.

Related expenditures by political parties and PACs create the same potential for undermining direct contribution limits that led the *Buckley* Court to uphold FECA’s challenged limits on coordinated expenditures. Such expenditures are tantamount to direct contributions and thus create the same risk of corruption as direct contributions. *Cf. Buckley*, 424 U.S. at 36-37. Witnesses who testified before the Vermont Legislature on the need to regulate related expenditures expressed particular concern about spending by

political parties on behalf of candidates which could evade the limits. Exh. Volume II at E-0428-0432, E-0542-0548, E-0564-0568.

The Landell plaintiffs err in contending that political parties, unlike all other political participants, are constitutionally entitled to make totally unlimited coordinated expenditures on behalf of candidates.<sup>25</sup> First, the Vermont Republican State Committee’s contention that it will be irreparably harmed unless it is exempt from the related expenditure limitations is directly contradicted by the actions of the VRSC and leading Vermont Republicans during the legislative consideration of Act 64. At one point during that process, a House committee sought to alter the “related expenditure” provision of the bill by limiting its coverage to “an individual or single source” – language that would have excluded political parties from coverage. Exh. Volume-I at E-0044; *see* Exh. Volume-II at E-0542-E-0548.

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<sup>25</sup> The Landell Plaintiffs argue that parties are entitled to an exemption from any limits on coordinated expenditures, but neither the Randall nor Landell plaintiffs argue that a similar exemption should apply to PACs. Therefore, the arguments in this section are directed to the Landell plaintiffs’ arguments concerning political parties. Further, the application of the “related expenditure” provision to political parties is dependent upon reversal of the district court’s judgment invalidating Act 64’s limits on direct party contributions to candidates, 17 V.S.A. §§ 2805(a)-(b), and/or its judgment invalidating the limits on candidate spending. The “related expenditure” provision defines when an expenditure will be attributed to a candidate, and would not come into play for related expenditures by political parties in the absence of a limit on party contributions to candidates and/or a limit on candidate spending.

Representative Walter Freed, a leading Vermont Republican who was then the House minority leader, strongly objected to this, insisting that the related expenditures attributed to candidates *must* include “not just the ones made by an individual or single source but also the ones made by the political party and the PAC.” *See* Exh. Volume II at E-0542-E-0548; Exh. Volume-I at E-0064.

Further, according to a press release issued by the Vermont Republican State Committee during the consideration of Act 64, it was critical for any campaign finance legislation to “close loopholes.” Exh. Volume-V at E-1736. The VRSC stated that it was particularly concerned about certain expenditures made by the Democratic Party on behalf of Senate Democrats in the 1996 election, because the VRSC believed the expenditures actually “were not ‘independent expenditures’ done without [the candidates’] knowledge.” *Id.* at E-1735.<sup>26</sup>

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<sup>26</sup> These 1996 expenditures by the Democratic Party on behalf of Senate Democrats prompted an investigation by the Attorney General concerning whether the expenditures were truly independent. The controversy over such expenditures was reported on extensively in the press after the 1996 elections and was one of the issues that propelled campaign reform to the top of the legislative agenda in 1997. Tr. VII-149-150 (Pollina); *see also* Exh. Volume-III at E-0762, “Democratic Senate Fund Raising Probed,” *The Burlington Free Press*, Tuesday, April 29, 1997; Exh. Volume-III at E-0760, “The Party’s Over,” *Rutland Herald*, May 1, 1997; Exh. Volume-III at E-0761, “Democrats’ Spending Not Fully Stated,” *Rutland Herald*, April 29,

Turning to the VRSC's current position, plaintiffs' claim of unconstitutionality is based on an erroneous premise. Plaintiffs argue that because political parties have a close relationship with their candidates and exist for the purpose of electing candidates to office, speech by a candidate is the same as speech by a party. This alleged unity between a party and its candidates is said to transform any limit on party contributions to candidates into a direct limit on party speech. Landell Brief at 74-78.

Plaintiffs' argument is factually and legally insupportable. Candidates and parties are not one and the same. Even when a candidate for office is a member of a party, she also remains a distinct individual with an identity separate from that of her party. She is capable of taking – and indeed should have an unquestioned right to take – positions that might not be fully in accord with the platform of her party. Certainly, the notion that candidate speech is party speech would not give political parties the right to offer outright monetary bribes to a candidate to convince her to advocate the party platform rather than her own views. By the same token, Vermont was entitled to conclude that, in order to deter the corruption and appearance of corruption associated with large infusions of cash to legislators, there must

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1997; Exh. Volume-III at E-0756, "The \$121,000 Question," *The Burlington Free Press*, May 4, 1997.

