

AGAINST ACT 64: PRESERVING POLITICAL FREEDOM FOR THE CANDIDATE AND THE CITIZEN, BRIEF FOR THE APPELLANTS IN *LANDELL V. SORRELL*

Mitchell L. Pearl
Mark Lopez*

I. STATEMENT OF FACTS**

The State and defendant-intervenors rest their support for the contribution and expenditure limits contained in the Act on a vision of Vermont politics where “old fashioned,” “grass roots,” “door to door” campaigning ruled the day. At the same time, the State posits that the rising costs of campaigns and the greater role of money in financing those campaigns perversely threatens the bucolic landscape they seek to preserve. A quick read of the lower court’s findings would seem to adopt the States’ vision—even though it rejected a number of the State’s arguments for sidestepping First Amendment principles and controlling precedents as too extreme. A closer read of the trial court findings, moreover, shows that the landscape it describes is not entirely accurate. In important respects, the evidence relied upon by the lower court is incomplete or inapposite. A careful review of the complete record does not support the Act’s drastic limits on contributions or expenditures.

A. *The Plaintiffs*

The Randall Plaintiffs include Neil Randall, George Kuusela, John Patch, Steve Howard, Jeffrey Nelson, and the State Libertarian Party. These individuals and organizations are involved in various capacities in

* Mitchell Pearl, Partner, Langrock, Sperry, and Wool, Middlebury, Vermont; J.D. 1988, New York University School of Law; B.A. 1980, Colgate University. Mark J. Lopez, Senior Staff Attorney, American Civil Liberties Union; J.D. 1985, Rutgers University School of Law; B.S. 1980, Campbell University. The authors wish to thank their co-counsel, Peter F. Langrock, Joshua Diamond, and David Putter, (and Melanie Kehne, at the trial level) for their hard work and for the numerous contributions, suggestions, edits and ideas that eventually found their way into this brief.

** [Editor’s Note] The statement of facts for this brief relies on the transcripts of the extensive hearings held by the District Court. *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000). Hearings were held during May and June of 2000. Although written in the present tense, the statement of facts refers to matters as they existed at the time of hearing. Citations to these transcripts are abbreviated as: Tr. at volume-page numbers (parenthetical identifying speaker where necessary). The *Vermont Law Review* has made editorial changes to this brief that are marked by brackets, which condense some of the arguments within. This brief has also been modified to conform to the Seventeenth edition of the Bluebook and to correct any spelling errors.

Vermont electoral politics and all testified to the impact the Act would have on their current and future activities.

I. Neil Randall

Neil Randall is incumbent representative in the Vermont legislature. He was elected in 1998 on a Libertarian/Republican ticket from Orange-3 District. At the time of the trial Mr. Randall was seeking reelection. Orange-3 is a single member district. As a member of the State House of Representatives, Randall is the highest office holding Libertarian in the country.¹

[Mr. Randall testified to how Act 64's single source rule, two-year election cycle rule, and the 25% limit on out-of-state contributions will limit his ability to run an effective campaign. Randall's experiences as a non-mainstream candidate running against an incumbent evince the burden Act 64 imposes on candidates. For example, Randall spent \$3,735.54 in his successful 1998 campaign for a seat in the House of Representatives or \$1,735.54 more than the \$2,000 limit for a non-incumbent in a single member district.² Under Act 64's two-year election cycle rule,³ Randall's post-election fundraising to retire his \$1,726.60 debt is deducted from his expenditure limits of \$1,800 in the 2000 election. Thus, under the current interpretation of Act 64 he will only be able to spend \$73.40 in the 2000 election. Finally, Randall testified that he raised, and, as a member of an emerging party, he will continue to need to raise the majority of his campaign funds from out-of-state sources. In his 1998 campaign, Randall raised about 64% of his campaign contributions from out of state or 39% more than the current law allows.⁴ Most of these contributions would also violate Act 64's limit of \$200 for a single source contributor.⁵

All of Randall's expenditures were on top of the 2000 households he personally visited during the 1998 campaign cycle. Randall testified that the visits were indispensable to his victory, but household visits must be coupled with advertisements and direct mailings. Advertisements and mailings cost money. The amount of money necessary to run an effective

1. Tr. at IV-227-230, Tr. at II-10, II-39-40.

2. VT. STAT. ANN. tit. 17, § 2805a(a)(5) (2002).

3. *Id.* §§ 2805a(a)(5), 2805a(c).

4. *Id.* § 2805(c). Current law limits out-of-state contributions to 25% of total contributions.

Id.

5. *Id.* §§ 3805(a)-2805(b). In his 1998 election, Mr. Randall received \$1800 from out-of-state Libertarian party members, and \$750 from the National Republican Congressional Committee and \$250 from GOPAC both of which are located in Washington, D.C.

campaign, Randall notes, cannot be proscribed because the amount will vary with the needs of the particular race.]

2. George Kuusela

George Kuusela is a retired electrical contractor and Chairman of the Windham County Republican Party. He resides in a 2-member House district and has tried four times since 1992 to unseat one of the two incumbent democratic representatives. One of those representatives happened to be the speaker of the House. At the time of trial, Mr. Kuusela had recently retired and announced his plans to run for the House seat again in 2000. He also testified that he hoped to devote more time and money to his 2000 campaign. In 1998, Mr. Kuusela spent less than the current \$3,000 spending limit on his unsuccessful bid for office. Mr. Kuusela's prior campaigns were similarly low-budget and unsuccessful.⁶

[Mr. Kuusela testified to how Act 64's contribution and spending limits will hurt his chances of winning a seat in the House of Representatives as a non-incumbent. First, Kuusela noted that he would need to spend about \$5000 to run an effective campaign against an incumbent in his district in the 2000 election. Kuusela explained that door-to-door canvassing is an important method for reaching candidates, but a two-member district is simply too large for one person to effectively cover. Thus, he believes two mailings will be necessary. However, the cost of one mailing will account for most of the expenditures he is able to make under Act 64 and two mailings would be illegal. Mass mailings are more important for non-incumbents because they do not enjoy the name recognition and free media coverage that many incumbents do. Second, Kuusela testified that under Act 64's contributions limits it would be extremely difficult for him to raise enough money to run a competitive campaign in 2000. For example, Kuusela received a \$600 contribution from the Republican Legislative Election Committee to finance his 1998 campaign. Today, Act 64 makes this contribution illegal.⁷ Thus, Kuusela testified that Act 64 would make it extremely difficult for him to raise even as much as he did in 1998, let alone the \$5,000 he needs to run in 2000.]

6. Tr. at III-5-8.

7. VT. STAT. ANN. tit. 17, § 2805(a) (2002) (limit of \$200 for contributions from a single source).

3. John Patch

John Patch is a resident of Burlington, Vermont. He is the current chairman of the Chittenden County Democratic Party and was an "unofficial" candidate for the State senate at the time he testified. Candidates are elected at-large in this, Vermont's only 6-member district. All other districts in Vermont are single, 2-member or 3-member districts. Chittenden County is far and away the largest in Vermont with a population in excess of 100,000. The City of Burlington lies at the heart of the county. Chittenden County is unique in that it is the most urban and most populated, yet is very rural in the outlying areas.⁸

[At trial, Patch explained how various sections of Act 64 will adversely impact candidates, especially non-incumbents. His testimony focused on Act 64's spending limits, contribution limits, per-source limits on party expenditures, and per-cycle limits. First, he testified that the spending limits will inhibit discussion of issues and favor incumbents. Second, he testified that the contribution limits might severely curtail a little-known non-incumbent's ability to run a competitive campaign because the candidate will no longer be able to rely on receiving substantial support from a small group of family and friends. Third, he testified that the per-source limits make it much more difficult for a party to raise money because a candidate can no longer accept contributions from various organizations affiliated with the same party.⁹ Fourth, Patch testified that two year election cycle limits will cause the Vermont Democratic Party to discourage more than six candidates from running in order to avoid a contested primary race that would exhaust spending limits and tap-out donors. This result will be accomplished through self-selection, targeted and limited recruitment efforts, and subtle arm-twisting.]

4. Steven Howard

Steve Howard is another candidate who was discouraged from running for office, in part, because of the expenditure limits contained in the Act. In the months immediately prior to the commencement of the lawsuit, Mr. Howard was a candidate for State Auditor. Ultimately, he withdrew his candidacy. He hopes to run for state office again, although he has serious

8. Tr. at II-177-86.

9. The per-source contribution limit treats all state party organizations of the same party as one contributor. VT. STAT. ANN. tit. 17 § 2801(5) (2002).

reservations about doing so under restraints imposed by the Act. He testified about these concerns at trial.¹⁰

[Mr. Howard, an openly gay resident of Rutland County, Vermont, has a great deal of experience in Vermont politics. Mr. Howard was elected to three consecutive terms as a democratic representative in the Vermont House of Representatives—1992 to 1998. As a member of the Vermont legislature he has served as the Director of both the House Democratic Campaign and Finance Committees. Howard also ran unsuccessfully for state senator and for State Auditor and dropped out of his campaign for Secretary of State. More recently, Howard has served as a political consultant working for candidates in state and local campaigns, political action committees, and non-profit organizations in Vermont, New Hampshire, and Massachusetts.

Mr. Howard's cumulative experience as a representative in the Vermont legislature, a candidate for other elected positions in Vermont, and his role as a political consultant give him considerable expertise on running effective campaigns. Howard relied on his personal experiences to expose the burdens Act 64 will place on candidates in Vermont, particularly, non-traditional non-incumbents. The thrust of Howard's testimony focuses on the fact that candidates will no longer be able to run effective campaigns in Vermont. For example, in his 1998 campaign for state senator Howard spent approximately \$26,000 in his race, of which approximately \$10,000 was spent on direct mail, radio, and newspaper advertisements. In his district, Act 64 caps expenditures at \$9000. Thus, Howard exceeded expenditure limits by \$17,000 in his unsuccessful campaign.

Mr. Howard also focused directly on the burdens imposed by Act 64's per-cycle limits and the limits on out-of-state contributions. First, Howard noted that the per-cycle limits are impossible to overcome especially when candidates face competitive primary races. For example, Howard chose not to run for Auditor of Accounts in 2000 because a difficult primary race would have left him without resources to effectively campaign in the general election. The per-cycle limits are also problematic for candidates, such as Howard, who have accrued campaign debt because debt from one election cycle is counted against total expenditures in a subsequent election. Second, Howard noted that the limits on out-of-state contributions impose exceptional barriers on non-traditional, e.g., gay, non-incumbent candidates. Such candidates, Howard noted, rely heavily on a small number of out-of-state contributors for large contributions to obtain seed money. For example, Howard raised 60% of his total contributions in his campaign for

10. Tr. at IV-148-87.

state senator and 45% of his campaign contributions in his campaign for Secretary of State from out-of-state contributors. Seed money helps non-traditional, non-incumbent candidates publicize their names and positions through media so that they can demonstrate to in-state contributors that they are viable candidates.]¹¹

5. The Libertarian Party

Scott Berkey testified on behalf of the Vermont Libertarian Party.¹² He is currently chair of the party and has held that position since January 1999. He offered abundant testimony about the operation of the party and explained how Act 64's various provisions would interfere with the party's mission.

The Libertarian Party is America's third largest political party. The party was organized nationwide in 1971, and in Vermont shortly thereafter. The party became less active in Vermont in the early 1990s, but has since been reinvigorated. In recent years, the Party has grown substantially, both in membership and in the number of candidates running for office in any given election. In 1996, just six candidates ran as Libertarians. In 1998, 40 candidates ran as Libertarians. The Party hopes that in the 2000 election, close to 100 candidates state-wide will run as Libertarians. These numbers do not reflect local elections for select board, school board, or other non-partisan elections.¹³

[Berkey testified that Act 64's limits on contributions to and from the political parties, and the aggregate 25% limit on out-of state contributions to the party and its candidates, will stifle the party's speech and the speech of it's candidates. Comparatively, the Libertarian Party will suffer more from the limits than the Democratic or the Republican parties because the Libertarian Party lacks the name recognition and the broad based support that attract greater contributions. As a result, the Libertarian Party obtains one-half of its budget from donations that exceed Act 64's limits. Berkey testified that the party would accept greater contributions from both in- and out-of-state contributors if it were legal.]

6. Jeffrey Nelson

Jeffrey Nelson is a longtime resident of the state of Vermont and a supporter of the Republican Party. Jeffrey Nelson has been making

11. *Id.* at 175-85.

12. Tr. at II-6-41

13. Tr. at II- 6-14.

monetary contributions to Vermont state and federal political campaigns, as well as to Republican Party organizations, for the past several years. In addition, Jeffrey Nelson has been extensively involved in Vermont politics in Addison County for the past few years. He was an active volunteer in the campaign of Harvey Smith for the Vermont House of Representatives in 1998 and also worked on Vermont State Senator Thomas Bahre's campaigns in 1996 and 1998. Mr. Nelson was also active in the Addison Town Republican Committee and on the Addison County Republican Committee since approximately 1994.¹⁴

[In 1998 and 1999, Mr. Nelson contributed money to local and state political parties, candidates running for seats in the House and the Senate of the Vermont Legislature, and candidates for Governor. Despite his familiarity with the current limits, Nelson unknowingly violated Act 64's "single source rule" in the recent election cycle by exceeding the Act's \$2000 limit by \$400. While Mr. Nelson intends to request a refund, he would like to contribute more money than Act 64 will allow.]

Mr. Nelson feels that it is important to make monetary political contributions, because, without money, political candidates are unable to reach the voters to inform voters on the candidate's views, establish name recognition, and to motivate eligible voters to go to the polls and vote. Mr. Nelson also enjoys doing volunteer work for campaigns, but finds that his time is limited. Monetary contributions enable him to help candidates and parties even where he is unable to volunteer personal services.¹⁵

7. The Consolidated Plaintiffs

The consolidated plaintiffs in *Landell, et al.*, and *Vermont Republican State Committee, et al.*, round out the table of the diverse group of plaintiffs who have challenged the multiple provisions of the Act. These consolidated Plaintiffs' testimony is set out in detail in their brief, and incorporated herein by reference. The claims raised by the State Republican Committee and the Vermont Right to Life Committee, Inc., in particular, are broad enough to cover every aspect of the Act. The members of these organizations collectively feel the impact the Act will have on their organization and the candidates they support. Although defendants have questioned the standing of the plaintiffs to challenge discrete provisions of the Act, the claims raised by the Randall Plaintiffs and consolidated plaintiffs are broad enough to reach the Act's major provisions.

14. Tr. at II-152-62 (Nelson).

15. Tr. at II-163 (Nelson).

B. The Evidence of Corruption from "Large" Contributions to Candidates or from "Unlimited" Candidate Spending Finds Little Support on the Record

To the extent the extensive evidence relied upon by the lower court supports its finding that "Vermonters are troubled by how money influences campaigns" or that the "public perceives corruption in the political electoral system," plaintiffs have no real quarrel. The role money plays in the electoral and legislative process is universally a matter of concern.¹⁶ The relevant factual determination in this case, however, must be confined to whether the new limits adopted in Act 64 are addressed to the problem of actual or perceived *quid pro quo* corruption that flow from *large, unregulated* contributions. On this point, the record evidence is very thin. Moreover, even if the court's findings could support regulation of contributions, they do not justify the draconian limits adopted, and provide no basis, as the court found, for regulating candidate expenditures.

The court's own findings show that the pre-existing \$1000 limits were adequate to combat corruption. Moreover, the court's findings, while supporting the view that contributions given in amounts greater than the current \$200-\$400 limits are considered "large" by many Vermonters, does not support the further contention that such contributions are "large" in any objective sense. That is, while candidates might predictably testify that all such contributions are "large" or "important"—there was even testimony that any contribution, even one dollar, was meaningful and important—that does not mean that such contributions are "large" in the sense that corruption, or the appearance of corruption, is likely to follow. There is nothing on the record to suggest that Vermont's elected officials would be unduly influenced by individual contributions up to the pre-existing limits. Moreover, a contribution of \$200 or \$400 is not "large," objectively, when a quarter-page ad in the weekday *Burlington (Vermont) Free Press* costs \$1,448.¹⁷

C. No Evidence Was Presented of Corruption from Out-of-State Contribution

Out-of-state contributions have unquestionably played an important role in the election of some Vermont officials. This issue is not in dispute. Additionally, the lower court specifically found that the public was suspicious about out-of-state money and concerned about the prospect of

16. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 478 (D. Vt. 2000).

