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2 Vermont; on behalf of Respondents Sorrell, et al.
3 BRENDA WRIGHT, ESQ., Boston, Massachusetts; on behalf
4 of Respondent Vermont Public Interest Research Group.

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1 PROCEEDINGS

2 (10:11 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in 04-1528, Randall v. Sorrell, and
5 the consolidated cases.

6 Mr. Bopp.

7 ORAL ARGUMENT OF JAMES BOPP, JR.

8 ON BEHALF OF THE PETITIONERS

9 IN NOS. 04-1528 AND 04-1530

10 MR. BOPP: Thank you. Mr. Chief Justice, and
11 may it please the Court:

12 As this Court made clear recently in
13 Republican Party of Minnesota v. White, since political
14 candidates are the ones who take office, it is
15 imperative that they be allowed freely to express
16 themselves on matters of current public importance. As
17 a result, this Court has never allowed the government
18 to prohibit candidates from communicating relevant
19 information to voters during an election.

20 Vermont, however, has adopted low expenditure
21 and contribution limits for the opposite purpose,
22 reducing overall candidate campaign spending, and these
23 limits would have that effect. This is fundamentally
24 incompatible with any reasonable interpretation of the
25 First Amendment and is not justified by any truly

1 compelling governmental interest. As a result, they
2 are unconstitutional.

3 Now, Vermont's expenditure limits are an
4 unprecedented, direct restraint on candidate speech.
5 Once these low expenditure limits are exhausted, a
6 candidate may not drive to the village green to address
7 a rally, may not return the phone call from a reporter
8 at the local newspaper, and may not call a neighbor to
9 urge her to get out to vote. This Court has never
10 allowed the government to prohibit candidates from
11 communicating this sort of relevant information during
12 a campaign.

13 Further, this Court has long held that more
14 speech is better than less speech. As long as
15 contribution limits are available to address any
16 realistic concerns about corruption, the public will
17 benefit from candidates' being allowed to spend all
18 that they can lawfully raise in their campaign.

19 Now, the record is clear in this case that
20 the expenditure limits will deprive candidates of
21 substantial resources. The district court erroneously
22 looked at average spending over the last three
23 elections and found that in all but one category, that
24 is, Senate candidates running in single-member
25 districts, that the average spending for all candidates

1 in those campaigns were below the limits set by the
2 expenditure limits in Vermont.

3 However, in Buckley, the last case for --
4 where this Court considered candidate expenditure
5 limits, the Court looked at the number of races
6 affected, not the average spending in all races. And
7 in Buckley, the Court looked at the expenditures in
8 U.S. Senate races and found that in previous election,
9 that 26 percent were over the mandatory expenditure
10 limits considered in Buckley, and in the House, 3
11 percent of the races had spending greater than the --
12 these limits.

13 JUSTICE GINSBURG: Mr. Bopp, would you
14 clarify a procedural point? As I understand it, on the
15 expenditure issue, there is no final decision that has
16 gone back to the district court for further
17 proceedings.

18 MR. BOPP: Well, there were -- that is
19 correct, that there is a remand.

20 JUSTICE GINSBURG: And it may -- the district
21 court might -- may well find that nothing passes
22 constitutional muster in the end.

23 MR. BOPP: Well, they could potentially, yes.

24 However, the -- the Second Circuit did -- did make
25 decisions of law. They found that these two interests

1 that the State is alleging, that is, in preventing
2 corruption and in conserving incumbent time, were
3 together a compelling governmental interest, and we --
4 we allege that they are not and that on this record,
5 this Court can determine that they are not -- they are
6 not together a compelling governmental interest.

7 JUSTICE GINSBURG: Are you arguing now then
8 that there may be no limits on expenditures?

9 MR. BOPP: Well, the -- this Court has now
10 considered, including this case, a dozen times in which
11 the government has sought to limit expenditures, either
12 of candidates or PAC's or political parties, and
13 despite the work of the most brilliant lawyers in the
14 United States, they have not come up with any
15 compelling governmental interest that this Court has
16 accepted. And we believe that this record demonstrates
17 that these claimed interests either are not compelling
18 or are not proven.