be limits on a party's ability to influence its candidates through the means of large coordinated expenditures on their behalf. *See AkCLU*, 978 P.2d at 626 (“The natural tendency of successful candidates who receive unlimited contributions from a party would be to reduce independent consideration of issues and adhere to positions taken by the party itself.”). The 10th Circuit majority opinion in *Colorado Republican II*, on which plaintiffs heavily rely, rests on a misapprehension of this basic point. In striking down the FECA's limits on party coordinated expenditures, the 10th Circuit majority stated “we reject the notion that a party's influence over the positions of its candidates constitutes a subversion of the political process” (internal quotations omitted). 213 F.3d at 1231. Again, while parties – like individuals and other organizations – certainly have the right to attempt to influence candidates' positions, the Supreme Court's campaign finance jurisprudence draws a clear line between influencing candidates' positions through cash contributions and influencing candidates' positions through other means. The right to influence candidates' positions on issues simply does not include the right to use unlimited *monetary contributions* as a means of influencing candidates.

Unlimited coordinated expenditures present the risk of corruption in other ways as well. For example, unlimited coordinated expenditures might

be offered to a candidate based on her willingness to pursue the legislative agenda of the party's major donors. As canvassed in the State Defendants' Reply Brief, Part II., the record in this case contained substantial evidence demonstrating how the political parties have exerted pressure upon elected officials to further the agendas of large donors. Moreover, the potential for such party-related corruption under a regime of unlimited contributions contributes to the appearance of corruption and public distrust of the integrity of elected officials.<sup>27</sup>

In addition, if coordinated party expenditures were unlimited, individual donors who had made the maximum direct donation to a candidate could use the party to channel additional funds to the candidate. *See also Landell*, 118 F. Supp. 2d at 487 ("[Vermont's] limits on the ability of a party to contribute to candidates are vital to deter avoidance of the individual limits.").

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<sup>27</sup> As the dissent in *Colorado Republican II* points out, the 10th Circuit majority also imposed an improper evidentiary burden by demanding extensive proof of actual corruption in order to sustain the challenged limits, contrary to the teaching of the Supreme Court in *Shrink*. 213 F.3d at 1238 (Seymour, C.J., dissenting). Moreover, even if the 10th Circuit majority decision were deemed to provide the controlling standard, the trial evidence in this case is more than adequate to meet that standard. *See* State Defendants' Reply Brief, Part II.

Plaintiffs' contention that most party spending is conducted for benign rather than corrupt purposes does not establish that parties must be exempt from limits on coordinated expenditures. The Court in *Buckley* assumed that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action," 424 U.S. at 29, but nevertheless upheld the constitutionality of contribution limits because of the "opportunity for abuse inherent in the process of raising large monetary contributions." *Id.* at 30. See also *FEC v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"). The Vermont Legislature was entirely correct to conclude that unlimited infusions of money from a political party to a candidate, like unlimited infusions of money from other sources, pose a danger of corruption and its appearance.

**C. The Rebuttable Presumption Applicable to Political Party and Committee Expenditures on Behalf of Six or Fewer Candidates is Constitutional.**

Similarly, the provisions of 17 V.S.A. § 2809(d), which apply a rebuttable presumption of coordination to certain expenditures by political parties and political committees that recruit or endorse candidates, are

constitutional.<sup>28</sup> Section 2809(d) distinguishes between related expenditures that are made to support more than six candidates and are intended to serve general party or committee functions (such as promoting voter turnout, platform promotion, and organizational capacity), on the one hand, and those made in support of a few targeted candidates (six or fewer), on the other. The latter are “presumed” to be related expenditures, under the statute, while the former are not. 17 V.S.A. § 2809(d).

The Administrative Rule promulgated by the Secretary of State pursuant to the authority granted under §2809(f) expressly establishes that, even with respect to a party or political expenditure targeted to six or fewer candidates, the presumption is rebuttable, not conclusive. Exh. Volume-II at E-0738, Administrative Rule 2000-1(3)(d) (Appendix I). This Rule is entirely consistent with the legislative history of Act 64. Exh. Volume-III at E-0561.

The statute’s presumptions and exemptions are intended to provide guidelines that will facilitate compliance with the statute by political parties

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<sup>28</sup> It bears emphasis that the presumption set forth in 2809(d) does not apply to political committees generally, but only to those political committees that “recruit or endorse candidates.” 2809(d). Thus, it includes the so-called “party PACs” that have been established by the major political parties in Vermont for the purpose of supporting party candidates, but does not include entities such as VRLC-PC or VRLC-FIPE.

and political committees that recruit and endorse candidates. The mere *presumption* that certain types of expenditures by such entities are “related expenditures” does not run afoul of cases such as *Colorado Republican I*, when the presumption in question is fully rebuttable as a factual matter. *Colorado Republican I* merely rejected the FEC’s *conclusive* presumption that *all* party expenditures are coordinated with the candidates. *Id.* It did not hold that a fully *rebuttable* presumption, such as that in § 2809(d), is unconstitutional.<sup>29</sup>

Furthermore, contrary to plaintiffs’ argument, the presumption in § 2809 is not invalid merely because not all expenditures on behalf of six or fewer candidates are in fact coordinated with those candidates. If the mere existence of counterexamples were enough to invalidate a presumption, no presumption could withstand challenge.