17. Ex. 110 at E-1888-89 (*Burlington Free Press*, 2000 Retail Advertising Rates).

undue influence.¹⁸ The State, however, failed to come forward with any evidence that demonstrated how the “out-of-state factor” was what in fact led to actual or perceived corruption; or that contributions from out-of-state sources were any more or less corruptive than those from in-state sources.¹⁹

The State and defendant-intervenors do not contest these findings. Instead, they object to the legal conclusion the District Court drew from the evidence concerning the amount of out-of-state contributions and the public’s suspicion of it. The District Court was correct to reject this evidence as insufficient to meet the current standard for evaluating contribution limits or as a separate justification to broaden the definition of corruption to include mere public suspicion of out-of-state money contributed in individual amounts otherwise lawful.

D. No Evidence Was Presented of Corruption from Political Parties or PACs

The evidence recited by the District Court about the role of large contributions to candidates from political parties and PACs is extremely thin. This is partially explained by the fact that under the pre-existing law, the amount PACs could contribute to candidates was limited to \$3000. There were no limits on how much a political party could give. Despite the higher limits in effect for these organizations in recent elections, none of the evidence relied upon by the lower court supports the contention that political parties or PACs regularly made objectively large contributions to candidates in Vermont. Particularly concerning political parties, there was no evidence that those organizations have acted to improperly influence candidates or allowed contributors to use the party as a conduit for large “pass-through” contributions.

Even with respect to PACs, the pre-existing limits appeared adequate to alleviate the threat of corruption. The court’s findings about the influence of PACs are anecdotal and generalized. The findings fail to account for healthy contributions made by legislative majority/minority House and Senate PACs to jumpstart a campaign or provide a last minute infusion of cash on a close election.²⁰ Similarly, the court fails to account for healthy contributions made by advocacy groups, such as the NRA or the Sierra Club, which aggregate many small contributions made by its members in the expectation that through their collective efforts, the organization can make its voice heard. In the end, the court fails to distinguish

18. *Landell*, 118 F. Supp. 2d at 470.

19. *Id.*

20. Testimony of John McNeill. Tr. at II-78-102.

PAC contributions made within reasonable limits from the undifferentiated suspicions some people hold about the role PACs serve in financing elections generally. The evidence, if anything, shows that PACs generally make small contributions to many diverse candidates. There was no evidence of record to support the contention that these organizations should be subject to the same limits as individuals.

E. Spending and Contribution Limits Based on a Two-Year Election Cycle Will Harm Candidates and Affect Who Runs in Election

The lower court made no findings with respect to the justification or impact of per-cycle limits. The court dismissed plaintiffs' evidence describing the hardship this statutory scheme imposed on candidates by concluding simply that the legislature's reasons for adopting per-cycle limits were reasonable. The only reason identified by the court as having been put forth by the legislature in support of the scheme was the State's interest in ensuring "that candidates would have greater freedom to decide how to allocate their funds between the primary and general elections."²¹ As elicited by the testimony, however, this explanation does not respond to plaintiffs' objection that per-cycle limits do serious harm to candidates who deplete their resources in a tough primary, and then turn around and face an opponent in the general election who may have faced token or no opposition in the primary. The proximity of the primary to the general election, moreover, may present an even greater challenge to the disadvantaged candidate since he/she may have "tapped out" his/her pool of donors. The seven week window between the primary and general election is precious little time to identify new contributions, especially given the reduced increments the candidate must raise the money in. Candidates from both parties testified that this factor may well influence which candidates run in an election, as parties may attempt to avoid the expense of a contested primary.²²

F. The Spending Limits Will Hamper Many Candidates in Getting Their Message Out

Although the lower court held that controlling precedent foreclosed regulation of candidate expenditures, it went out of its way to credit the evidence offered by the state and defendant-intervenors in support of the limits. It found that rising campaign costs in Vermont, and the attendant

21. *Landell*, 118 F. Supp. 2d at 480.

22. Tr. at II-186-89 (Patch); Tr. at IV-27-34 (Meub).

money chase, are undermining the public confidence in the integrity of the political process. It also found that the limits would not unduly burden the ability of candidates to get the message out. The State points to these findings as evidence of the need to impose the expenditure limits and as grounds for seeking reversal of the District Court's decision. Plaintiffs submit that the evidence cited by the court refutes, rather than supports, the State's and Intervenor's position.

First, the court's findings that rising campaign costs are contributing to a number of campaign-related evils is undermined by the very data it relies upon.²³ The court found that based on historical spending patterns in recent elections, average candidate spending was generally below the new limits.²⁴ While plaintiffs believe that it is inappropriate to rely on statistical averages because they factor in candidates who spent no money or nominal amounts of money in elections where they may have faced token or no opposition, the District Court's reliance on that data refutes the suggestion that average campaign costs are rising out of control.

The problem with relying exclusively on average candidate spending is that it indicates little about how much the expenditure limits will injure a candidate in elections where spending exceeds the average. If campaign costs are steadily rising—as the State argues and plaintiffs agree to some extent—then expenditure limits (especially with no adjustment for inflation) will systematically and progressively operate to choke-off spending in those campaigns where expenditures deviate from the average. As the data and testimony of both plaintiffs' and defendants' witnesses show, the expenditure limits will impose a real hardship for many candidates.²⁵

G. The Act's Contribution Limits Will Prevent Many Candidates from Running Effective Campaigns

The crucial factual finding made by the District Court is that the contribution limits would not significantly impact the ability of candidates to raise the funds necessary to finance their campaigns. To support this finding the court relied primarily on the data introduced by the defendant-intervenors which showed that contributions in recent elections were overwhelmingly made in amounts at or below the amounts permitted under

23. *Landell*, 118 F. Supp. 2d at 483.

24. *Id.* at 471.

25. This data is set out in more detail in the brief of Plaintiffs-Appellees-Cross-Appellants *Landell, et al.* and the Vermont Republican State Committee, which the Randall Plaintiffs adopt and incorporate herein pursuant to Fed. R. App. P. 28(i).

the new limits.²⁶ Additionally, the court found that any shortfall in fundraising could be made up for by finding additional sources. While plaintiffs agree that many candidates, especially those in "safe districts," may be largely unaffected by the new limits, candidates in competitive legislative and state-wide elections will be hit much harder. In this respect, plaintiffs adopt and incorporate the data compiled in the brief of the consolidated plaintiffs, summarizing the testimony and documentary evidence showing that the new limits would have imposed a tremendous hardship on those candidates who faced serious competition or who were otherwise locked in an expensive race. The District Court chose to ignore this evidence, as well as the testimony of Mark Snelling²⁷ and William Meub,²⁸ on the hardships the Act will place on statewide candidates.²⁹

Contrary to the lower court's findings, moreover, plaintiffs' evidence shows that candidates faced with the loss of campaign funds contributed under the old limits will have difficulty replacing those funds. The number of potential contributors is limited and has been previously largely identified.³⁰ Candidates may actually spend more time fundraising.

H. No Record Evidence Supports the Lower Court's Determination that Contributions To and From Political Parties and PACs Can Be Limited as Set Forth in the Act

Political parties and PACs are an important source of funding to candidates. The Act limits contributions from these organizations to the same amounts as established for individuals. Recognizing the important role of political parties in our system of government, the lower court struck down the limits on party contributions. Conversely, the court upheld the limits on contributions by PACs as necessary to safeguard against undue influence and to prevent evasion of limits on individual contributions. Additionally, the court upheld a \$2000 per cycle limit on the amount an individual or organization could contribute to a political party or PAC, as necessary to prevent the organization from acting as a conduit for large "pass through" contributions. Vermont law already prohibits "pass through" or "earmarked" contributions. While the District Court was

26. *Landell*, 118 F. Supp. 2d at 470.

27. Tr. at I-22-72.

28. Tr. at IV-24-78.

29. The District Court's rejection of Darcie Johnston's testimony that candidates for Governor must spend \$800,000 to \$1,000,000 to run an effective campaign, see *Landell*, 118 F. Supp. 2d at 472, is particularly ironic given that both Governor Howard Dean and his Republican challenger Ruth Dwyer spent approximately \$900,000 in the hotly contested 2000 election.

30. Tr. at I-43 (Snelling), I-79 (Johnston).

unquestionably correct to enjoin enforcement of limits on party contributions to candidates in view of the relationship between party and candidate, the record does not justify the sweeping conclusion reached by the court that there was no justification for treating PACs different than individuals. The pre-existing limits applicable to PACs have been in place since 1976, and there was no evidence that PACs have failed to conduct themselves within the rule. As emphasized above, healthy non-corrupt PAC contributions were often made in amounts far less than the \$3000 ceiling but greater than the new \$200-\$400 limits. There is no factual justification for treating an organization which, by definition, purports to speak for many through its collective efforts, in the same way that individuals are treated. On the record, such treatment is arbitrary. Nor do the court's findings effectively answer how candidates can replace PAC money in the future. In the past, money from legislative minority and majority PACs have provided important "seed money" contributions and last minute infusions of cash in close elections.³¹

Finally, the court's rationale for upholding the limits on how much can be contributed to a political party or PAC is unsupported by record evidence or reasonable concern that the restriction is necessary to avoid "pass through" contributions.

I. No Evidence Supports the Act's "Related Expenditures" Rule

Under § 2809(c), an expenditure by someone other than the candidate is considered a related expenditure if it was intentionally solicited, or coordinated by the candidate. Related expenditures are, in turn, treated as contributions under the Act.³² Additionally, under the Act, *independent* expenditures are presumptively treated as "related" or coordinated expenditures if they are made by a political committee, including a political party, and benefit six or fewer candidates.³³ As explained above, these expenditures, in turn, are treated as direct contributions to the candidate and also count as expenditures by the candidate.³⁴ The District Court held that it was permissible to presumptively treat independent expenditures as related expenditures and thus, as contributions, but impermissible to treat them as expenditures by the candidate. In upholding this aspect of § 2809, the District Court made no findings that address or refute plaintiffs' contention that the operation of § 2809 will dampen the First Amendment

31. Testimony of McNeill, Patch.

32. VT. STAT. ANN. tit. 17, § 2809(a) (2002).

33. *Id.* § 2809(d).

34. *Id.* § 2809(a).

rights of advocacy groups and political parties wishing to make *independent* expenditures. These groups may have neither the sophistication nor the financial resources to deflect a charge or enforcement action claiming that the expenditure was coordinated with the candidate.

J. The Act Attempts to Impose a Particular Method or Approach to Campaigning on All Candidates, Which Is Not Constitutionally Appropriate

The evidence at trial established that Act 64 will severely hamper Vermont candidates and unconstitutionally restrict the freedom of speech and association of candidates, supporters, and political parties. The State and Intervenors do not, at bottom, deny that the Act will restrict certain forms of speech. Rather many of the state's witnesses and Intervenors rest their support of the Act's so-called "reforms" on a vision of "old fashioned" Vermont politics where door-to-door campaigning ruled the day. One of defendants' witnesses, House member Gordon Bristol, repeatedly used the words "old fashioned," "down-home," or "traditional" in referring to the type of campaign he prefers to run.³⁵ Similar testimony was elicited from Elizabeth Ready, Cheryl Rivers, Donald Hooper, and Ellen David-Friedman.³⁶

Although this "down-home" vision of politics may be enticing, it ignores several unassailable facts. First, Vermont is not an island. As much as many might prefer to go back to past, "old fashioned" ways, the fact of the matter is that we are in the 21st century where most Americans, even Vermonters, receive their information through the mass media. Vermont is not the same place it was 100, 50 or even 20 years ago. Family structures have changed; there are many more single parent, "two paycheck," and non-traditional families, and people commute longer distances to work more hours at their jobs. Most Vermonters are no longer home on the farm or working in traditional manufacturing industries. Indeed, most folks are not at home at all when candidates go door-to-door.³⁷ Accordingly, the ability of candidates to get their message out by relying primarily on traditional, "old fashioned" campaign methods, such as door-to-door campaigning, and attendance at community forums and parades, has somewhat diminished. Second, people are in general busier than they used to be and have more demands on their time, energy, and emotions. For candidates to run effective campaigns, they must tailor their means of campaigning to today's electorate. Finally, it is unrealistic to believe that

35. *E.g.*, Tr. at IX-45, 50, 51, 64-66.

36. *E.g.*, Tr. IX-141-45 (Ready).

37. Tr. at I-103-49 (Johnston).

the traditional or "old fashioned" methods of campaigning have ever been truly effective in state-wide races. Even Defendants' witnesses recognize that on a statewide level, Vermont is "a pretty big state"³⁸ and that television is necessary.³⁹ The trial judge, no stranger to Vermont politics, took judicial notice of the fact that door-to-door campaigning for statewide office is "inconceivable" and "not the standard."⁴⁰ Fundamentally, the root of the problem with Defendants' and Intervenors' vision of Vermont politics is that it is not constitutionally appropriate for the state to impose this vision on all candidates and all races. Even if it were possible for all candidates to run effective campaigns under this vision—which it is not—it is not constitutionally permissible for Vermont to determine that all candidates must campaign using the "down-home," "old fashioned" methods of campaigning. Because each district, each race, and each candidate's characteristics are different, the Act is wrongheaded in approach and will vastly restrict the freedom of candidates, contributors, political parties, and political committees in Vermont.

II. SUMMARY OF THE ARGUMENT

A. *Response to Appeals of the State Defendants and Intervenors.*

The District Court correctly concluded that the controlling precedent of *Buckley v. Valeo*⁴¹ as reaffirmed in more recent cases, prohibits the State from enacting the type of expenditure limitations on campaign spending that Vermont has done here. Defendants' and Intervenors' arguments that *Buckley* is outdated or should be overruled are not properly addressed to this Court. Defendants and Intervenors arguments that *Buckley* can be distinguished are without merit. The government interests asserted by Defendants as reasons for distinguishing *Buckley*—such as controlling the increased costs of campaigns, or "leveling the playing field"—were either considered by *Buckley* directly or indirectly, or rejected by other courts on the strength of *Buckley*. Moreover, even if there were some merit to the argument that *Buckley* could be distinguished in a proper case, and that some form of spending caps on candidates could be constitutionally allowed, this is not the proper case to do so. The limits adopted by Vermont are so low, indeed lower than historical spending of many

38. Tr. at V-77 (Hooper).

39. See Tr. at IX-143 (Ready); see also Tr. VII-92 (Rivers) (agreeing that in a statewide-race a candidate "can't knock on every door during the course of a Senate campaign").

40. Tr. at I-102.

41. *Buckley v. Valeo*, 424 U.S. 1 (1976).

Vermont candidates in contested races, that they can have no other effect but to stifle core political speech. In addition, Vermont has adopted an irrational and arbitrary "incumbent handicap," which, though attempting to compensate for the various advantages an incumbent may often possess, constitutes a wholly arbitrary discount.

The District Court properly concluded that Vermont had no legitimate government interest in arbitrarily limiting contributions from out-of-state sources. There was no evidentiary showing that out-of-state donors are more likely to be corrupting or lead to the appearance of corruption. As such, Vermont's ban on the aggregate receipt of more than 25% of contributions from out-of-state sources is nothing more than nativist legislation, which infringes the right to speech and association of candidates, donors, and political associations. The out-of-state cap also runs afoul of the privileges and immunities clause, the inverse commerce clause, and equal protection principles.