19 Now --

20 JUSTICE SOUTER: Do you -- when -- when you
21 make that point, that on this record the -- the claimed
22 interests are not compelling or not proven, would you
23 have us leave the door open for a greater degree of
24 proof? For example, take the -- the problem of
25 candidate time. The lower the donation limits are, the

1 -- the more donations there have got to be, and -- and
2 there's -- there's plenty of comment, particularly in
3 some of the amicus briefs, on the amount of time that
4 political candidates generally spend scrounging around
5 for money. If we decided the case your way, would the
6 door be left open for a more impressive and compelling
7 record on this issue?

8 MR. BOPP: Well, we -- we are asserting that
9 that is not a compelling interest in and of itself, and
10 this Court should reject it. I -- I just don't see --

11 JUSTICE SOUTER: But you also say, on this
12 record.

13 MR. BOPP: Yes. And in addition -- well, the
14 -- the point about it not being a compelling interest I
15 think is an analytical point that doesn't have to be --
16 that doesn't rest on this -- strictly on this record.

17 JUSTICE SOUTER: So I -- I take it your point
18 then on the combined corruption/competition for money
19 problem is that there isn't any record that would
20 support it.

21 MR. BOPP: If it were a compelling interest,
22 there's no record here that is a problem in Vermont.

23 JUSTICE SOUTER: Right, but you're saying
24 this combination cannot be a compelling interest as a
25 matter of law, consistent with the First Amendment. Is

1 that correct?

2 MR. BOPP: Yes, it is. I don't see how it is
3 a compelling governmental interest to limit challengers
4 to only fund-raise to the extent that an incumbent
5 finds comfortable or convenient.

6 JUSTICE SOUTER: Yes.

7 JUSTICE KENNEDY: Well, just --

8 JUSTICE SCALIA: Or at least where -- where
9 the limitation -- you make a big point of this in your
10 brief as -- as I -- as I recall. At least where the
11 reason the candidate would have to spend so much time
12 is the very small contribution limit established by the
13 same statute. It's -- it's rather like the -- the
14 murderer asking for mercy because he's an orphan,
15 having killed his parents.

16 MR. BOPP: It is a self-justifying statute by
17 imposing the lowest contribution limits in -- in the
18 Nation, adjusted for inflation for 1974 dollars, when
19 the \$1,000 limit was approved. This is a contribution
20 limit of \$50 for an --

21 JUSTICE KENNEDY: Well, to get back to
22 Justice Souter's questions, could you answer it this
23 way? Let's assume that some members of the Court
24 simply accepted the proposition that money buys access.
25 And -- and I don't think maybe we can take judicial of

1 that, but I -- I think that's a common sense conclusion
2 that we can reach. And you tend to fight this in your
3 brief to say that this doesn't happen. I tend to doubt
4 that. I tend to think money does buy access. What --
5 if -- if we or I were to conclude that, what would
6 follow?

7 MR. BOPP: Well, I think it's not a matter of
8 just access. It has to be a matter of privileged
9 access that this Court found in the --

10 JUSTICE KENNEDY: All right. Let's say it's
11 privileged access.

12 MR. BOPP: Well, if it -- if it's privileged
13 --

14 JUSTICE KENNEDY: I mean, isn't the answer
15 that the -- that this is up to the voters. The voters
16 can see what's going on and throw the legislator out if
17 they choose.

18 MR. BOPP: Indeed, and in fact, the -- there
19 are other less restrictive ways of -- of dealing with
20 this. For -- for instance, Vermont prohibits
21 contributions from lobbyists during the session. Other
22 legislatures have imposed a prohibition on incumbents
23 from raising any money during the time the legislative
24 session -- the legislature is in session. So there are
25 ways of dealing with the question of access that are

1 not the blunderbuss approach here.

2 JUSTICE KENNEDY: It -- it is true that all
3 the polls say that there's public disaffection and
4 cynicism. Does that translate into action to defeat
5 incumbents who take particularly large sums of money?
6 Is there -- is there statistical evidence to show that?