While plaintiffs appear to argue that even a rebuttable presumption in a campaign finance regulation is *per se* unconstitutional under the First Amendment, they cite no case establishing that proposition. They rely instead on *County Ct. of Ulster County, New York v. Allen*, 442 U.S. 140

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<sup>29</sup> *Republican Party of Minnesota v. Pauly*, 63 F. Supp. 2d 1008 (D. Minn. 1999), also involved an apparently conclusive presumption that expenditures made by a party subsequent to endorsing a candidate were coordinated with the candidate.

(1979), which holds only that a presumption shifting the burden of proof in a criminal prosecution may rise to the level of a due process violation.

Plaintiffs here have asserted no due process violation, and Act 64, in any event, establishes a civil regulatory scheme, not a criminal presumption. As the Supreme Court has held, “Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.” *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

Indeed, even in the due process context, the Supreme Court has held, in a line of cases stemming from *Mobile, Jackson & Kansas City RR Co. v. Turnipseed*, 219 U.S. 35 (1910), that a “legislative presumption of one fact from evidence of another” does not violate due process if “there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.” *Id.* at 43; *see, e.g., United States v. Gainey*, 380 U.S. 63, 67 (1965).

Under any plausible test for the permissibility of a presumption – whether the due process “rational connection” test of *Turnipseed* or even a more demanding standard that would be applicable to criminal prosecutions

under the *Ulster County* decision – the presumption in §2809(d) would pass muster. Plaintiffs themselves have unequivocally conceded that the relationship between political parties and candidates is extremely close – far closer than the relationship between individuals or non-party organizations that may engage in independent expenditures. Landell Brief at 33 (“A party and its candidates are uniquely and strongly bound to one another”); *id.* (“No other political actor shares comparable ties with a candidate.”). For example, parties and candidates share strategists and campaign workers, and parties typically have unique knowledge of the candidate and her campaign. Plaintiffs’ own reasoning thus establishes that it is entirely rational for Vermont to apply to certain party expenditures a *rebuttable* presumption of coordination that does not apply to individuals and non-party organizations.

Moreover, the presumption applies not to all party expenditures, but *only* to those made by a party (or party committee) on behalf of six or fewer candidates. It was clearly permissible for the Vermont Legislature to conclude that the greater the number of candidates benefited by a party expenditure, the smaller the likelihood that any one candidate is controlling the expenditure – and vice-versa. *See also Landell*, 118 F. Supp. 2d at 492 n. 28. When it is reasonable to draw some line, a legislature’s decision is not unlawful simply because the line could have been placed slightly

differently. It is clear that the relation at issue here, between the number of candidates benefited by a political party's expenditure and those candidates' likely control over the expenditure, is a matter that the Vermont Legislature is uniquely qualified to understand. After all, the relevant empirical data supporting the presumption is legislators' own experience with campaigns in Vermont.

Finally, the presumption places no unreasonable burden on political parties. Parties are sophisticated players within the political system, and are fully able to maintain records or procedures that will allow them to rebut the presumption as to expenditures on behalf of six or fewer candidates, if necessary. For example, the party may simply retain a signed statement by the party official who authorized the independent expenditure, stating that the expenditure was not facilitated, solicited or approved by the candidate who is the beneficiary of the expenditure. Indeed, the party and its candidates are uniquely knowledgeable as to whether a party expenditure was in fact coordinated with a particular candidate.

For all these reasons, the rebuttable presumption in § 2809(d) does not render the provision unconstitutional.

**VII. Plaintiffs Lack Standing to Litigate Certain Sections of Act 64 Ruled Constitutional by the District Court.<sup>30</sup>**

**A. Limits On Contributions From Political Committees To Candidates For Vermont Senate Or Statewide Offices Other Than Governor**

No plaintiff has standing to challenge 17 V.S.A. §§2805(a) and (b)'s limits on contributions from PACs to candidates for the Vermont Senate or statewide offices other than Governor.

VRLC-PC is the only plaintiff which is a PAC that makes contributions to candidates. While VRLC-PC claimed to be interested in making contributions over the limits to candidates in 2000, the evidence shows that it lacked sufficient funds to do so and therefore has suffered no injury-in-fact. VRLC-PC had only \$50 in its coffers and had made no contributions to candidates for the 2000 campaign cycle. Tr. IV-139 (Toborg). None of VRLC-PC's past contributions to candidates for the Vermont Senate or statewide offices other than Governor have been over \$100. Exh. Volume-VII at E-2603.