The District Court also correctly concluded that limiting political parties' contributions to candidates to the same limits imposed on individuals—\$200, \$300, or \$400, depending on the office sought—was unconstitutionally low. The danger of *quid pro quo* corruption, or the appearance of corruption, is not present in contributions from political parties to their own candidates. Thus the only rationale allowed by the Supreme Court for limiting contributions by *individuals* does not apply the same manner to contributions by political parties. Moreover, the draconian contribution limits imposed by Vermont have the effect of drastically changing the role of political parties in elections and would clearly infringe on the parties' rights of speech and political association.

Finally, the District Court correctly concluded that plaintiffs, individually and as a collected whole in these consolidated matters, have standing to bring this action. The consolidated plaintiffs in these matters represent a broad spectrum of candidates, contributors, parties, political committees, and other affected by the Act. The parties' testimony establishes a sufficient "stake" in this controversy to confer standing.⁴²

B. Cross-Appeal

The District Court was not correct in upholding Vermont's contribution limits, which are the lowest in the country and are riddled with various loopholes and irrational features. The District Court ignored evidence that these limitations would hurt candidates in close or hotly contested elections,

42. Vt. Right to Life Comm. Inc. v. Sorrell, 221 F.3d 376 (2d Cir. 2000).

and particularly in statewide races. Limits this low are not justified by the state's legitimate interest in guarding against *quid pro quo* corruption or the appearance thereof, either intuitively or by any evidence of record. In addition, the fact that these limits apply to a two-year election cycle (including all contributions allowed for both primary and general elections), that they apply to giving by parties and political committees as well as by individuals, and that they include an irrational and arbitrary "wealthy family exception," create a limitation on speech and association which is different in kind and purpose, and not just a matter of a difference of degree or size from limits upheld in *Buckley* and *Nixon v. Shrink Missouri Government PAC*.⁴³

In addition, Vermont's regulation of independent, non-coordinated expenditures by political parties and political committees (defined as "related" expenditures in Act 64) unconstitutionally chills and restricts expression of parties and political committees by presuming that certain expenditures are contributions to the candidate. Vermont's regulation of these "related expenditures" flies in the face of the rights of the rights of political parties and PACs to independently speak their minds in the political arena.

The District Court also incorrectly found that Vermont's limitation on individual or organizational contributions to political parties were constitutional. Vermont's limits are not justified by the corruption rationale, since political parties do not have legislative authority, comprise a wide array of interest groups, and conduct various activities in addition to making contributions to a wide variety of candidates. Firm enforcement of the prohibition against "pass through" or "earmarked" contributions is the proper method to control any potential for evasion of other limits. The limits set by Vermont would hamper the political parties' and political committees' ability to raise funds, thus interfering with their ability to recruit and support candidates, and to engage in voter registration, issue debate, party building and other activities traditionally associated with political parties.

43. *Buckley*, 424 U.S. 1; *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

III. ARGUMENT

A. The Restrictions Imposed on Candidate Spending and Independent Expenditures Violate the First Amendment Rights of Speech and Association of Candidates and Political Organizations

Since *Buckley v. Valeo*⁴⁴ every campaign finance case has begun by characterizing the challenged regulation as either a contribution or an expenditure.⁴⁵ Limits on expenditures have been invariably struck down. Limits on contributions have been upheld only if they plausibly advance the recognized interest in preventing corruption or the appearance of corruption.

The basis for this distinction was set forth in *Buckley*. "[R]estrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their explanation, and the size of the audience realized."⁴⁶ The *Buckley* Court explained that it was subjecting the Act's expenditure limitations to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression."⁴⁷ By contrast, the Court wrote in *Buckley*, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support."⁴⁸ Accordingly, contribution limits have come to be analyzed under a somewhat more deferential standard.⁴⁹

After drawing this distinction, the Court held that the danger of actual or perceived *quid pro quo* corruption that flows from a system of unregulated campaign contributions justified reasonable limits on contributions, but that the restrictions on candidate spending and independent expenditures could not be sustained by that interest or any of the other interests the challenged statute purportedly advanced. Applying the exacting scrutiny that is applicable to the government regulation of speech,⁵⁰ the Court rejected the argument that expenditures limits were necessary, (1) to prevent corruption of candidates, or the appearance of corruption; (2) to reign in spiraling campaign costs; or (3) to "level the playing field."⁵¹

44. *Buckley v. Valeo*, 424 U.S. 1 (1976).

45. Randal Plaintiffs adopt by reference the Standard of Review section set forth in the State Defendants' brief, pursuant to Fed. R. App. P. 28(i).

46. *Buckley*, 424 U.S. at 19.

47. *Id.* at 44-45.

48. *Id.* at 21.

49. See *Shrink*, 528 U.S. at 396-97.

50. *Buckley*, 424 U.S. at 39, 44-45.

51. *Id.* at 39-57.

In the years since *Buckley* was decided, the law has not changed. Because expenditure limitations necessarily restrict political expression at the core of the electoral process and the First Amendment, they can survive a constitutional attack only if justified by a compelling state interest,⁵² and narrowly tailored to serve that interest.⁵³ Thus far, the Supreme Court has identified only one legitimate and controlling interest that justifies restrictions on campaign financing—the prevention of corruption or the appearance of corruption—and that justification has never been found sufficient to support restrictions on expenditures. To the contrary, the Court's post-*Buckley* cases have adhered to the view that restrictions on candidate spending or independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and represent substantial, direct restraints on the quantity and diversity of political speech. For this reason, the Court has consistently invalidated attempts to place limits on this type of speech.⁵⁴

Against this historical backdrop, Vermont contends that the principles established in *Buckley* have been overtaken by time and that its regulation of candidate expenditures falls outside the reach of that decision. Similarly, the State maintains that it can sidestep *Buckley*'s protection of independent expenditures by treating certain expenditures by political parties or advocacy groups as contributions. Vermont officials have miscalculated on both accounts.

1. The District Court Was Correct to Enjoin Regulation of Candidate Expenditures (17 V.S.A. § 2805a)

Section 2805a(a) imposes expenditure limits on candidates ranging from \$2,000 for House candidates, \$4,000 for candidates for Senate candidates, \$300,000 for gubernatorial candidates and \$100,000 for candidates for Lt. Governor. These limits are for a *two year election cycle*, including all spending on both primary and general elections. Limits are also established for other statewide offices. The statute was enacted in direct defiance of *Buckley*'s holding that candidate spending may not be capped. The Supreme Court has never retreated from this basic position, and there is nothing unique about Vermont elections that would support so

52. *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 609 (1996) [hereinafter *Colorado I*]; *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251–52 (1986).

53. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985); see also *Shrink*, 528 U.S. at 387–88 (holding that regulation of contributions must be “‘closely drawn’ to match a ‘sufficiently important interest’”).

54. See *Colorado I*, 518 U.S. at 609 (collecting cases).

radical a departure from the principles that emerged from *Buckley*. While the District Court signaled some receptiveness to the interests advanced by the State in support of the limits, it correctly held that none of these interests justified taking the "unprecedented step of finding expenditure limits unconstitutional."⁵⁵

The main arguments advanced by the State have all been explicitly rejected by the Court in *Buckley*. The State maintains that the campaign finance landscape has changed in the 25 years since *Buckley* was decided and that the arguments that were unsuccessfully made then have taken on new meaning. At base, however, the State offers variations on the arguments rejected in *Buckley* and are no more helpful now than when they were first made in 1976. Indeed, these very same arguments were rejected by the Sixth Circuit Court of Appeals in a recent attempt to cast *Buckley* aside.⁵⁶ That decision provides a blueprint for analyzing the multiple arguments advanced by the State and the Intervenors in this case.⁵⁷

a. Campaign Spending Does Not Implicate the Anti-Corruption Rationale

"The major evil associated with rapidly increasing campaign expenditures is the danger of candidate dependence on large contributions."⁵⁸ This interest proved insufficient to support spending caps in *Buckley* because it was not closely drawn to serve that interest. First, the government's interest was largely alleviated by the Act's contribution limits and disclosure requirements.⁵⁹ Second, the expenditure ceilings would have resulted in a reduction in the scope and spending of a number of House and Senate campaigns and substantially limited the overall expenditures of the two major party presidential candidates.⁶⁰ More fundamentally, the Court concluded that "the First Amendment simply cannot tolerate [the] restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy" whether the source of his money is personal wealth or funds raised from legal contributions.⁶¹

The State counters that contribution limits are not enough to address the corrupting influence of money in politics. The State argues that the Court's empirical judgement in *Buckley* is no longer valid to the extent it relied on FECA's contribution limits and disclosure requirements. The

55. *Landell*, 118 F. Supp. 2d at 481-83.

56. See *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998).

57. See *id.*; see also *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998).

58. *Buckley*, 424 U.S. at 55.

59. *Id.*

60. *Id.* at 55 n.62.

61. *Id.* at 54.

State maintains that contribution limits, standing alone, are not enough to combat the danger of *quid pro quo* corruption and the appearance of corruption that flows from the money chase. But the Supreme Court rejected this argument in *Buckley* when it held that the spending of money legally raised by candidates poses no risk of *quid pro quo* corruption and campaign spending limits cannot be justified by the anti-corruption rationale.⁶² As the Court observed in the context of rejecting a related argument advanced by the Act, “[t]here is nothing invidious, improper, or unhealthy in permitting such [lawfully raised] funds to be spent to carry the candidate’s message to the electorate,”⁶³ quoting with approval from the decision below, “If a senatorial candidate can raise \$1 from each voter, what evil is exacerbated by allowing that candidate to use all of that money for political communication? I know of none.”⁶⁴

The broader definition of corruption urged by the state to encompass the public’s cynicism of the influence of money in the electoral process is an extension of the problem of actual or perceived corruption discussed above and the inequalities of the “playing field,” discussed below. Since neither of these arguments is sufficient to justify expenditure limits standing alone, it cannot “be severed as a ‘new’ form of corruption the Supreme Court has not considered.”⁶⁵ Moreover, as emphasized in *Kruse*, it is doubtful that the Supreme Court was unmindful of this argument when it considered FECA’s expenditure limits in *Buckley* when it held that “[N]o governmental interest that has been suggested is sufficient to justify the restriction in the quantity of political expression imposed by’ the ceiling on campaign expenditures.”⁶⁶ “[T]he very fact that the candidate is allowed to spend his or her own money without any restriction is, in fact, the assurance that the candidate is ‘beholden to no one.’”⁶⁷ The Court’s post-*Buckley*

62. *Id.* at 55–56.

63. *Id.* at 56; see also *id.* at n.64.

64. *Buckley v. Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975) (Tamm, J., concurring in part and dissenting in part).

65. *Kruse*, 142 F.3d at 916.

66. *Id.* at 910 (citation omitted). While not separately addressed by the Supreme Court, one of the interests specifically advanced by the government in *Buckley* was “the alienation from and disillusionment in the electoral process by this country’s citizens.” *Id.* at 916 (quoting from the court of appeals decision in *Buckley*, 519 F.2d at 913); see *Suster v. Marshall*, 149 F.3d 523, 532 (expenditure limits imposed on judicial candidates could not be justified by State’s interest in reducing the influence of otherwise lawful campaign contributions on judicial decisions).

67. *Suster*, 149 F.3d at 532; see also *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 213 F.3d 1221 (10th Cir. 2000), cert. granted, 531 U.S. 923 (Oct. 10, 2000, No. 00-191) [hereinafter *Colorado II*] (rejecting argument that coordinated party expenditures could be regulated to prevent corruption of the political process); *N.H. Right to Life Comm. v. Gardner*, 99 F.3d 8, 10–19 (1st Cir. 1996) (rejecting argument that expenditure limits could be justified by corrosive effect of money on the electoral process).

cases have consistently rejected attempts to regulate expenditures under various pretexts that have been asserted to preserve the integrity of the electoral process.⁶⁸ The Court has even struck down attempts to regulate contributions where the interests purportedly advanced are not linked to the risk of *quid pro quo* corruption. *Buckley* itself involved a provision that sought to regulate a candidate's own contributions to his/her campaign. Because there was no threat of corruption flowing from that conduct, the Court invalidated the regulation.⁶⁹

b. The Interest in Curbing the Rising Costs of Campaigns Is an Insufficient Justification for Spending Limits

The State also seeks to justify expenditure limits as necessary to curb the so-called rising costs of campaigns and relatedly (1) improving the quality of the electoral debate away from mass media appeals and (2) decreasing the amount of time candidates spend raising money. The State further maintains that these objectives will purportedly bolster voter interest and engagement in election politics.⁷⁰ These arguments are also answered by *Buckley*. The Court held that the interest in "reducing the allegedly skyrocketing costs of political campaigns" is not compelling or sufficient enough to justify restrictions on campaign spending.⁷¹

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

68. See *Colorado I*, 518 U.S. at 615-19 (rejecting attempts to regulate political party expenditures to combat a substantial danger of corruption to the electoral system since lack of coordination between the party and candidate precluded the type of *quid pro quo* corruption thus far identified as the only justification sufficient to impose expenditure limits and despite purported danger of unlimited party spending); *Nat'l Conservative PAC*, 470 U.S. at 491-97 (same); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking down restriction on corporate expenditures to influence ballot measure).

69. See *Buckley*, 424 U.S. at 52-54 (1976); see also *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (striking down restriction on contributions to group organized around ballot measure because no possibility of *quid pro quo* corruption).

70. Brief of Defendants-Appellants-Cross-Appellees, (No. 00-9159 (L)), at 35.

71. *Buckley*, 424 U.S. at 57.

retain control over the quantity and range of debate on public issues in a political campaign.⁷²

Adhering to *Buckley's* explicit holding on this point, the Sixth Circuit in *Kruse* rejected the contention that expenditure limits are needed to reduce the amount of time candidates spend raising money, and relatedly, to achieve the broader objective of "combating the demonstrated corrosive effects on the democratic process of uncontrollable campaign spending."⁷³ The Court reasoned that to the extent *Buckley* did not already foreclose the argument:

The need to spend a large amount of time fundraising is a direct outgrowth of high costs of campaigns. . . . [B]ecause the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.⁷⁴

In *New Hampshire Right to Life Comm.*, the First Circuit also emphasized that rising campaign costs undercut, rather than justified, the State's position since the price of television, newspaper, advertisements and printing has "ballooned."⁷⁵

In *Carver* the Eighth Circuit specifically rejected the argument that reduced contribution limits could be justified by the State's interest in changing the nature of local campaigns away from "hot button sound bites" in thirty-second television commercials toward a substantive discussion of the issues. "As laudable as this interest may appear, these comments, on their face, manifest a content based restriction on expression and association."⁷⁶ In the final analysis as the Supreme Court has noted, "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."⁷⁷

72. *Id.* (footnote omitted); see also *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000) (rejecting attempt to shape views of political party in an effort to bring party more to the center).

73. *Kruse*, 142 F.3d at 916.

74. *Id.* at 916-17. *Accord* *N. H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 19 n.8 (1st Cir. 1996) (rejecting the argument that State's interest in encouraging candidates voluntary acceptance of spending limits could be accomplished by restricting independent expenditures).

75. *N. H. Right to Life Comm.*, 99 F.3d at 19; see also *Suster v. Marshall*, 149 F.3d 523, 532 ("unlimited campaign expenditures may, in fact, promote and establish an electorate that is informed and well-aware"); *Carver v. Nixon*, 72 F.3d 633, 637 (8th Cir. 1995).

76. *Carver*, 72 F.3d at 639 n.6.