7 MR. BOPP: I'm not aware of that. But
8 certainly the press and opponents often, you know,
9 point to examples where they believe that their
10 challenger is under too much of an influence of a
11 particular entity, and the voters, you know, in certain
12 circumstances take that into account in their voting.

13 And furthermore, it is true that there is a
14 general cynicism about politicians and government that
15 has existed since the first colonists came to our
16 country and continues today. In fact, our governmental
17 system is established on the proposition that we need
18 to limit the -- the government, and we need to have
19 checks and balances because we don't want free rein by
20 politicians because we are concerned about their
21 exercise of power.

22 But if this is enough --

23 JUSTICE STEVENS: May ask you this question,
24 Mr. Bopp? This -- in -- following up on Justice
25 Ginsburg's inquiry, is it your view that there is no

1 set of facts, no matter how scandalous and so forth and
2 so on, Watergate and all the rest of it, could ever
3 justify an expenditure limit?

4 MR. BOPP: That is not our position.

5 JUSTICE STEVENS: Well, if that's the case,
6 then why -- why would it be inappropriate to have
7 further hearings in this case to see whether they're --
8 they could be justified?

9 MR. BOPP: Because there have been legal
10 findings by the Second Circuit that we believe are
11 erroneous. The -- the first, as I mentioned
12 previously, is that -- that we do not believe that the
13 -- preserving incumbents' time through expenditure
14 limits can ever be a compelling governmental interest,
15 to limit what challengers can spend -- raise and spend
16 in their own election. I mean, this interest -- the
17 expenditure limits don't apply just to incumbents who
18 -- if there is a concern about --

19 JUSTICE STEVENS: No, I understand. I'm just
20 curious to know what sort of -- what sort of evidence
21 could ever support an -- an expenditure limit in your
22 view, if -- if any.

23 MR. BOPP: I have a -- a very difficult time
24 justifying expenditure limits.

25 I know there's a debate on this Court on

1 whether or not there are per se situations under the
2 First Amendment. If there was ever a candidate for a
3 per se First Amendment ban on a law, surely it would be
4 this type of case. In other words, we are talking
5 about speech that is at the core of the First
6 Amendment, and secondly, we are talking about candidate
7 speech. Candidates are the ones that go into office.
8 They are the ones that are going to be exercising
9 governmental power. These low expenditure and
10 contribution limits would have the effect of making
11 candidates a bit player in their own election so that
12 the voters --

13 CHIEF JUSTICE ROBERTS: Counsel, with respect
14 to the contribution limits, what -- what makes this
15 case different from the -- the Shrink PAC case from a
16 few years ago?

17 MR. BOPP: Well, several things. First is
18 there was actually a paucity of evidence in the Shrink
19 PAC case. There was only an allegation of one PAC that
20 wanted to give one contribution to one candidate, and
21 this Court said that, you know, you didn't need a lot
22 of evidence to combat such a weak -- weak claim.

23 So secondly is the novelty and plausibility
24 of a -- adjusted for per election in 1974 dollars of a
25 \$50 contribution limit, that that would actually give

1 rise to realistic concern about actual and perceived
2 corruption. So, again, in Shrink PAC --

3 CHIEF JUSTICE ROBERTS: So you think it --
4 you think it's the dollar amounts that are involved?

5 MR. BOPP: Well, one of the decisions that
6 the Court has to make under your jurisprudence is that
7 -- that contribution limits can only eliminate large
8 contributions that give rise to this realistic
9 perception or actuality of corruption. So it is --
10 whether it's large or not and giving rise to that
11 concern because of the size, that is an integral part
12 of the Shrink analysis.

13 JUSTICE SOUTER: It -- it was pointed out in
14 -- in one of the briefs -- and I -- I didn't go back
15 and check it myself, but I'd like your comment. It was
16 pointed out in one of the briefs that the limits in
17 Vermont were substantially close to or even -- even
18 higher than the -- than the limits in the Missouri
19 scheme, out of which the Shrink litigation grew. Do
20 you know whether that is correct?