VRLC-FIPE makes no direct contributions to candidates; its sole purpose is to accept contributions that are then used to make independent

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<sup>30</sup> For discussion of the standards governing standing, see section III, above, and Intervenor's Opening Brief at 61-67, and 70-76. The arguments regarding lack of third party standing apply equally to the claims in this section.

expenditures on behalf of candidates it supports. Exh. Volume-VII at E-2437, E-2438; Tr. IV-124-125, 139 (Toborg). It therefore lacks standing to challenge Section 2805(b)'s limits, which apply only to political committees that make direct contributions to candidates.

Steven Howard claimed that he would have run for one of the lower statewide offices, state auditor, in 2000 but was deterred by the contribution and spending limits. However, as discussed in Part III.B, *supra*, Howard's mere assertion that he would have run is insufficient to show injury from the contribution limits. He identified no PAC that wished to contribute to him in excess of the limits. No evidence showed that Howard had received any contributions toward a race for auditor.

As discussed above in Part III.C, *supra*, there is no evidence that Patch's decision not to run for Senate was affected by Act 64. At the time of trial Patch had received no contributions, nor had anyone indicated that he wished to contribute an amount in excess of the limits. Tr. II-188. Patch indicated that he expected to receive little or no money from PACs. Tr. II-192. Thus, he is not injured by and cannot challenge this provision.

Donald Brunelle also failed to establish injury from the PAC contribution limit in his 2000 Senate race. At the time he testified, he had received no contributions for the 2000 campaign, nor could he identify any

donors (PACs or otherwise) interested in contributing more than \$300. Exh. Volume-VII at 2702. As an incumbent candidate for Vermont House in 1998, Brunelle had received only six contributions from contributors for a total of \$665. Exh. Volume-V at 1756; Exh. Volume-VII at 2700-2701. He had only two PAC contributions, for \$50 each. Exh. Volume-IV at E-1304. His reluctance to accept contributions stems from his desire not “to be beholden to anyone for any reason.” Exh. Volume-VII at 2700. Thus, his claimed injuries are too speculative to confer standing.

The remaining plaintiffs are not, nor do they claim that they intend to be, candidates for the Vermont Senate or for any statewide office. Neither are they political committees. Thus, they cannot be injured by this provision.

### **B. Limits On Contributions To Political Committees**

None of the Randall plaintiffs has standing to challenge the \$2000 limit on contributions to political committees at 17 V.S.A. §§2805(a) and (b). No member of the group is a PAC. The sole donor plaintiff in the group, Nelson, testified that the limit was not unreasonable. Tr. II-174. The other Randall plaintiffs did not claim that they had ever contributed or desired to contribute more than \$2000 to a PAC.

Additionally, the Randall plaintiffs did not challenge the \$2,000 limit on contributions to PACs in their original or amended complaint, and never moved to amend their complaint to add this claim. Therefore, they may not raise it on appeal. *See Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 171 (2d Cir. 1998) (when plaintiff fails to move for leave to amend in district court, Court is usually “disinclined” to grant such a request on appeal.)

The Landell plaintiffs have abandoned any facial challenge to contributions from any source to PACs. In its principal brief on appeal, VRLC-PC fails to challenge the constitutionality of this limit. VRLC-FIPE, the only other PAC that is a party to this case, challenges the constitutionality of the \$2,000 contribution limit only as applied to PACs organized solely for the purpose of making independent expenditures. Landell Brief at 2, 135-141. Plaintiffs Landell and Brunelle have expressed no ability or desire to donate more than \$2,000 to a PAC, and therefore lack the injury necessary to establish standing to challenge this provision. *See* Exh. Volume-VII at E-2639-E-2640.

## **CONCLUSION**

Intervenors-Defendants-Appellants-Cross-Appellees respectfully request that the Court reverse those portions of the District Court’s judgment finding portions of Act 64 unconstitutional and affirm those portions finding

portions of the Act constitutional. Specifically, they ask the Court to uphold those parts of Act 64 that (a) limit contributions from individuals, parties and political committees to candidates (§2805(a & b)); (b) limit contributions to and from parties and political committees (§2805(a & b)); (c) regulate related expenditures made on behalf of candidates (§2809); (d) limit contributions from out-of-state sources to candidates, political committees and political parties (§2805(c)); and (e) limit candidate expenditures (17 V.S.A. §2805a). They further request that the claims of the plaintiffs be dismissed to the extent they lack standing to challenge portions of Act 64, and that the Court order such other and further relief as the Court deems just and proper.

Respectfully submitted

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