77. *Riley v. Nat'l Fed. of the Blind of N.C.*, 487 U.S. 781, 790-91 (1988).

c. The Interest in "Leveling the Playing Field" Is an Insufficient Justification for Spending Limits

Lastly, the State seeks to justify the expenditure limits as necessary to ensure equal political participation of candidates and their constituents. On this point, the State largely adopts arguments made by the intervenors—including the suggestion that *Buckley* be overruled on this issue. This of course, is something only the Supreme Court can do itself.⁷⁸

The arguments raised by the defendants about the inequalities of private economic power were specifically addressed by the court in *Buckley*. In rejecting the contention that expenditure limits are necessary to "level the playing field," the Court made the following observation :

Given the limitations on the side of outside contributions, the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support. There is nothing invidious, improper, or unhealthy in permitting such funds to be spent to carry the candidate's message to the electorate. Moreover, the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.⁷⁹

Both the State and the Intervenors appear to concede that *Buckley* rejected the contention that expenditure limits can be justified by the government's interest in equalizing the financial resources of candidates. To avoid the force of that holding, they attempt to recast the issue in a number of different ways that emphasize the "wealth barriers to voting and running for office."⁸⁰ Thus, it is argued : (1) Candidates without wealth are excluded from the electoral process; (2) voters are deprived of a full slate of candidates because otherwise qualified candidates are excluded or discouraged from running by cost-prohibited campaigns; (3) voters are deprived of hearing candidates with less resources because wealthy candidates effectively drown them out; and (4) voters without access to wealth cannot

78. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (reaffirming that lower courts must follow existing Supreme Court precedent directly on point, and should not infer or predict future action by Supreme Court).

79. *Buckley*, 424 U.S. at 56-57 (footnotes omitted).

80. Brief for the Intervenors-Defendants-Appellants-Cross-Appellees, (No.00-9159(L)), at 35.

be heard by candidates and are not players in the system because they are drowned out by contributors with more money and influence.

Initially, it must be noted that these arguments are not supported by the evidence of record. Then State Senator Elizabeth Ready, an Intervenor, testified that she readily provided access to any constituent. Voters in her district would even leave messages on her kitchen table in her Lincoln, Vermont home, which she leaves unlocked.⁸¹ Similar testimony was elicited from Intervenor Cheryl Rivers, who stated she would return the call of a homeless person before that of a \$1,000 donor.⁸² Additionally, money does not often buy elections in Vermont, and many candidates without means are able to run effective campaigns. The classic example is that of Fred Tuttle, who without spending any significant sums defeated Jack McMullen in the 1998 Republican primary for U.S. Senate. McMullen was widely perceived as a wealthy out-of-stater who was attempting to buy a senate seat, and he did not know how many teats were on a cow.

Moreover, as emphasized by the court in *Kruse*, Intervenors' arguments all flow from the broader proposition rejected in *Buckley* that the government has a legitimate interest in eliminating the advantage of wealth in the electoral process, or "leveling the playing field."⁸³ These arguments cannot be severed from *Buckley*'s main teaching on this point in its discussion of expenditure limits generally:

It is argued . . . that the . . . governmental interests in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by [the Act's] expenditure ceiling[s]. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of the others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social change desired by the people. The First Amendment's protection against governmental abridgement of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion.⁸⁴

81. Tr. at IX-165.

82. Tr. at VII-106.

83. *Kruse*, 142 F.3d at 917.

84. *Buckley*, 424 U.S. at 48-49; see also *id.* at 54-57.

The State and Intervenors seek to frame the issue as implicating the First Amendment rights and Equal Protection rights of voters. These alleged constitutional interests, however, are actually the same interests in "leveling the playing field" as described in *Buckley*.⁸⁵ The reliance of the State and Intervenors on governmentally imposed barriers to participation in the electoral process do not support their position and is refuted by *Buckley* itself:

[T]he principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression. Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues.⁸⁶

Finally, the statute's attempt to fine-tune the expenditure limits in an effort to "level the playing field" or to achieve its other goals is not narrowly tailored or closely drawn to accomplish those objectives. Vermont's misguided approach will have the opposite effect in many cases. First, the limits are established at unrealistically low levels and will starve many candidates, particularly gubernatorial candidates and other candidates whose seats are "in-play," of the funds necessary to finance their campaign.⁸⁷ Moreover, as the Court cautioned in *Buckley*, the limits may

85. *Kruse*, 142 F.3d at 917.

86. *Buckley*, 424 U.S. at 49 n.55. In rejecting the equal protection arguments, the court in *Kruse* relied in part on *NAACP v. Jones*, 131 F.3d 1317 (9th Cir. 1997), which rejected similar challenges to the state of California's campaign finance system for judicial elections. Plaintiffs argued that a "wealth primary" exists in Los Angeles County's system of electing judges which precludes candidates without access to wealth from running a meaningful campaign and which prevents voters without access to wealth from contributing effectively to a candidate in violation of voters' and candidates' rights under the First Amendment and the Equal Protection Clause. The court rejected the equal protection argument that all voters are entitled to the same access to the campaigning process regardless of wealth.

We refuse to attribute societal differences in income or the high cost of running a judicial campaign to the State. . . . The inability to influence other peoples' votes through campaign contributions is not equivalent to the inability to cast one's own vote. . . . [There is no right] to have equal access to the campaigning process.

NAACP, 131 F.3d at 1323-24. The court also rejected plaintiffs' First Amendment argument. It held that the First Amendment right of voters can be no greater than those of the speaker, i.e., the candidate. *Id.* at 1322. Because the court rejected plaintiffs' argument that candidates have a First Amendment right to public funding, it rejected the voters' argument as well. *Id.* "The First Amendment simply does not guarantee access to all of the information a voter would like to receive. . . . The 'wealth primary' does not burden any fundamental First Amendment rights." *Id.* at 1323.

87. Although the court enjoined enforcement of the expenditure limits, it adopted defendants' data showing how the limits would have effected previous elections in Vermont based on historical spending patterns. The court's finding focused only on average spending for legislative and statewide

very well "handicap a candidate who lacked substantial name recognition or exposure of his/[her] views before the start of the campaign."⁸⁸ The problem is exacerbated by the fact that the limits are adopted on a *per two-year cycle* basis. This approach fails to account for the cost of a contested primary, or worse, a candidate who spent up to his limit during the primary and who must face in the general election an opponent who faced no primary opponent. Witnesses from both the Democratic and Republican parties testified that this provision may affect who runs in certain elections by creating incentives to avoid contested primaries.⁸⁹

Second, the limits are arbitrarily adjusted downward for incumbents, even though incumbents may be the underdog or face a serious challenge.⁹⁰ The statute provides that incumbents running for reelection to statewide office may spend only 85% of the standard limits, and those running for reelection to other offices may spend only 90%.⁹¹ The un rebutted evidence showed that no empirical basis exists for this provision and that the legislature chose these percentages arbitrarily.⁹² Additionally, even though legislative candidates in multimember (at large) districts are permitted to exceed the limits established for candidates in single member districts, they are not permitted to do so in direct proportion to the size of their district relative to a single member district.⁹³ While the candidate in a two-member

office. The Court made no attempt to isolate or measure the impact of the limits on elections that were competitive or considered "in-play." The cost of these elections deviate from the average considerably. Gubernatorial elections, which the court discussed in the most general terms, are often "in-play" and spending far exceeds the limits established for that office. In 2000, each major party candidate spent \$900,000 or more. See Vermont Secretary of State Campaign Finance Database, at <http://vermont-elections.org/sos/home.htm#campaign> (last visited May 11, 2003). In 1998 Governor Dean spent \$435,000 to win re-election; and as far back as 1990, the late Governor Richard Snelling spent \$450,000. Even with respect to the court's finding about "average" legislative spending, specifically that House and Senate candidates for the most part spent within the expenditure limits, *Landell*, 118 F. Supp. 2d at 471-72, it must be emphasized that this finding tells this Court nothing about the number of campaigns that would have been affected by the expenditure limits. Plaintiffs did provide this evidence, but the lower court failed to consider it. Moreover, even if only a small percentage of candidates would be affected, these percentages compare favorably to the percentages cited by the Court in *Buckley* as evidence of the stifling impact FECA's limits would have exacted. *Buckley*, 424 U.S. at 20 n.21. In any event, the court's findings undercut the State's contention that unregulated candidate expenditures are exclusionary since many, if not most candidates did previously spend within the limits.

88. *Buckley*, 424 U.S. at 57.

89. Tr. at II-186-89 (Patch); Tr. at IV-27-34 (Meub).

90. VT. STAT. ANN. tit. 17, § 2805a(c) (2002).

91. *Id.*

92. Tr. at X-99 (Gross); Tr. at VII-98-100 (Rivers).

93. VT. STAT. ANN. tit. 17, § 2805a(a)(4) (2002) (candidates for State Senator in single-member districts can spend up to \$4,000, and candidates in multi-member districts can spend an additional \$2,500 per additional seat); *Id.* § 2805a(a)(5) (candidates for State Representative in single-member districts can spend up to \$2,000, and candidates in two-member districts can spend an additional \$1,000).

district is trying to get votes from approximately twice as many voters as is the candidate in a single-member district, the two-member district candidate is not allowed to spend twice the amount of money. The spending limit for a district with one extra seat is closer to 1.5 times the single-seat limit. The Vermont legislature had no record from which to justify this arbitrary discrepancy.⁹⁴ Where the general spending limits impede candidates' abilities to get their messages out to the voters, this disparity based on district size is wholly arbitrary and unfairly penalizes candidates in multi-member districts, thus curtailing their First Amendment rights even more severely.

2. The Regulation of Independent Expenditures (17 V.S.A. § 2809(d))

Section 2809(d) provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a "related expenditure." These "related expenditures" are treated as both contributions and expenditures and are subject to the attendant limits. Thus, a political party's conduct in taking out an advertisement advocating the election of the party's nominee is treated as a contribution and an expenditure. The lower court upheld this provision on the strength of *Buckley's* discussion of *coordinated* expenditures and its approval of treating *coordinated* expenditures as contributions.⁹⁵ *Buckley*, however, did not approve regulation of independent expenditures or the adoption of a statutory scheme which treated independent expenditures as if they were presumptively coordinated with the candidate. That issue was decided by the Court in *Colorado I*, which invalidated FECA's presumption that independent party expenditures were presumptively controlled or coordinated by the candidate. Admittedly, this case falls somewhere between *Buckley* and *Colorado I* because the statutory presumption adopted by the Vermont legislation is rebuttable. However, Plaintiffs maintain that this mechanism is not sufficient to address the First Amendment problem inherent in presumptively treating independent expenditures as contributions and by shifting the burden of proving non-coordination to organizations whose speech may be chilled and who may be intimidated by this mechanism or ill-prepared to defend against legal action brought against them by the State, or by other candidates.⁹⁶ The District Court did not even consider these objections.⁹⁷

94. See Tr. at VII-92-96 (Rivers).

95. *Buckley*, 424 U.S. at 36-37.

96. See *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999).

97. Plaintiffs have no argument with the basic view that coordinated expenditures can be

To the extent the related expenditures provision is an attempt to limit, inhibit or otherwise discourage independent expenditures by advocacy groups or political parties, it directly contradicts *Buckley's* prohibition against such regulation. In *Buckley*, plaintiffs challenged a statutory cap (\$1000 per year) on the independent expenditures that individual and groups could make relative to a clearly identified candidate.⁹⁸ In evaluating the constitutionality of this provision, the Supreme Court first established a frame of reference: expenditures limitations, the Court said, "operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."⁹⁹

Public debate about candidates, the Court continued, often costs money.¹⁰⁰ As a consequence, any "restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."¹⁰¹ The FEC Act's ceiling on independent expenditures therefore represented a substantial restraint on political speech.¹⁰² In the Court's evocative metaphor, "[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline."¹⁰³ Having described the depth of the restriction involved, the *Buckley* Court proceeded to find that the government had not advanced a sufficiently compelling interest to warrant the severe First Amendment incursions

regulated as contributions—at least by persons or groups other than the political parties. Limits on party coordinated expenditures raise different considerations and have been struck down in a case that is currently pending in the Supreme Court. *Colorado II*, 213 F.3d 1221, cert. granted, 531 U.S. 923 (Oct. 10, 2000, No. 00-191). To the extent that Vermont treats all party coordinated expenditures as contributions, it runs afoul of *Colorado II*. However, the issue does not arise in this case unless the Court were to reverse the District Court's finding that § 2805(a)'s limits on party contributions were unconstitutionally low.

98. *Buckley*, 424 U.S. at 7.

99. *Id.* at 14.

100. *See id.* at 19.

101. *Id.*

102. *See id.*

103. *Id.* at n.18. To be sure, the price of political expression has changed, but those changes work against Vermont's position. This court can take judicial notice that political campaigns are much more expensive now than when *Buckley* was decided more than two decades ago. *See N. H. Right to Life Committee v. Gardner*, 99 F.3d 8, 19 (1st Cir. 1996). As recognized by the First Circuit in a similar challenge to a New Hampshire law limiting independent expenditures, "[t]he price of television and newspaper advertisements has ballooned, as have the costs associated with printing and distributing leaflets." *Id.*

associated with the provision. The principal government interest asserted—avoiding corruption of the political process—could not justify the cap because independent expenditures, by definition, were made without consultation or cooperation between the contributor and the candidate.¹⁰⁴ The Court likewise rejected the idea that expenditure limitations served a governmental interest in equalizing the ability of various groups to affect the outcome of elections. “The First Amendment’s protection against governmental abridgement of free expression cannot properly be made to depend on a person’s financial ability to engage in public discussion.”¹⁰⁵

Because of the constitutional difference between independent expenditures and “contributions,” it is not constitutionally permissible for the State of Vermont to presume that the former is the latter by counting them as contributions.¹⁰⁶ The fact that the presumption created by the statute is rebuttable does not cure the constitutional objection.¹⁰⁷ The *Williams* court held that the presumption “eliminat[es] the independent nature of the speech and thus diminish[es] its value.”¹⁰⁸ Individuals and organizations wishing to engage in expenditures may be reluctant or chilled from doing so knowing that if they cannot successfully rebut the presumption, they will have violated the state’s campaign finance laws. When candidates are challenged under § 2809(e), they will be required to spend their limited resources in court.¹⁰⁹

Here, the Act necessarily limits the rights of political parties and political committees to make independent expenditures by presuming that certain expenditures are coordinated with candidates and treating them as contributions. The Act’s presumption that the independent expenditures of political parties and committees are coordinated is overbroad and unsupported by any record of improper coordination by political parties and committees. Rather, Vermont is attempting to do indirectly what is clearly prohibited from doing directly—limit “expenditures for express advocacy of candidates made totally independently of the candidate and his campaign.”¹¹⁰ Indeed, the Vermont statute is even more objectionable than the FECA provision struck down in *Buckley*, because it arbitrarily applies

104. See *Buckley*, 424 U.S. at 45–47.

105. *Id.* at 49.

106. *Colorado I*, 518 U.S. at 610.

107. See *Iowa Right to Life Comm. Inc.*, 187 F.3d at 967–68 (rejecting attempts to presumptively treat independent expenditures as candidate expenditures, i.e., coordinated, unless disavowed).

108. *Id.*

109. See VT. STAT. ANN. tit. 17, § 2806 (2002).

110. *Buckley*, 424 U.S. at 47.

only to political committees and political parties. The FECA limits applied across the board.

As with the state's attempt to cast aside the protection for candidate spending afforded in *Buckley*, this court should reject Vermont's attempt to sidestep that decision's protection for independent expenditures. There is nothing unique about Vermont elections that would warrant this court reaching a contrary result than that reached in *Buckley* and subsequently in *Colorado I*.

A. The New Contribution Limits Violate the First Amendment Rights of Speech and Association

Under Vermont's new law, candidates for state representative are limited to \$200 contributions, state senate candidates \$300, and candidates for statewide office are limited to \$400. These limits apply to the total contributions from a single source during a two-year election cycle (including primary and general election), and apply to contributions from parties and political organizations as well as individuals.¹¹¹ The statute also imposes a 25 percent aggregate limit on contributions from out-of-state sources to candidates. Additionally, the statute places a ceiling of \$2000 per election cycle on the amount of money that can be contributed to a political committee or a political party. These organizations are also subject to the percentage limitations on out-of-state contributions. Despite the plaintiffs' contention that the limits are set at unreasonably low levels and stray far from the principles laid down in *Buckley*, the District Court upheld the general statutory scheme except to the extent that (1) political parties were subject to the same limitation as individuals and other groups, and (2) out-of-state contributions were capped at 25 percent. These provisions were struck down. In all other respects, the statutory limits were upheld. The Plaintiffs have cross-appealed on these issues.