21 MR. BOPP: Well, it depends on how you -- you
22 compute it. The --

23 JUSTICE SOUTER: It always -- it always does,
24 yes.

25 (Laughter.)

1 MR. BOPP: The -- well, certainly what the --
2 what the evidence was in Shrink was it was a \$1,075
3 limit, again adjusted for inflation, was about \$375
4 adjusted for inflation compared to the Buckley limits,
5 and because of the paucity of evidence and the fact
6 that it wasn't really novel to say that a \$1,000 limit
7 could give rise to corruption because --

8 JUSTICE GINSBURG: But there were lower
9 limits, Mr. Bopp, and I think that's what Justice
10 Souter was asking about.

11 JUSTICE SOUTER: Yes.

12 JUSTICE GINSBURG: There were the thousand
13 dollars, but I think it went down as low as \$250 in --

14 JUSTICE SOUTER: Yes, take the whole schedule
15 in Missouri.

16 MR. BOPP: Yes. Well, the -- the
17 contribution limits that this Court considered was the
18 \$1,075 --

19 JUSTICE GINSBURG: There -- there was a court
20 that subsequently considered the rest and upheld the
21 contribution --

22 MR. BOPP: Yes, there was. The Eighth
23 Circuit did so and the -- the lowest limit there was
24 \$275 per election, which would be \$500 for -- for the
25 -- the entire election cycle. And the -- and -- but

1 really that -- that was on a -- a record that this
2 Court found to be, frankly, inadequate to -- to raise
3 any serious questions about the -- whether the amounts
4 concerned gave rise to a realistic threat of
5 corruption.

6 And the record here demonstrates that -- that
7 the -- that the only time really there is a actuality
8 or perception of corruption in Vermont is when they --
9 is when we're talking about amounts in excess of
10 \$1,000. That was the prior limit.

11 JUSTICE SCALIA: And we -- we didn't send it
12 back so that more of a record could be made, did we?

13 MR. BOPP: No. No.

14 And, you know, we had a 10-day trial. We had
15 numerous witnesses here. The -- Shrink had been
16 decided. I mean, there was -- everything was before
17 the court to consider the -- the matter.

18 And so, you know, they had their chance at --
19 at proof. And -- and in the numerous witnesses, they
20 made their best case. They could not identify one
21 single politician in Vermont that was -- that anyone
22 would -- would claim was corrupted in any way by a
23 contribution -- by contributions under \$1,000. They
24 could not name one single incumbent politician in
25 Vermont that neglected any specific duty that he or she

1 had.

2 JUSTICE SCALIA: Well, but you know. You
3 expect them to name names? I mean, here --

4 (Laughter.)

5 MR. BOPP: Well, if --

6 JUSTICE SCALIA: Really, that -- that's --
7 that's a lot to ask.

8 MR. BOPP: Well -- well, they at least have
9 to give, you know, realistic circumstances. They gave
10 a few circumstances --

11 JUSTICE KENNEDY: Well, suppose three
12 legislators had been corrupted, venal, criminal
13 corruption, actually taking no wink-wink, nod-nod, a
14 specific agreement to vote for money. So what? Does
15 that change your case?

16 MR. BOPP: Well, the -- the responsibility
17 that Shrink imposes is to -- to demonstrate both actual
18 and perceived corruption at that the --

19 JUSTICE KENNEDY: Suppose -- suppose that had
20 been demonstrated in -- in a particular State. Does
21 that mean, in your view, that a State can have strict
22 contribution limits and support?

23 MR. BOPP: If it's just anecdotal, no. It
24 has to be --

25 JUSTICE KENNEDY: No. It's true. It's --

1 it's done. There have been criminal convictions.

2 MR. BOPP: Well, the -- if it's isolated
3 examples that are unconnected to any perception of
4 corruption at that level, then it would not be adequate
5 on -- on its -- on its -- by itself.

6 Now, of course, in *Shrink*, the Court cited to
7 both actual and perceived evidence of corruption at the
8 level that the -- you were considering that limit.

9 JUSTICE KENNEDY: Well -- well, if -- if you
10 -- if you concede and -- and you tend, at least, to
11 back away from the proposition that the case I put
12 would be an inadequate ground or an adequate ground for
13 legislative limits, then I suppose you can say the
14 State has the power to prevent this from happening to
15 begin with.

16 MR. BOPP: Well, this Court has never
17 approved restrictions on fundamental First Amendment
18 values based purely upon speculation or concern about
19 something that's happening some other place. In other
20 words, these are real limits on people in Vermont, and
21 it seems to me that to approve the lowest contribution
22 limits in the Nation and these very low expenditure
23 limits, the State would have to demonstrate that
24 Vermont is the most corrupt State in the Nation. And
25 they're far from it. In fact, the opposite --

1 JUSTICE SCALIA: Only -- only the most
2 corruptible.

3 (Laughter.)

4 MR. BOPP: Nor corruptible. The -- the
5 evidence is quite clear. Even in the few examples that
6 they cite to like the tobacco industry passing out \$40
7 checks after a -- a vote defeating a bill. Of course,
8 that's still legal under this -- this act. But, you
9 know, even pointing out that they -- that the person
10 who talked about that example made it clear that he
11 didn't believe anybody was -- was influenced by post-
12 contributions after a vote regarding a matter that's
13 not even prohibited by this -- by this act.

14 So it was -- it was a lot of testimony about
15 how truly clean Vermont is, not the most corrupt, where
16 people -- politicians would be tempted at these quite
17 low limits to, you know, sell their honor and -- and
18 personal, you know -- and their -- and affect their
19 own, you know, personal character and reputation.

20 JUSTICE SOUTER: Mr. Bopp, toward the end of
21 your brief, you -- you make the argument that if we
22 accepted the State's position in this case, we
23 implicitly would have accepted the position that
24 totally -- totally publicly funded elections would be
25 constitutional. And -- and I -- I realize your -- your

1 concern there was with expenditure limits, obviously,
2 not contribution limits. You didn't come out and say
3 it, but I -- I assume your position is that that would
4 be unconstitutional per se. A totally publicly funded
5 scheme would be unconstitutional per se.

6 MR. BOPP: The key would be if it's mandated,
7 voluntary --

8 JUSTICE SOUTER: Yes.

9 MR. BOPP: If it was mandated, yes, it would
10 be unconstitutional.

11 JUSTICE SOUTER: And -- and its
12 unconstitutionality would rest on the limitation on
13 expenditure, in effect?

14 MR. BOPP: Yes. Oh, yes. Well, there would
15 be a prohibition in that case if I understand your --

16 JUSTICE SOUTER: Oh, yes, yes.

17 MR. BOPP: -- on -- on contributions, and
18 there would be also a -- a mandatory expenditure limit
19 because you could only spend what the government gave
20 you. So that would have all those features.

21 Now, if it was, of course, voluntary, it
22 would solve the -- the two problems that -- that the
23 State talks about because if you have a voluntary
24 public funding system -- and this is, again, why remand
25 is -- is inappropriate. You don't need to go back and

1 -- and determine whether or not the legislature
2 considered providing adequate public funds. I mean,
3 it's whether that alternative exists.

4 JUSTICE SOUTER: But on -- on your view, if
5 -- if there were a -- a mandatory publicly funded
6 scheme and the -- the limits on expenditure were very
7 high -- it was a very generous scheme. They gave them
8 lots of money -- it would still be unconstitutional
9 because there would be -- I -- I take it on your view,
10 because there would be an elimination of any way to
11 participate by contributing. Is that correct?

12 MR. BOPP: There would be an absolute
13 prohibition, and this Court in -- in Beaumont reserved
14 that question of whether or not an absolute prohibition
15 -- and -- and then in McConnell, you struck down the
16 absolute prohibition on minors' contributing to
17 campaigns. So, yes, there would be a absolute
18 prohibition on any way for any individual to associate
19 with a campaign through a contribution.