1. The Reduced Contribution Limits Violate the First Amendment Rights of Contributors and Candidates Since They Are Not Closely Drawn to Serve a Sufficiently Important Government Interest and Because They Will Prevent Candidates from Amassing the Resources Necessary to Finance Their Campaigns (17 V.S.A. § 2805(a), (b))

While it is now axiomatic that the state may regulate "large" contributions, nothing in that decision or later cases suggests that the state is free

111. VT. STAT. ANN. tit. 17, § 2805(a) (2002).

to establish limits at levels which will effectively starve candidates of the funds necessary to finance a modern campaign and which are not directly addressed to the state's purported interest in preventing *quid pro quo* corruption or the appearance thereof.¹¹²

In *Buckley*, the Supreme Court upheld the \$1000 Federal Election Campaign Act ("FECA") limit on individual contributions to candidates for federal office as a permissible means of combating the potential for corruption in politics.¹¹³ During the pendency of this litigation, the Court had occasion to reconsider *Buckley* and reaffirmed its basic teaching that contributions to political candidates may be regulated. In *Nixon v. Shrink Missouri Government PAC*, the Court upheld a Missouri statute which imposed a \$1,000 limit (which was to be adjusted for inflation) against the charge that inflation had eroded the value of \$1,000 in the years since *Buckley* was decided.¹¹⁴ Although the Court rejected the argument that changes in the Consumer Price Index controlled its analysis, the Court reiterated what it said in *Buckley*, twenty-four years earlier, namely, that there are circumstances where campaign contribution limits can be so low as to violate First Amendment rights.

In *Buckley*, we specifically rejected the contention that \$1,000, or any other amount, was a constitutional minimum below which legislatures could not regulate. As indicated above, we referred instead to the outer limits of contribution regulation by asking whether there was any showing that the limits were so low as to impede the ability of candidates to "amas[s] the resources necessary for effective advocacy," 424 U.S. at 21. We asked, in other words, whether the contribution limitation was 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. Such being the test, the issue in later cases cannot be truncated to a narrow question about the power of the dollar, but must go to the power to mount a campaign with all the dollars likely to be forthcoming.¹¹⁵

Justice Breyer's observation in his concurring opinion amplifies the fact that states must act with some restraint in setting contribution limits.

112. *Buckley*, 424 U.S. at 25.

113. *Buckley* also upheld a \$5000 limit on contributions by a political action committee to a candidate. *Id.* at 35-36.

114. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

115. *Shrink*, 528 U.S. at 397.

On a better record, Justices Breyer and Ginsberg would have found the \$1,000 limits unconstitutional:

We should defer to [the legislature's] political judgment that unlimited spending threatens the integrity of the electoral process. But we should not defer in respect to whether its solution, by imposing too low a contribution limit, significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from effective electoral challenge. The statutory limit here, \$1,075 (or 378, 1976 dollars), is low enough to raise such a question. But given the empirical information presented—the type of election at issue; the record of adequate candidate financing post-reform; and the fact that the statute indexes the amount for inflation—I agree with the Court that the statute does not work disproportionate harm.¹¹⁶

The record here demonstrates that it often requires the expenditure of substantial funds to communicate one's campaign message. While some non-competitive elections may require the expenditure of little money by the candidates, competitive elections can and do cost far more. The District Court chose to overlook this evidence and rely instead on averages that include all races, even those elections that are woefully one-sided affairs. Indeed in dozens of legislative elections, particularly in House districts, the candidate ran unopposed or faced only nominal opposition where the loser literally did not spend a dime.

For those elections that do cost more, the evidence demonstrated that the impact of the new limits will be substantial—particularly in state-wide elections for Governor and Lt. Governor. Candidates will have to replace thousands of dollars lost to the lower limits with no assurance that they can identify the many more donors that will be required to offset the fall-off in receipts. More likely, candidates will be forced manipulate the new limits in numerous ways suggested by the State at trial to pressure the very same donors who contributed larger amounts in the past to continue to do so by means that circumvent the new limits (e.g., writing separate checks from husband, wife, and business). The lower court's only answer to this objection is that whatever burden the new limits impose on candidates, it can be easily offset by the simple expedient of tapping more small donors. This response fails to accurately assess the difficulty many candidates have, especially political newcomers seeking legislative office, in raising "seed

116. *Shrink*, 528 U.S. at 403–04 (Breyer, J., concurring).

money” contributions to jumpstart and finance their campaigns. The candidates are often dependent on contributions from their political parties, legislative PACs, friends and business associates. Even seasoned politicians seeking re-election or higher office can reasonably be expected to have trouble raising money given how drastically the limits have been scaled back. The court’s findings cannot be squared with the evidence.

For example, in the 1998 state House race there were only 276 candidates for 150 seats.¹¹⁷ This figure alone goes a long way toward explaining why more than one-third of winning House candidates spent little or no money on their campaigns.¹¹⁸ It also shows why the District Court’s focus on statistical averages makes no sense. Indeed, in 1998 legislative races Act 64’s contribution limits would have prohibited at least 28% of the funds raised by Senate candidates and 22.7% of the funds contributed to House candidates. The impact is greater for non-incumbents,¹¹⁹ and far more pronounced for statewide candidates.¹²⁰ Looking at individual legislative races, with all their unique factors, the testimony was un rebutted that at least 11 Senate candidates and 15 House candidates would have been prevented from running effective campaigns in 1998 had the new limits been in place.¹²¹

Even if the lower court’s empirical judgment were correct about the minimal hardship of replacing contributions lost to the lower limits, the Court’s reasoning is flawed for the more basic reason that it is not faithful to the principles upon which *Buckley* rests. In assessing the reasonableness of contribution limits, the Supreme Court has made clear, that the State’s reasons for imposing limits on contributions must be “subject to the closest scrutiny,”¹²² and “‘closely drawn’ to match a ‘sufficiently important interest.’”¹²³ Not any interest will suffice. The single interest identified by the Court thus far is the State’s interest in preventing corruption or the appearance of corruption that may flow from *large* campaign contributions.¹²⁴ Contributions which, after adjusted for inflation, are only a tiny fraction of those upheld in *Buckley*, are not linked to the State’s interest in

117. Ex. U-1, at E-0979 (Table 9) (Expert Report of Anthony G. Gierzynski, Ph. D).

118. *Id.* at E-0945.

119. *Id.* at E-0978 (Table 7A).

120. See Ex. U at E-0970 (Table 3A) (showing that limits would have outlawed nearly 50% of funds raised by Gov. Howard Dean and over 40% of the funds raised by his Republican opponent, Ruth Dwyer).

121. See Tr. at II-78-102 (McNeill); Ex. 8 at E-2340-49 (Expert Report of Clark H. Benson of Polidata (Fr, Dec.17, 1999)); Ex. 52 at E-2602 (campaign finance analysis, Dwyer).

122. *Buckley*, 424 U.S. at 25 (quoting *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958)).

123. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387-88 (2000) (citations omitted).

124. *Buckley*, 424 U.S. at 25-27.

regulating objectively large contributions. It is not appropriate to completely defer to the judgment of the legislature as to the reasonableness of the limits, particularly where, as here, there is no evidence of the actual occurrence, much less the pervasiveness of objectively *large* contributions to candidates for state office.

In *Shrink*, the Supreme Court reaffirmed that the interest it identified in *Buckley* was limiting large contributions to candidates. The Court reiterated this point throughout its opinion:

To the extent that *large* contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined.

....
Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of *large* individual financial contributions.

....
In speaking of "improper influence" and "opportunities for abuse" in addition to "*quid pro quo* arrangements," we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of *large* contributors.

....
While neither law nor morals equate all political contributions, without more, with bribes, we spoke in *Buckley* of the perception of corruption "inherent in a regime of *large* individual financial contributions" to candidates for public office.

....
The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of *large*, corrupt contributions and the suspicion that *large* contributions are corrupt are neither novel nor implausible.¹²⁵

Adhering to the Supreme Court's main premise that only large contributions can be restricted, a number of federal court decisions have struck down contribution limits ranging from \$50–\$500 because they were too low

125. *Shrink*, 528 U.S. at 388–89 (emphasis added) (internal quotations omitted). See also *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995) (noting that "[t]he Court reiterated this interest at least seven times [in *Buckley*]").

under *Buckley*.¹²⁶ In *Carver v. Nixon*, the court struck down \$100–\$300 limits that applied on a *per cycle* basis, stating: “The district court erred as a matter of law in extending *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions.”¹²⁷ It is thus clear that the potential for corruption necessary to justify contribution limits stems not from campaign contributions *per se*, but from large campaign contributions.

The decision in *Shrink* changes neither the analysis nor the result reached in the forgoing cases. The reduced limits in Vermont are constitutionally defective based on the same considerations relied upon by other courts called upon to resolve the claim asserted in this case. When adjusted for inflation, and for the critical fact that the limits apply on a two-year election cycle basis, rather than per election (regardless of whether there is a contested primary), the limits amount to less than 3.5 percent of the *Buckley* limits for Vermont House races, 5.2 percent for Senate races, and less than 7.0 percent for gubernatorial elections.¹²⁸ Vermont’s new limits contain no automatic adjustment for inflation.

Limits this low are not closely drawn to address the evils of corruption or the appearance thereof. There is no legislative record that the reduced limits were enacted to address the actual occurrence of corruption or that they are objectively large. The predictable testimony that contributions of \$200–\$400 are “large” by some Vermonter’s standards—or that all such

126. See *Russell v. Burris*, 146 F.3d 563 (8th Cir. 1998) (enjoining \$100–\$300 per election limits); *Carver*, 72 F.3d 633 (invalidating \$100–\$300 limits that applied on an election cycle basis); *Citizens for Responsible Gov’t State PAC v. Buckley*, 60 F. Supp. 2d 1066 (D. Colo. 1999) (enjoining \$500 per election cycle limits for state-wide office and \$100 limits for legislative office); *Cal. ProLife Council Political Action Comm. v. Scully*, 989 F. Supp. 1282 (E.D. Cal. 1998) (enjoining \$250 limits for legislative offices and \$500 limits for state-wide offices because of the diminution of candidate’s speech resulting from a diminished ability to raise sufficient funds and deliver his or her message); *Nat’l Black Police Ass’n v. D. C. Bd. of Elections and Ethics*, 924 F. Supp. 270, 282 (D.D.C. 1996) (\$50 and \$100); *Wilkinson v. Jones*, 876 F. Supp. 916 (W.D. Ky. 1995) (enjoining \$100 limits in context of public financing scheme); see also *Vannatta v. Keisling*, 931 P.2d. 770, 784 (Or. 1997) (striking down \$500 limits for state-wide office and \$100 limits for State legislature).

127. *Carver*, 72 F.3d at 639.

128. *Buckley*’s limits applied separately to the primary election, the general election, and special elections. Thus candidates seeking a congressional House seat could raise \$2,000 each two year election cycle from individuals. They could also accept up to \$10,000 from PACs, and even greater amounts from political parties. When adjusted for inflation since *Buckley* was decided in 1976 and taking into account that the limits apply on a per cycle basis, Vermont’s limits of \$200, \$300 and \$400 are the equivalent of \$34.90, \$52.35 and \$69.80, respectively. These amounts represent an insignificant fraction of the \$1000 limit upheld in *Buckley*. Using the “all items” Consumer Price Index (CPI) for 1976 and 1998. U.S. CENSUS BUREAU, 1996 STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 745 483 (1996). The 1976 CPI was 56.9 and the same index for 1998 was 163. U.S. CENSUS BUREAU, 1999 STATISTICAL ABSTRACT OF THE UNITED STATES tbl. 776 495 (1999). Thus, the appropriate deflator to convert 1998 dollars to 1976 dollars is $56.9/163 = .349$. The new restrictions apply equally to organizational giving and are even more severe when measured against the \$5000 PAC limit upheld in *Buckley*. They represent less than two percent of the *Buckley* limit.

contributions are “important”—does not answer the question of whether they are the type of “large” contributions that *Buckley* has cautioned might result in *quid pro quo* corruption of the appearance of it.¹²⁹ What is a significant amount of money from the point of view of the contributor, may be viewed differently by the recipient. In fact, since the overwhelming percentage of the contributions on record did not exceed the new limits, the argument that these so-called large contributions are the source of any problem in Vermont is suspect.¹³⁰ The evidence cited by the District Court is simply not addressed to the problem of large contributions. The most the evidence shows is that “[T]he public perceives corruption in the political electoral system” and that “Vermonters are troubled by how money influences campaigns.”¹³¹ This evidence, however, fails to differentiate between the public’s dissatisfaction with the role of money in election politics, generally, and the problem of *quid pro quo* corruption that flows from *large* contributions made directly to candidates. This is a crucial distinction, however, since the Supreme Court has already told us that there is nothing “invidious, improper, or unhealthy” about spending money that is lawfully raised.¹³²

While the Court in *Shrink* cautioned against using the CPI as a strict barometer to evaluate contribution limits, the departure here from the limits upheld in those cases represents substantially more than a difference in “degree”; it is a distinction in “kind” or “purpose” that will undoubtedly undermine political dialogue by preventing candidates from amassing the resources necessary to finance modern campaigns and arbitrarily benefit certain candidates over others, depending on whether they are faced with a contested primary. Nothing in *Shrink* detracts from the kind/degree analysis that the Court in *Buckley* specifically endorsed as a safeguard against the adoption of limits that unreasonably depart from the limits it upheld.¹³³

129. Certainly there was no evidence of record showing that such corruption actually existed in Vermont. Vague (and politically motivated) out of court statements like “money buys access” are a far cry from proof that a \$200 contribution results in *quid pro quo* corruption.

130. The evidence relied on by the lower Court showed that 88% to 95% of the contributions to Senate candidates were under the \$300 limit and 90% of those to state-wide candidates were made under the limit. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 470 (D. Vt. 2000).

131. *Id.* at 478.

132. *Buckley*, 424 U.S. at 56.

133. The fact that Vermont’s limits may compare favorably to Missouri’s or Maine’s, as stated by the District Court, begs the question of how much further Vermont could have lowered its limits and still be comparable. At some point, the exercise becomes attenuated because it loses sight of the fact that the Supreme Court is concerned with the effect of *large* contributions that improperly influence a candidate. The per cycle limits at issue here are so low that they refute the suggestion that candidates will be improperly influenced by them.

The rule that emerges from *Buckley*, *Shrink* and the lower court cases is equally applicable here. Vermont's reduced contribution limits cross the threshold of reasonableness and are not directed at the type of *large* contributions that the Supreme Court has cautioned might be exchanged for political favors. It is neither intuitive, nor was any evidence presented at trial that Vermont legislators would sell their votes for \$200 or that Vermont's governor would grant a political favor for \$400. More importantly, there is no evidence that the pre-existing \$1000 limits were inadequate to deter corruption. The defendants cannot reasonably argue that Vermont has a citizen legislature on one hand, and that it can be so easily corrupted or "bought" on the other. The offices of state senator and state representatives are part-time positions that pay a modest stipend.¹³⁴ Except for the satisfaction of serving their constituents, there are few—if any—perquisites of office that would lead a reasonable person to conclude—or even suggest—the likelihood of *quid pro quo* corruption. Certainly no evidence was proffered by the defendants to prove that corruption actually exists. Even the "appearance" of corruption that the defendants urge as the justification for the limits, cannot be considered objectively reasonable.