20 JUSTICE SCALIA: Well, it would also prevent
21 the candidate himself from expending his entire
22 fortune, if he wishes, in informing people of why he
23 should be elected --

24 MR. BOPP: Yes, that is true.

25 JUSTICE SCALIA: -- think that's okay.

1 MR. BOPP: And -- and in the record below,
2 plaintiff Donald Brunelle said that he was prepared to
3 spend considerable sums in support of his State Senate
4 election, which -- and considerable sums above the
5 expenditure limits that were before -- that were
6 adopted by Vermont. So the -- the question is an
7 independent --

8 JUSTICE SCALIA: Which raises no possibility
9 of corruption.

10 MR. BOPP: Well, nor -- nor on fund raising
11 using up your time because all a wealthy person has to
12 do is write a check. And -- and, of course, in
13 Vermont, they even have an exception for not only just
14 the wealthy -- wealthy candidate, but the wealthy
15 family. So, you know --

16 JUSTICE SCALIA: I don't know what you mean
17 they have an exception for the wealthy family.

18 MR. BOPP: Yes. To a third degree of
19 consanguinity, people who are related to you to that
20 degree are not subject to the contribution limit. So,
21 you know, it's hard to justify Vermont's scheme if
22 you're concerned about the influence of the wealthy
23 because they're giving the wealthy carte blanche to
24 fund their own campaigns, even under these limits. So
25 a wealthy person who runs for Governor -- he has no

1 fund raising costs. So -- and -- and he can get
2 contributions from others that are related by blood,
3 but not by marriage, interestingly, to -- to him. So
4 the public funding or the expenditures by -- by the
5 wealthy neither give rise to -- and both solve --
6 either don't give rise or solve the problems that they
7 claim.

8 So there's -- there's -- you don't need a
9 remand to consider that -- that question, and that is
10 one of the questions that the Second Circuit has asked
11 that -- that the matter be remanded for.

12 Now, in addition, the expenditure and
13 contribution limits here are not going to allow even
14 effective campaigns. We have considerable evidence in
15 the record that to run an effective campaign for
16 Governor in Vermont, it takes \$600,000 to \$800,000; for
17 the Senate --

18 JUSTICE GINSBURG: Mr. Bopp, may I ask you?
19 You keep -- the way you're discussing this case, one
20 would think that the trial court found there was an
21 evidentiary insufficiency, but I thought, at least on
22 the contributions part, the trial court found that the
23 evidence sufficed to justify those limits.

24 MR. BOPP: They did, but erroneously, and I
25 -- we believe that you have a responsibility to do an

1 independent examination of the record. For instance,
2 there was a finding by the district court that these
3 amounts were, quote, suspiciously large. Now, if you
4 look at the record and you look at the six individuals
5 --

6 JUSTICE SCALIA: Excuse me. What -- what
7 amounts were suspiciously large?

8 MR. BOPP: The contribution limits -- amounts
9 over the contribution limits for --

10 JUSTICE GINSBURG: Can you -- can you point
11 to the place in the district court opinion that you're
12 referring to?

13 MR. BOPP: I am sorry. I do not have that in
14 front of me. That the district court found that the
15 amounts prohibited under the contribution limits by
16 Vermont were, quote, suspiciously large, and then they
17 cited six different witnesses. We have reviewed each
18 -- in our reply, each one of those witnesses, and it is
19 simply not true that any of them said that it was
20 suspiciously large, that is, that if there was any
21 relationship between contributions between the old
22 limits of \$1,000 per election and these new, much --
23 much lower limits, if there was any -- any witness
24 related contributions of that size to any threat of
25 corruption. In fact, in the examples that are given,

1 they disclaim that there was any -- that anybody was
2 bought or influenced in any way by the contributions
3 that were made.

4 Now, the -- in terms of an effective
5 campaign, of course, under Shrink if a expenditure --
6 if a contribution limit amounts to an expenditure limit
7 -- and the Court commented on this. This Court
8 commented on this in -- in Citizens Against Rent
9 Control v. Berkeley. If a contribution limit acts as
10 an expenditure limit, then it can -- it will be also be
11 struck down if the candidates cannot mount effective
12 campaigns.