The public has no objective basis to believe that Vermont's citizen legislators are acting contrary to the interests of the constituents they represent. The fact that the public's perception of the role of money in Vermont's political process may be more cynical is not sufficient basis to meet *Buckley's* definition of corruption.¹³⁵ It is no more appropriate to credit that bias than it would be to enact legislation that restricts individual rights on some other improper prejudice.¹³⁶

While there is nothing inherently or intuitively objectionable about the amount of money spent in Vermont's political process, what is intuitive about the reduced contribution limits is that candidates who are dependent on private contributions will have to redouble their fund-raising efforts to avoid a substantial decline in receipts.¹³⁷ This will not only detract from the primary mission of candidates as they direct more resources towards raising

134. See VT. STAT. ANN. tit. 32, § 1052 (1994 & Supp. 2002).

135. Although Intervenor witnesses testified that money was "in the air" or "in the humidity," they also testified that they were not themselves improperly influenced by money, and that they would give access to any constituent. (Ready, Rivers, Kitzmiller.) There was no record before the legislature, and no evidence presented at trial, that any public cynicism or distrust of Vermont government was specifically focused on contribution limits to candidates. Rather, people may believe that "there is just too much money in politics," or that matters are taking place in secret.

136. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 41 F. Supp. 2d 1197, 1210–12 (D. Colo. 1999), *aff'd*, 213 F.3d 1221 (10th Cir. 2000) (rejecting assertion that public's disapproval with the amount of money in the political process is a sufficient basis to meet *Buckley's* definition of corruption or the appearance thereof).

137. Testimony of Pomper, McNeill, Johnson.

money, but for many candidates these efforts will not result in more funds. It costs time and money to raise campaign funds with no assurance that the investment will pay off. It will be challenge enough for incumbents who can at least rely upon past contributors and lobbyists. For challengers, "third-party" candidates, and other political newcomers, the task is far more herculean since the pool of political donors is inevitably smaller. The pool of contributors is not unlimited.

The harshness of the new limits is exacerbated by the fact that they are adopted on a per election cycle basis. As with expenditure limits, this scheme will severely handicap candidates who have exhausted their financial resources and pool of donors in a contested primary. To then turn around and face a candidate in the general election, after having "tapped out," may be too much to overcome. This is especially likely if your general election opponent faced no opposition in the primary. The District Court's answer to this is that Vermont's primary is only two months removed from the general election and that it was reasonable for the legislature to conclude that this allowed, "candidates . . . greater freedom to decide how to allocate their funds between the primary and [the] general elections."¹³⁸ This reasoning entirely fails to respond to plaintiffs' objection that candidates may have exhausted their resources in the primary or face an opponent in the general election who has built a "war chest" and had no primary. The proximity of the primary and general election, moreover, presents a greater, not lesser, hurdle for candidates who have to catch up.

The problem is further exacerbated by the fact that Vermont's limits apply equally to contributions by political party committees and PACs, including legislative leadership and caucus committees whose very purpose is to fund candidates.¹³⁹ While the impact of the reduced limits on these organizations is discussed below, at this juncture it is important to observe that even the FECA limits upheld in *Buckley* drew a distinction between contributions made by individuals and those made by political organizations. Larger contributions by political organizations are an essential adjunct to the smaller contribution received from individuals. Currently, under FECA, PACs are permitted to give up to \$5000 directly to federal candidates.¹⁴⁰ State and national party committees can give substantially more, either directly or through *coordinated* expenditures which the

138. *Landell*, 118 F. Supp. 2d at 480.

139. The limits on party contributions were struck down. The State has appealed this ruling. In the event the party limits are reinstated, plaintiffs challenge to the individual limits must be evaluated in the context of the significant loss of party money.

140. 2 U.S.C. § 441a(a)(2)(A) (2000).

candidate controls.¹⁴¹ Thus, in contrast to the limits upheld in *Buckley*, there can be little question that Vermont's new limits will vastly reduce the amount of money available to candidates.

Adjusted for inflation—and particularly since the limits apply equally to political parties and PACs—and to two-year election cycles—Vermont's reduced contribution limits represent a difference in kind, not degree. While *Buckley* and *Shrink* are premised on the prevention of corruption, they do not support the broader goal of entirely—or even substantially—reducing reliance on private money to fund political campaigns. The First Amendment does not countenance such result.

The District Court stated that plaintiffs' claims of harm were speculative and that they failed to prove that the limits would disparately harm any particular group of candidates—whether they be challengers or incumbents, Republicans or Democrats, non-wealthy, women, non-traditional, or third-party candidates.¹⁴² This was the sum total of the court's analysis of the voluminous evidence offered by the plaintiffs. Contrary to the court's assessment, however, plaintiffs' claims are not "speculative," but reasonable inferences that flow from the record and from the sheer force of: (1) the drastic rollback of the pre-existing limits; (2) the virtual elimination of the role of party and PAC giving; and (3) the adoption of per election cycle limits. Some propositions are self-evident.¹⁴³ Plaintiffs' evidence may rely on extrapolations about future events, but it is not speculative. It is based on the testimony of experienced candidates and political consultants, witness after witness who explained how the limits would typically favor incumbent and wealthy candidates, while often handicapping challengers, political newcomers, and third-party candidates.¹⁴⁴

141. *Id.* § 441a(d)

142. *Landell*, 118 F. Supp. 2d at 480.

143. *See, e.g., Buckley*, 424 U.S. at 57 (observing that expenditure limits will "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of a campaign"); *see also Shrink*, where Justices Breyer and Ginsburg stated in concurrence, "imposing too low a contribution limit significantly increases the reputation-related or media-related advantage of incumbency and thereby insulates legislatures from effective electoral challenge." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 390, 403 (2000) (Breyer, J., concurring).

144. The wealthy-candidate advantage that flows from the right to spend unlimited amounts of one's own money becomes even greater when it is considered that the contribution limits do not apply at all to a candidate's "immediate family." Vermont has strangely defined "immediate family" as "individuals related to the candidate in the first, second or third degree of consanguinity." VT. STAT. ANN. tit. 17, § 2805(f) (2002). Thus a candidate's relations by blood (not by marriage, which is a relation by "affinity") are permitted to contribute unlimited amounts of money to a candidate, while a political party, PAC or individual contributor cannot. This provision in the law expands the wealthy candidate advantage to candidates from wealthy families. While there may be no justification for limiting the spending of a wealthy candidate because he or she cannot corrupt himself or herself, *see Buckley*, 424 U.S. at 53, nothing stops a blood relation within the third degree of consanguinity to a

The Court's own findings support plaintiffs' contention that "some candidates may be hit harder by these limits than others."¹⁴⁵ Moreover, while the overall or "average" effect on fundraising may be moderate, the impact on particular elections considered "in-play" will be far greater. This is most likely to occur in elections for the top state-wide offices and in toss-up districts or where there is an open seat or incumbent that faces a strong challenger. In a so-called safe district, both fundraising and expenditures will predictably be less important.

The problems faced by a candidate or potential candidate who is not an incumbent or otherwise well-known to local voters cannot be dismissed out of hand.¹⁴⁶ He or she cannot hope to raise funds from a large number of small contributors until he or she can first bring himself or herself to the attention of potential contributors and attract their support, but doing so requires the initial expenditure of a significant amount of money that the Act prevents the candidate from raising. Challengers simply do not have the number of donors that an incumbent who has been in office for one or more terms can count on. The Act thus creates a classic "Catch-22"—by prohibiting an underdog candidate from raising, and his/her supporters from contributing, this essential start-up money, the Act will cause underdog campaigns that might ultimately succeed to fail before they can begin.

In addition to the foregoing concerns that apply across the board, it must be emphasized that reduced contribution limits do not neutrally impact all candidates. Major party candidates benefit from greater name recognition, media coverage and, most importantly, from party affiliation and structure. Major party affiliation ensures a broad base of voter support from which funds can be raised. Moreover, these candidates benefit from national party expenditures that are free from Vermont regulation. Candidate forums and media coverage, additionally, often exclude Libertarian—and other "third party"—candidates from participation or coverage. The base of contributor support for the Libertarian Party is extremely limited in Vermont. There are a limited number of members statewide, many of whom did not contribute to party candidates in the 1998 elections. Other smaller political parties will face similar hurdles. The lower court brushed this claim aside with the casual observation that *Shrink* does not require this degree of fine tuning.

candidate—which includes grandparents, uncles, nieces and nephews, but, arbitrarily, does not include a spouse or mother-in-law—from seeking to buy influence with a large contribution. The wealthy family exception creates such a significant—and arbitrary—loophole in the law that the rationale for establishing the limits is completely undermined.

145. *Landell*, 118 F. Supp. 2d at 480.

146. *Shrink*, 528 U.S. at 404 (Breyer, J., concurring).

Thus, while the limits may not effect all elections in all districts, it is hard to argue that the limits will not seriously impact receipts in statewide races and many Senate elections. Even in many House elections, particularly competitive ones, where there is an open-seat or when an incumbent faces a serious challenge, the new limits will seriously impact elections. The limits will seriously hamper candidates with contested primaries, and may change political behavior drastically by affecting who runs for office in a given year. The costs of television, radio and newspaper advertising have increased the expense of running an effective campaign and, Defendant's vision of Vermont politics—that of "old fashioned," grassroots campaign methods—may be enticing, but such vision cannot be legally imposed on all candidates. Vermont's new limits prevent candidates from "amassing the resources necessary for effective advocacy"¹⁴⁷ and undermine "the potential for robust and effective discussion of candidates and campaign issues."¹⁴⁸

2. The Act's Prohibition on Candidates, Political Parties, and Committees Receiving More Than 25 Percent of Their Total Contribution from Out of State Violates the First Amendment and Other Constitutional Provisions
(17 V.S.A. 2805(c))

Section 2805(c) limits to 25% the amount of money candidates and political organizations can raise from out-of-state sources. The lower court correctly struck down the Act's restriction on out-of-state contributions as an unconstitutional burden on the rights to free speech and association of candidates, political parties, political committees and out-of-state contributors that is unsupported by compelling governmental interest and is not closely drawn to prevent corruption.¹⁴⁹

The State contends that limits on out-of-state contributions are necessary to combat the perception that the Vermont legislature might be unduly influenced by out-of-state interests. On its face, the justification goes beyond *Buckley's* holding that only large contributions given in exchange for political consideration can be regulated. The aggregate limit on out-of-state contributions fails to distinguish between large contributions and contributions that would not otherwise be viewed as corrupting if made by Vermont residents. Until such time that the Supreme Court broadens the definition of corruption beyond its present meaning, the State is not free to

147. *Buckley*, 424 U.S. at 21.

148. *Id.* at 29.

149. *Landell*, 118 F. Supp. 2d at 483-84; *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998); *Whitmore v. Fed. Election Comm'n*, 68 F.3d 1212 (9th Cir. 1995).

limit contributions based on a rationale that finds no support in the Court's cases.¹⁵⁰

In the only two federal decisions on the subject of out-of-state contributions, the Ninth Circuit flatly rejected the idea that such contributions could be restricted. In *Vannetta* the court affirmed an injunction enjoining a virtually identical statute as the one challenged in this case—except that it limited to 10% the amount of money that could be contributed by out-of-district donors. The panel unanimously agreed that the measure could not be supported by the state's interest in preventing corruption since out-of-state contributors are no more or less linked to corruption than in-state contributors. The court likewise rejected a second interest purportedly advanced by the measure, involving protecting the integrity of a republican form of government by assuring that representatives are truly elected by their own constituents. The court brushed this assertion aside with the observation that there was simply no support for any claim found on a republican form of government.¹⁵¹

The conclusion reached in the forgoing cases is unquestionably correct.¹⁵² The State simply has no legitimate interest in limiting the influence of non-residents in local elections. Indeed, during the pendency of this case, the Supreme Court cast serious doubt on the State's theory in a case that raised the issue in a slightly different context.¹⁵³ There, the Court struck down a Colorado law that required petition circulators to be registered to vote in Colorado. The State sought to justify the restriction as necessary to preserve the integrity of the ballot process from out-of-state interests. The Court held that such a requirement unduly limited the number of voices who might convey a political message and the size of the audience that a message might reach.¹⁵⁴

Compared to the Colorado law struck down in *Buckley v. American Constitutional Law Foundation*, Vermont's attempt to restrict donations from non-Vermont residents is as great a burden, if not a greater burden on those that wish to engage in political activity. For instance, there is nothing

150. The District Court specifically found that the evidence offered in support of the out-of-state limit focused on the size of the contributions from so-called special interests, rather than on the fact that the contributions were from out-of-state. *Landell*, 118 F. Supp. 2d at 484.

151. *Vanatta*, 151 F.3d at 1217 (citing *Whitmore*, 68 F.3d 1212).

152. The case of *State of Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), should not guide this Court. First, it is simply incorrect in its determination that limitations on out-of-state contributions do not unconstitutionally infringe on out-of-state residents' freedom of speech. Second, it is premised on what the court considered the "unique" situation of Alaska. Finally, that case does not address any of the other significant constitutional issues implicated by the 25% provision. *Id.* at 616-17.

153. See *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999).

154. *Id.* at 194-95 (citing *Meyer v. Grant*, 486 U.S. 414 (1988)).

improper about pro-life or pro-choice individuals or political committees, from outside Vermont, wishing to support Vermont candidates that share their respective views. Second, Vermont has many non-resident homeowners who will be precluded by the statute from financially supporting candidates whose positions are aligned with theirs. In a House election for instance, a candidate in a district with many out-of-state property owners is limited to raising the paltry sum of \$500 from non-resident constituents. It is no less an exercise of one's First Amendment freedoms to contribute, across geographic boundaries, to a candidate or political party who may share and advance one's views than it would be to contribute to a candidate in one's own state. Citizens of the United States may exercise their First Amendment freedoms in any state they would like. There is simply no legitimate government interest in preventing non-Vermont individuals, political parties, and committees from supporting Vermont candidates if they are so inclined.

The provision also fails to meet the standards of the Privileges and Immunities Clause of Article IV, of the United States Constitution. Section 2 of Article IV of the United States Constitution states: "The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause is meant:

to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.¹⁵⁵

To fulfill this purpose, the Constitution "bar[s] discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States."¹⁵⁶ Here,

155. *Hicklin v. Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul v. Virginia*, 8 U.S. (1 Wall.) 168, 180 (1869)).

156. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

there can be no reason for the 25% provision other than "the mere fact that [the contributors] are citizens of other States."

The Supreme Court of Montana applied the Privileges and Immunities clause to a similar provision. The State of Montana, in regulating lobbyists, excluded from the reporting requirements, "any Montana citizen lobbying on his/her own behalf . . ." ¹⁵⁷ The court could "discern no basis for creating an exception solely for individual Montana citizens. A citizen of North Dakota or New Jersey may have an interest in some official action in Montana that warrants his efforts to influence the outcome of that action."¹⁵⁸ The case here is no different. A property owner in Vermont, who happens to be a resident of Montana, North Dakota or New Jersey, may have just as significant an interest in the outcome of a Vermont election as a Vermont citizen. Moreover, the Vermont legislature may often consider matters having an effect outside of Vermont's borders. Statutes regulating environmental matters, the Northeast Dairy Compact,¹⁵⁹ or consideration of amendments to the U.S. Constitution, are just several examples. The United States Constitution, in an attempt to forge a single Union out of numerous separate sovereign entities, does not permit such xenophobic legislation.

The Commerce Clause of Article I provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." It is long established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce.¹⁶⁰ It is this "negative" or "dormant" Commerce Clause that is related closely to the Privileges and Immunities Clause just discussed. That "relationship . . . stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism."¹⁶¹

The Commerce Clause is significantly implicated by the 25% provision. The provision, on its face, limits the ability of an out of state citizen to send his or her money into Vermont, and the provision limits

157. *Mont. Auto. Ass'n v. Greely*, 632 P.2d 300, 304 (Mont. 1981).

158. *Id.*

159. A recent example of interstate politics and policy is very instructive. Governor Howard Dean of Vermont lobbied in Massachusetts to protect the Northeast Dairy Compact. Obviously, Vermonters have just as significant an interest in the Compact and its continued life as do Massachusetts citizens.

160. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (alterations in original) (citation omitted).

161. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978) (footnote omitted) (citation omitted).

independent political activities under the sweep of § 2809(d). It should be noted that the Commerce Clause does not only apply to tangible goods.¹⁶²

A statute that is facially discriminatory against out-of-state commerce has an extremely high hurdle to cross. "State laws discriminating against interstate commerce on their face are virtually per se invalid."¹⁶³ Such a facially discriminatory statute must pass the "strictest scrutiny."¹⁶⁴ The only way to justify such a statute is if there is *no* reasonable nondiscriminatory alternative to a *legitimate* local purpose.¹⁶⁵ Here, the statute's only purpose is the discrimination itself—hardly a *legitimate* purpose. Therefore, the 25% provision is invalid on its face.

Likewise, the Fourteenth Amendment bars certain types of discrimination against certain classes. It guarantees that no person shall be denied the equal protection of the laws without sufficient justification.¹⁶⁶ Here, the 25% provision unlawfully discriminates against non-Vermonters. The requirement that a "classification bear a rational relationship to an *independent and legitimate* legislative end" ensures "that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."¹⁶⁷ Here, the only possible reason for the 25% provision is the "disadvantaging" of out of state citizens. The evidence at trial was that the purpose of the 25% provision is to lessen the influence of out of state citizens or, at least, to lessen the appearance of such influence, in Vermont elections. In other words, the state unabashedly wants to diminish the political influence of out of state citizens. In fact, the United States Supreme Court has bluntly stated that such a law must be struck down: "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense."¹⁶⁸

The 25% provision is based simply on an "irrational prejudice" against out of state citizens.¹⁶⁹ A statute may not stand if that is its basis.¹⁷⁰ "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a

162. See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 576-77 (1997) (applying Commerce Clause when "product" was "in part the natural beauty of Maine").

163. *Id.* at 575 (quoting *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)).

164. *Or. Waste Systems, Inc. v. Dep't of Env't Quality of Or.*, 511 U.S. 93, 101 (1994). "This is an extremely difficult burden, 'so heavy that facial discrimination by itself may be a fatal defect.'" *Camps Newfound*, 520 U.S. at 582 (quoting *Or. Waste*, 511 U.S. at 101).

165. *Camps Newfound*, 520 U.S. at 581 (emphasis added); *Me. v. Taylor*, 477 U.S. 131 (1986).

166. See *Romer v. Evans*, 517 U.S. 620, 631 (1996).

167. *Id.* at 633 (emphasis added).

168. *Id.*

169. See *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

170. *Id.*

politically unpopular group cannot constitute a legitimate governmental interest.¹⁷¹ Therefore, Vermont's desire to disempower out of state citizens simply because they may be politically unpopular, is not legitimate, and the 25% provision must be voided.

Fundamentally, the limit on out-of-state contributions is not closely drawn to prevent corruption or the reasonable appearance of corruption. There is nothing inherently corruptive about out-of-state contributions versus in state contributions, and no evidence to suggest that Vermont officials are especially susceptible to the corrupting influence of non-Vermont contributors.

3. The Contribution Limits Imposed on Political Parties, and Political Action Committees Are Too Low to Survive First Amendment Scrutiny (17 V.S.A. § 2805 (a))

Vermont fails to draw a distinction between contributions made by an individual and those made by a political organization—including political parties. Worse, all subdivisions of a political party, involving town, county, and state party organizations are treated as a single entity for purposes of the state limits.¹⁷² National party committees are arguably treated separately under this provision but are still subject to the limits established for individuals. By failing to distinguish between contributions made by individuals and those made by political organizations, Vermont not only ignores the critical role that organizations play in financing political campaigns, but dismisses out of hand the important associational rights at stake. If political organizations, including political parties, are to continue fulfilling their historical role in elections, the limits contained in 17 V.S.A. § 2805 must be enjoined as to them—even if they are upheld against individuals, corporations and other groups.

Under the statute, all political committees, including political parties, legislative leadership committees, such as the Democratic and Republican leadership PACs which exist to finance candidate campaigns, and advocacy organizations such as the teacher's union PAC aggregating small \$25 contributions from its members, are barred from making contributions to candidates in excess of the amounts permitted to individuals. Since the restriction applies to all political organizations, it encompasses political parties, legislative PACs and ideological PACs even though they do not present a danger of corruption.

171. *Romer*, 517 U.S. at 634 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (alteration in original) (emphasis removed)).

172. VT. STAT. ANN. tit. 17, § 2801(5) (2002).

The District Court upheld the limits as applied to political committees (or PACs as they are often commonly referred) but enjoined enforcement as applied to political parties because they are established at unreasonably low levels. Applying the standard stated in *Shrink*, the court held that while some limits could be placed on party contributions, the limitation "cannot be so radical in effect as to render political association[s] between parties and candidates ineffective."¹⁷³ The Vermont limits, the Court concluded, are too stringent to pass constitutional muster under the controlling standard.

Political parties speak with a different voice than individuals. Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper. For the stability and consistency of our competitive electoral process, parties must continue to function as they have in the past.¹⁷⁴

Buckley is the leading Supreme Court case involving organizational giving. There, the Court upheld the \$5000 limit established by FECA governing contributions by political action committees.¹⁷⁵ While the Court's holding did not purport to establish a constitutional threshold, Vermont's reduced limits depart radically from that benchmark. Additionally, *Buckley* must be read in conjunction with the fact that under then (and current) FECA guidelines, political parties did and can make direct contributions to federal candidates in amounts that far exceed the amounts established for individual contributors.¹⁷⁶

173. *Landell v. Sorrell*, 118 F. Supp. 2d 459, 487 (D. Vt. 2000).

174. *Id.* See also *Mo. Republican Party v. Lamb*, 227 F.3d 1070, 1071 (8th Cir. 2000) (enjoining limits on party contributions); *Colorado II*, 213 F.3d 1221, 1233 (10th Cir. 2000) (enjoining FECA limits on party-coordinated expenditures).

175. *Buckley*, 424 U.S. at 35-36; see 2 U.S.C. § 441a(a)(2)(c).

176. *E.g.*, 2 U.S.C. § 441a(h) (\$17,500 to candidates for U.S. Senate). In addition to the FECA provisions allowing for *direct* contributions by PACs and committees to candidates, the FECA rules in effect when *Buckley* was decided permitted national or state party committees to spend \$20,000 in a Senate race, and \$10,000 in a House race in coordinated expenditures, controlled by the candidate. 2 U.S.C. § 441a(d). The limits are adjusted for inflation each year but have since been found unconstitutional. *Colorado II*, 213 F.3d 1221. In 1998, the average amount expended by the national committee on a House race was \$32,550 in the general election. Coordinated expenditures in Senate campaigns ranged from a low of \$130,000 in Alaska to a high of \$3,035,874 in California. *Id.* 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. VT. STAT. ANN. tit. 17, § 2809 (2002). Related expenditures are expenditures made in support of a candidate or in opposition to that candidate's opponent that were facilitated, solicited, or approved by the candidate. Under Federal law political parties are permitted to make coordinated expenditures over and above any direct contributions that are made to the candidate. 2 U.S.C. § 441a(d). Vermont law provides for no such allowances. Under Vermont law coordinated expenditures are treated

Implicit in *Buckley* and in the FECA guidelines is the recognition that, under our system of government, organizational giving by party committees and PACs is a legitimate and essential part of our federal campaign finance system. These organizations allow individual contributors—including many small donors—to pool their resources for the very purpose of influencing public debate and electoral politics. By establishing contribution limits for these organizations at levels equivalent to the limits applicable to individual contributors, Vermont has greatly diminished the importance of parties and PACs in electoral politics and undermined the associational character of those organizations, without showing a compelling justification for doing so.¹⁷⁷ Indeed, no evidence was presented to justify such limitations in Vermont.¹⁷⁸

To be sure, *Buckley* held that certain limitations on an individuals' contributions to candidates for public office were constitutional because such a limitation imposed "only a marginal restriction upon the contributor's ability to engage in free communication."¹⁷⁹ That was because, as the Supreme Court saw it, "[a] contribution serves as a general expression of support [of a] candidate. . . but does not communicate the underlying basis for that support."¹⁸⁰ This rationale does not transfer well to a case involving the severe restrictions on PACs and political parties at issue here. The associational interests at stake are weightier and involve more than a marginal restriction on the organization's right of free speech. A number of recent Court of Appeals decisions recognize this important distinction and have struck down limits on party and PAC contributions.

strictly as contributions. Such treatment is problematic under *Colorado II*, particularly if this court were to reinstate the party contribution limit to candidates found in VT. STAT. ANN. tit. 17, § 2805(a)-(b) (2002).

177. *Colorado I*, 518 U.S. at 604 (recognizing role of party as membership organization representing a broad-based coalition of interests and rejecting argument that party leaders exert undue or corruptive influence over candidates). See, e.g., *Buckley*, 424 U.S. at 22 (noting that expenditure limits applied to organizations "impinge on protected associational freedoms" as well as on freedom of speech).

178. In *Shrink*, the \$1000 limit upheld by the Court also applied to PACs, but not parties, which have much higher per-election limits under Missouri law. The *Shrink* Court did not discuss, however, the claim made here that a distinction must be made between limits that apply to individuals and those that apply to PACs. The argument does not appear to have been raised and there is only a passing reference in the opinion to the fact that the limits apply to PACs at all. Additionally, political parties in Missouri are not bound by the limits applicable to individuals or PACs and were allowed contribute up to \$20,000 per election cycle to candidates for state-wide office, \$10,000 for state Senate and \$5,000 for state House. MO. REV. STAT. § 130.032.4 (1997 & Supp. 2003). The *Shrink* Court's approval of Missouri's \$1000 adjusted-for-inflation individual contribution limits must be read in this context.

179. *Buckley*, 424 U.S. at 20-21.

180. *Id.* at 21.

a. Political Parties

In *Missouri Republican Party v. Lamb*, the Court struck down party limits, which had been established in Missouri at thousands of dollars above the limits that applied to individuals.¹⁸¹ The Eighth Circuit reasoned that in the contest of an election, the overriding goal of a political party is to elect its candidates to office and, to this end, party and candidate present a coordinated and common front.¹⁸² While political parties employ various methods to speak, a principal way in which they express themselves is through the speech of their candidates. While there may not be a metaphysical identity between candidates and their parties, the speech of its candidates is, in large measure, the party's own speech.¹⁸³ A party's contribution provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not, and thus it cannot properly be called a "contribution" in the same sense that the individual contributions at stake in *Buckley* were. Nor is a party's contribution to its candidate, again in the words of *Buckley*, merely a "symbolic expression" of support; it is more of a substantive political statement than others' contributions may be.¹⁸⁴ In contrast to interests at stake in restricting the amount an individual or association can contribute to a candidate, party spending in cooperation, consultation, or concert with its candidates of necessity "communicates the underlying basis for support," i.e., the hope that he or she will be elected and will work to further the party's political agenda.¹⁸⁵ The Court concluded by making the following observation directly relevant here:

The nature and character of political parties are relevant to another important aspect of our consideration of this case, namely, the kind of reason that the government must advance in order to justify an intrusion on first amendment rights. In *Shrink Missouri Government PAC*, 120 S. Ct. at 905-906, the Supreme Court held that preventing the corruption of candidates served as a sufficiently compelling reason to limit the size of contributions from individuals and political action committees. But, as Mr. Justice Thomas has observed, it is not easy to see how a party

181. The limits were comparably high, roughly \$10,000, \$5,000 and \$2,000 for state-wide Senate and House races. See *Mo. Republican Party v. Lamb*, 100 F. Supp. 2d 990, 991 (E.D. Mo. 2000), rev., 227 F.3d 1070 (8th Cir. 2000).

182. *Lamb*, 227 F.3d at 1072.

183. *Id.*

184. *Id.*

185. *Id.*

could "corrupt" one of its own candidates, since, on account of their general unity of purpose, they are committed, in the main, to the same aims and principles. See *Colorado Republican Federal Campaign Committee*, 518 U.S. at 646. . . (opinion of Thomas, J.) As we see it, the threat that a political party will corrupt a candidate is not a very realistic one.¹⁸⁶

The Eight Circuit's rationale for treating parties differently is fully supported by *Buckley* and the Supreme Court cases following that decision. Political parties hold a venerable place in American politics.¹⁸⁷ One reason that political parties hold such an "important and legitimate role . . . in American elections," is that they serve to promote core First Amendment values.¹⁸⁸ "The First Amendment embodies a 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs."¹⁸⁹

Since parties are not free to curry favor on either side of the aisle, and since candidates are inextricably linked to their party, there is little room for concern about undue influence or other distortion of the democratic process. As the Supreme Court has noted, "[w]e are not aware of any special dangers of corruption associated with political parties" that support restrictions on expenditures.¹⁹⁰ Indeed, "one might argue that the absolute identity of views and interests eliminates any potential for corruption."¹⁹¹ Justice Kennedy accurately observed in his concurrence in *Colorado Republican Committee* that "[t]he party's speech, legitimate on its own behalf, cannot be separated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals."¹⁹² A party does not have the ability to "corrupt" its representative through the giving of money any more than an individual's or a candidate's protected expenditures on his or her own behalf are "corrupting" to his or her policy and political positions. In Vermont, political parties have been an important source of large contributions to political campaigns. There has been no evidence to suggest—much less prove—that Vermont's

186. *Id.* at 1072–73.

187. See generally *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000). In *Jones*, the Court reaffirmed the right of political parties to select their own candidates unhampered by the governments efforts to shape those ideological choices.

188. *Colorado I*, 518 U.S. at 618 (plurality opinion).

189. *Id.* at 629 (Kennedy, J., concurring in judgment and dissenting in part) (citations and internal citations omitted).

190. *Id.* at 616 (plurality opinion).

191. *Id.* at 623.

192. *Id.* at 630 (Kennedy, J., concurring in the judgment and dissenting in part).

political parties have exerted a corruptive influence on elected officials or candidates.

The Supreme Court remanded the *Colorado Republican Committee* case back to the District Court for further findings of fact related to the role and influence of political parties. Specifically, the court was asked to decide whether coordinated party expenditures could be regulated as contributions. On remand, the District Court enjoined the limits, and the Tenth Circuit affirmed in an opinion which strictly adhered to *Buckley* and its progeny, and which specifically incorporated the Supreme Court's recent decision in *Shrink*. The Court of Appeals concluded that the regulation does not satisfy the standard consistently applied by the Supreme Court, which establishes that the only acceptable justification for limits on campaign contributions to a candidate are corruption or the appearance of corruption. Adopting the view already expressed by four Justices of the Supreme Court, the Tenth Circuit rejected the notion that any influence a political party exercises over its candidate through coordinated spending decisions involves such corruption or represents a subversion of the political process.¹⁹³

Noting at the outset that FECA treats coordinated expenditures as contributions,¹⁹⁴ the Tenth Circuit cast the issue as one involving contributions and set out to decide whether the regulation of coordinated party expenditures was "'closely drawn' to match a 'sufficiently important interest.'"¹⁹⁵ The court admitted some difficulty in applying the *Buckley* standard governing contribution limits for the reasons expressed in Justice Kennedy's and Thomas' concurring opinions in *Colorado I*,¹⁹⁶ but held that the party expenditure provision failed even the more deferential standard for evaluating contribution limits in *Buckley* and restated in *Shrink*.¹⁹⁷

Applying this standard, the Court of Appeals considered and rejected each of the FEC's arguments advanced in support of the expenditure provision. The FEC first argued that contributors to a political party—wealthy individuals or political action committees—can unduly influence a political party and thereby corrupt the political process.¹⁹⁸ The Tenth

193. *Colorado II*, 213 F.3d 1221, 1231–33 (10th Cir. 2000).

194. See *Fed. Election Comm. v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985).

195. *Colorado II*, 213 F.3d at 1226 (quoting *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 (2000)).

196. *Colorado I*, 518 U.S. 604 (1996).

197. *Id.* As the Court of Appeals explained, "a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties." *Colorado II*, 213 F.3d at 1227 (footnote omitted).

198. *Colorado II*, 213 F.3d at 1229.