13 And here we have demonstrated in the record
14 what an effective campaign amounts to, and the amounts
15 even for the House district of \$2,000 would be simply
16 used up by 1 brochure, 100 yard signs, and 1 postcard
17 mailing. All of these have been valued in the record,
18 and that would amount to \$1,500 to \$2,000, almost the
19 entire amount allowed, not allowing even one mailing to
20 all voters in -- in that House district.

21 I'd like to reserve the balance of my time.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 General Sorrell.

24 ORAL ARGUMENT OF WILLIAM H. SORRELL

25 ON BEHALF OF RESPONDENTS SORRELL, ET AL.

1 MR. SORRELL: Mr. Chief Justice, thank you,
2 and may it please the Court:

3 Justice Kennedy, you raised the issue of
4 whether money buys access. It clearly does. Our
5 Governor admitted that in a State of the State address.

6 But we also had testimony at trial from a former
7 statewide officeholder that money, of course, buys
8 access, but on the bad days, it buys influence. And we
9 had the President --

10 CHIEF JUSTICE ROBERTS: Counsel --

11 MR. SORRELL: -- of the Senate --

12 CHIEF JUSTICE ROBERTS: Counsel, you -- you
13 say in your brief -- I'm reading from page 13 -- that
14 the record convincingly shows that the ties among donor
15 groups and elected officials often determine the
16 positions officials take. Can you give me an example
17 of an official who took a position because of the ties
18 to donor groups?

19 MR. SORRELL: The -- there was testimony that
20 the President of the Senate said to another Senator who
21 was testifying at trial, we've lost the drug money.
22 I'm not willing to lose the food manufacturer money, so
23 I'm not going to sign this bill. That same President
24 of the Senate testified in a legislative hearing -- I
25 -- he admitted that he makes decisions in performing

1 his legislative duties because of that whole lot of
2 money that he had collected in the year before.

3 CHIEF JUSTICE ROBERTS: So your position is
4 that that official's official positions were determined
5 by the donor groups, as you say in your brief.

6 MR. SORRELL: Influenced and --

7 CHIEF JUSTICE ROBERTS: Well, your brief says
8 determined. And did -- did you --

9 MR. SORRELL: Have an influence and we would
10 suggest an undue influence in some cases.

11 CHIEF JUSTICE ROBERTS: So it should say
12 influenced rather than determined.

13 MR. SORRELL: We didn't have anyone, as
14 Justice Scalia asked, who stood up and admitted to
15 having taken bribes. We did have the Senator, who was
16 the chair of the Senate Finance Committee, who said
17 that she's not in favor of tax credits, but she had a
18 donor to her campaign who had given \$500 in one
19 campaign cycle and \$1,000 in another cycle, and she
20 allowed a tax credit to go through her taxing
21 committee, even though substantively she didn't like
22 tax credits.

23 CHIEF JUSTICE ROBERTS: How many prosecutions
24 for political corruption have you brought?

25 MR. SORRELL: We have not had any of

1 legislators or statewide officers that I'm aware of.

2 CHIEF JUSTICE ROBERTS: Do you think that
3 political corruption in Vermont is a serious problem?

4 MR. SORRELL: It is a serious problem. Over
5 70 percent of Vermonters at -- there was testimony at
6 trial from an expert that over 70 percent of Vermonters
7 believed that corporate interests and wealthy
8 individuals have an undue influence on politics in the
9 State, and I think 73 percent believe that the average
10 citizen --

11 CHIEF JUSTICE ROBERTS: Would you describe
12 your State as a clean State politically or as a corrupt
13 one?

14 MR. SORRELL: We have a real problem in
15 Vermont. We haven't had a Governor go to prison. We
16 haven't had legislators tearfully apologizing for
17 having taken bribes, facing an indictment the next day.