Circuit acknowledged that corporations and others may indeed exert influence over the legislative process, but the FEC's evidence failed to "demonstrate that *parties* undermine[d] the integrity of the electoral process."¹⁹⁹ "We will not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process."²⁰⁰

The FEC's second theory—that a cap on coordinated expenditures keeps party officials from using the party's spending authority to further their own interests—"has the appeal of directly targeting the source of alleged corruption," the court acknowledged.²⁰¹ But the underlying premise "gravely misunderstands the role of political parties in our democracy."²⁰² Political parties are "simply too large and too diverse to be corrupted by any one faction," the court stated.²⁰³

Finally, the FEC argued that the party expenditure provision prevents evasion of FECA's other contribution limits. The Tenth Circuit agreed that an individual's channeling of money to a specified candidate through the party would threaten the integrity of the individual contribution limits. However, it held that Congress took care of this possibility by treating such earmarked contributions as going directly to the candidate.²⁰⁴

The court concluded that Colorado's regulation impermissibly interfered with political parties' First Amendment rights and was not "closely drawn" to address corruption in the political process. *Buckley* concerned limits on contributions by individuals, candidates, and PACs and "said nothing about the First Amendment implications of [limiting] *party* speech on behalf of its candidates."²⁰⁵ To bring political parties into the corruption framework would require an extension of precedent that is "not warranted by the [Supreme] Court's post-*Buckley* FECA jurisprudence and would betray the historic[al] importance of political parties."²⁰⁶

Vermont's party limits undeniably hamper the ability of parties to support their chosen candidates. It becomes much more difficult for parties

199. *Id.*

200. *Id.*

201. *Id.* at 1230.

202. *Id.* at 1231.

203. *Id.*

204. *Id.* at 1232.

205. *Id.*

206. *Id.* Like the Court in *Lamb*, the Tenth Circuit held that the justification for subjecting contributions to greater regulation than expenditures—that contributions represent only symbolic expression or, alternatively, a form of speech by proxy—fails to capture the unique and undeniable relationship between a candidate and its party. "[A] limit upon the amount a party can spend in coordination with its candidates certainly entails more than a 'marginal restriction' upon party's free speech." *Id.* at 1227.

to use their resources to have their candidates, as standard bearers, speak for them. The ultimate effect of these restraints is that the limitation interferes with the ability of parties to promote their members' shared political beliefs. As a consequence, it also undermines the traditional role of political parties in fostering robust political debate. The contribution restrictions perversely threaten special harm to smaller parties, such as Plaintiff Libertarian Party of Vermont, that command less money than other parties and therefore find it strategically advantageous to pool resources on behalf of a strong candidate.

b. Political Action Committees

The recognition of the weightier interests at stake when political organizations contribute to candidates should not be limited to political parties. While parties have some unique attributes that greatly diminish the possibility of corruption, other organizations, especially legislative leadership PACs, share some of those attributes. Similarly, it is doubtful that the threat of corruption which might justify limits on corporate giving is present in the actions of political committees organized around ideological issues, such as gun control or reproductive choice. For this reason, the Eighth Circuit has twice brushed back legislative attempts to place unreasonable limits on PAC contributions.

In *Shrink Missouri Gov't PAC v. Maupin*, the Eighth Circuit recognized the importance of PAC contributions to candidates and invalidated a scheme that limited non-participating candidates to receiving contributions from individuals *only*, while their participating opponents were free to accept organizational (PAC) and corporate contributions.²⁰⁷ Critical to the court's analysis was its predicate determination that candidates have a constitutional right of access to organizational contributions that could not be taken away.²⁰⁸ In striking down the Missouri legislation, the court considered and rejected various arguments proffered by the state, including (1) corruption, (2) "leveling the playing field," and (3) discouraging the race toward hugely expensive campaigns. Addressing the state's interest in reducing corruption, the court held that the restriction on organizational giving had the effect of suppressing rather than promoting speech and that the state had failed to show that the restriction on organizational giving was narrowly tailored to combat corruption.²⁰⁹ In *Day*, the court invalidated \$100 limits established for contributions to or

207. *Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422 (8th Cir. 1995).

208. *Id.* at 1425.

209. *Id.* at 1426; see also *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994) (alterations in original).

from political committees, observing that these limits affect “not only free speech but also free association, the ‘tradition of volunteer committees for [political] collective action. . . . [B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.’”²¹⁰

The provisions of Vermont’s law are not narrowly tailored. As shown, the corruption rationale that justifies regulation of individual contributions is not sufficient to justify the greater burden the law imposes on the associational rights of PACs, particularly legislative leadership PACs or ideological PACs. This law seeks to mute the financial ability of PACs to use their aggregated resources to directly assist candidates. Even if there were some evidence (and there is *no* evidence in this case) that PAC contributions have ever had a negative or deleterious or corruptive influence on Vermont’s politics, Vermont’s law uses an overbroad, blunderbuss approach that punishes innocent speech while neither identifying nor creating meaningful restrictions on supposedly “harmful” PAC contributions.

4. The Limits on Contributions to Political Parties and Political Committees Violate the First Amendment Rights of Speech and Association (17 V.S.A. § 2805)

Section 2805 provides, in pertinent part, that a political party shall not accept aggregate contributions from any person that exceed \$2,000 per two year election cycle. Like the contribution limits that restrict the amount of money political parties and political committees can give to candidates, this limit cannot survive constitutional scrutiny. State enforced limits on contributions to political parties or committees stifle “not only free political speech, but also free political association.”²¹¹ As such, these limits are subject to strict scrutiny and must be narrowly tailored. Vermont’s \$2,000 biennial limit does not advance a legitimate—much less compelling—governmental interest and is not narrowly tailored. In fact, it does not further the interest identified by the District Court in preventing circumvention of the limits on individual contributions. PACs and political parties are subject to the same contribution limits to candidates as individuals, thus alleviating the danger of large pass through contributions.

Contributions to political parties and committees are not the same thing as contributions to candidates. Contributions to these organizations cannot create directly the prospect for the actuality or appearance of *quid pro quo*

210. *Day*, 34 F.3d at 1365 (quoting *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981)) (alterations in original). *Accord Buckley*, 424 U.S. at 22, 25–26.

211. *Russell v. Burris*, 146 F.3d 563, 571 (8th Cir. 1998); see *Day*, 34 F.3d at 1365.

corruption of an office-holder, because the contribution does not go to a candidate. As observed by the Eighth Circuit, "the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate is not present when the contribution is given to a political committee or fund that by itself does not have legislative power."²¹² Thus, limitations upon contributions to political committees can be justified *only* through their possible indirect corruptive effect

The importance of allowing individuals to express themselves by contributing to and associating with political committees cannot be overemphasized. "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost."²¹³ The Supreme Court in *National Conservative Political Action Committee* stated:

We also reject the notion that the PACs' form of organization or method of solicitation diminishes their entitlement to First Amendment protection. The First Amendment freedom of association is squarely implicated [here]. NCPAC and [Fund for a Conservative Majority] are mechanisms by which large numbers of individuals of modest means can join together in organizations which serve to 'amplif[y] the voice of their adherents.'²¹⁴

As such, Section 2805(c) attempts to eviscerate the core First Amendment rights of citizens who chose to associate as a political committee or political party.

Limits upon contributions to political organizations can be justified only as a necessary and narrowly tailored device to prevent evasion of reasonable limits upon large individual contributions to candidates through "earmarked" or "pass through" contributions to candidates through parties.²¹⁵ Any danger that individual limits on contributions to candidates can be evaded or circumvented by contributions to parties may be controlled by proper enforcement of the explicit prohibition of earmarked or "pass through" contributions²¹⁶ or, as recognized by FECA, by drawing a distinction between "hard" and "soft" money contributions.²¹⁷ This

212. *Day*, 34 F.3d at 1365 (internal citation omitted).

213. *Day*, 34 F.3d at 1365 (quoting *Citizens Against Rent Control*, 454 U.S. at 294) (bracket in original).

214. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 494 (1985) (third bracket in original).

215. *Cal. Med. Ass'n v. Fed. Election Comm'n*, 453 U.S. 182 (1981).

216. See VT. STAT. ANN. tit.17, § 2805(e) (2002).

217. See, e.g., *Colorado II*, 213 F.3d 1221 (adopting this view in context of challenge to limits placed on party coordinated expenditures).

concern, however, may not be used to justify broad, untailed restrictions upon reasonable and legitimate contributions to parties. This is particularly true where, as here, the \$2,000 limit does not prevent evasion of the limits applicable to individuals because the limits on contributions to candidates apply equally to political parties and committees.

A second consideration mitigating against the rationale for limiting contributions to political parties and committees is that these organizations regularly give to multiple and diverse candidates. Thus, they are even less useful as a potential device for channeling excessive money to any single candidate. Instead, such limits serve only to stifle the rights of individual citizens to associate with each other through the mechanisms of political parties. This result is entirely contrary to First Amendment principles.²¹⁸

Even assuming that contributions to political parties and committees may be limited at some reasonable level, it does not follow that these arbitrary limits are permissible. Indeed, there is no evidence here or in the Act's legislative history that contributions to political parties in Vermont have created any problem or potential problem in need of the "solution" embedded here. The evidence is just the opposite—there is no such problem. In fact, the inevitable consequences of the low limit is the financial starvation of party and committee operations and less money to support candidates. Any credible concerns about improper candidate influence can be adequately addressed by adequate enforcement of the prohibition on "pass through" contributions.

The \$5,000 *per election* limit (as to PACs) upheld in *California Medical Ass'n*, did not apply to political parties. Vermont's new limits explicitly extend to political parties, in contrast, and include all levels of affiliated parties within the state. These funds must support the day-to-day operations of all these affiliated parties, their staffs, and all of their support (monetary and otherwise) to their full slate of candidates. When viewed in this context, \$2,000 no longer appears to be a particularly high number. Indeed, the statute fails to draw a distinction between "soft" money contributions used to support a party's general activities unrelated to a specific candidate, and "hard" money contributions that are used to support particular candidates. Political parties—like any other organization or association of like-minded individuals—must remain free to raise unlimited amounts of money to support their party-building activities and to pursue fully protected First Amendment activities, including engaging in issue advocacy.

218. See *Citizens Against Rent Control*, 454 U.S. at 294 ("[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost.").

Because the plain language of Vermont's restriction on contributions to political committees would necessarily proscribe contributions to political parties and committees that did no more than promote or advocate their views on important public issues,²¹⁹ the statute fails to afford the "[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms."²²⁰ Because this section's overboard applications will chill constitutionally protected speech, it must be struck down.

C. Plaintiffs Have Standing to Bring This Action

Defendants and Intervenors argue that some plaintiffs do not have standing to bring this action. The gist of Defendants' and Intervenors' argument is that *each* plaintiff must have standing to challenge *each* sub-provision of the statute. This is not the test governing standing determinations; nor is it the position advanced by the plaintiffs. The correct analysis focuses on whether one or more plaintiffs has standing to challenge each of the major subjects covered by the statute, or the statute as an integrated whole. The record conclusively shows that each plaintiff in these consolidated matters is or has been injured by the operation of one or more provisions of Act 64 and that this is sufficient to confer Article III standing.

Article III, § 2 of the United States Constitution restricts federal courts to deciding "Cases" and "Controversies." From this has emerged the doctrine of constitutional standing. Federal courts must determine at the threshold of every case whether "a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy."²²¹ "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'"²²² The threat of prosecution under the questioned statute may be injury enough. Plaintiffs bringing a pre-enforcement facial challenge against a statute need not demonstrate to a certainty that they will be prosecuted under the statute to show injury, but only that they have "an actual and well-founded fear that the law will be enforced against" them.²²³

219. See VT. STAT. ANN. tit. 17, § 2801(4) (2002).

220. *Buckley*, 424 U.S. at 41 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

221. *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972); see also *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *United States v. Cambio Exacto, S.A.*, 166 F.3d 522, 526 (2d Cir. 1999).

222. *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)); see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

223. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."²²⁴

Especially in the area of First Amendment freedoms, "the alleged danger of th[e] statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution."²²⁵

[The consolidated plaintiffs represent three distinct groups of persons affected by Act 64. First, Randall, Kuusela, Patch, and Howard are either current members of the Vermont General Assembly who would like to run again, have campaigned unsuccessfully for a seat and would like to continue to campaign again for seats, or would like to campaign for the first time for seats in the Vermont legislature. Second, Nelson made and will continue to make campaign contributions to candidates for elected positions in Vermont. Third, the Vermont Libertarian Party must conduct fundraising activities to raise money so the Party can continue to operate and to grow in Vermont. The limits that Act 64 places on these three groups would make it more difficult for them to effectively participate in Vermont politics and will alter their behavior in ways that amount to self-censorship.

The first group will be affected by various sections of Act 64 including provisions on contribution limits, expenditure limits, two-year election cycle, and 25% limit on out-of state contributions. For example, Randall testified that he raised and spent more money than permitted under the new limits in past elections, and that he would need to spend at least that amount in his next election. Kuusela has vowed to raise and spend more money in the 2000 election than Act 64 allows. Patch, for example, testified that the "single source rule," the contribution limits, the spending limits, and the two year election cycle rule altered his behavior as both a candidate and as chair of the county Democratic Party. Howard chose not to run for state-wide office in 2000, in part, because of Act 64's fundraising and spending limitations. His decision to run in the future will depend on whether portions of the Act survive constitutional challenge. The testimony of these parties was based on their experiences as active politicians in Vermont.

224. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)).

225. *Am. Booksellers*, 484 U.S. at 393. See generally *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, (2d Cir. 2000).

Second, Mr. Nelson offers a different perspective than the candidate plaintiffs injured by Act 64. Nelson is most afflicted by Act 64's contribution limits, and specifically the single-source rule. As a contributor and campaign volunteer, Nelson has contributed amounts of money to candidates and political organizations up to or in excess of the Act 64's limits. In the 2000 election cycle, Nelson inadvertently violated the single source rule by contributing more than \$2000 to the local and State Republican Party. Nelson testified that if the law allowed he would contribute greater amounts to legislative candidates and various political parties and organizations. Like the candidates above, Act 64 is now and will in the future change his behavior.

Third, the Vermont Libertarian Party is affected by Act 64's contribution limits, expenditure limits, and out-of-state contribution limits. The Party testified that it would accept greater donations than those allowed under Act 64, and would solicit and accept more out-of-state money. Further, in the past the Party has accepted contributions in excess of the limits imposed by Act 64. Finally, the Party testified that it would make targeted contributions to candidates in excess of the Act's limitations if it were legal to do so.] At a minimum, all Plaintiffs in these consolidated matters have shown that they have standing to challenge various interrelated aspects of the Act; and as a group, Plaintiffs represent a sufficient cross-section of candidates, contributors, political parties, and political committees to establish standing to challenge the integrated whole. Plaintiffs have a clear "stake" in this controversy.

In any event, so long as any party or combination of parties has standing, it would be a needless academic exercise for the Court to pick apart the various claims and sub-claims, and determine which parties had standing on each. These consolidated matters have been fully tried over an extended period, and raise serious questions that transcend the interests of any individual Plaintiff. Vermonters need and want an answer to the questions presented,²²⁶ and it is unlikely that there will ever be a better time or a better case in which to provide those answers.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees-Cross-Appellants Neil Randall, et al, respectfully request that the Court (1) Affirm those portions

226. Bills have already been introduced in the Vermont Legislature to ameliorate to effect of the lower court's ruling. Final action in the Legislature will likely await the ultimate determination of this case. See *Markowitz: Go Slow on Finance Law Change*, THE SUNDAY RUTLAND HERALD AND THE SUNDAY TIMES ARGUS, Jan. 7, 2001, at D2.

of the District Court decision enjoining portions of Act 64 relating to expenditure limits, out-of-state contributions, party contributions to candidates, and related expenditures (as applied to expenditure limits); (2) Reverse those portions of the District Court decision upholding the portions of Act 64 relating to individual contributions to candidates, political parties and political committees, and as to political committee contributions to candidates, and as to the regulation of related expenditures (as applied to contribution limits), with instructions to enjoin enforcement of these provisions; and (3) order such other and further relief as the Court deems just and appropriate.