18 But we have got a problem in Vermont. In over 65
19 hearings before our legislature and then through a 10-
20 day trial, we established that as the trial court said,
21 the threat of corruption in Vermont is far from
22 illusory.

23 JUSTICE SCALIA: To the extent that Vermont
24 legislators can be bought off by \$51?

25 (Laughter.)

1 MR. SORRELL: There's nothing in the record

2 --

3 JUSTICE SCALIA: That's very sad.

4 (Laughter.)

5 JUSTICE SCALIA: But that's the limit you've
6 placed on -- on contributions.

7 MR. SORRELL: I -- no.

8 JUSTICE SCALIA: I mean, the -- you know, if
9 -- if you accept more than \$51, you're -- you're likely
10 to have your vote determined by that.

11 MR. SORRELL: No, I -- we don't suggest -- we
12 don't suggest that.

13 JUSTICE SCALIA: Then why -- why the \$50
14 limit? It certainly isn't based on the corruption --

15 MR. SORRELL: I don't know what \$50 limit you
16 are talking --

17 JUSTICE BREYER: No, no. He's thinking in --
18 he sometimes thinks in the past. He's --

19 (Laughter.)

20 JUSTICE BREYER: He's translated it into 1974
21 or '72 real dollars.

22 MR. SORRELL: Oh, it's --

23 JUSTICE BREYER: It's \$200. The same
24 question or \$201.

25 MR. SORRELL: It's the math.

1 The reality is that these contribution limits
2 that we had -- we had examples under the old
3 contribution limits. Even Petitioner Randall admitted
4 that in Vermont, a \$1,000 contribution -- if you
5 receive a \$1,000 contribution in Vermont -- this is one
6 of the petitioners -- then Vermonters think that you've
7 been bought. And that's the reality --

8 CHIEF JUSTICE ROBERTS: And they can -- and
9 presumably they act accordingly at the polls. If they
10 think someone has been bought, I assume they don't
11 reelect the person.

12 MR. SORRELL: The Buckley court thought that
13 disclosure obligations and contribution limits alone
14 would be -- would suffice to address corruption and --

15 JUSTICE BREYER: But I have the same question
16 Justice Scalia had. I mean, the -- the question is you
17 -- you have limits here of \$100 per election. It's
18 \$200 per cycle.

19 MR. SORRELL: For a House race, yes.

20 JUSTICE BREYER: For a House. \$300 for the
21 Senate, \$400 for a candidate for statewide office,
22 including the Governor. That's \$200 for an election
23 for Governor. You throw in contributions in kind. You
24 say that the political parties themselves cannot give
25 more than that \$200 for an election for the Governor.

1 If we translated those into 1974 dollars, they're just
2 the numbers Justice Scalia mentioned, and I would like
3 to know why are they -- why does not give incumbents a
4 tremendous advantage, that if you have the incumbent
5 plus a newspaper, it's hopeless, that there's no way of
6 spending as a challenger. In other words, why aren't
7 these limits far too low?

8 MR. SORRELL: Incumbents had a much more of
9 an advantage in the pre-Act 64 world. They could raise
10 more money and spend more money than --

11 JUSTICE BREYER: It's not going to help to
12 say incumbents had a bigger advantage before. That is,
13 the question is, what we're interested in is -- at
14 least what I've written that I'm interested in, is at
15 what point do these become so low that they really, as
16 a significant matter, shut off the possibility of a
17 challenge. And from that point of view, your numbers,
18 which do not tell me the expenditures in a competitive
19 district, and your numbers, which do not explain all
20 the problems that Judge Winter had with these things,
21 do not help. That's why I'm asking you the question.

22 MR. SORRELL: Vermont has the --

23 JUSTICE BREYER: I want your answer.

24 MR. SORRELL: Vermont has the second lowest
25 gubernatorial spending in the country. In the record

1 it shows that in the largest urban area in the State,
2 in the Burlington area, you can buy three 30-second TV
3 ads in prime time on tier one cable for \$45.

4 JUSTICE BREYER: I'm not talking about the
5 expenditure. I'm talking about the contribution
6 limits. I and my friends have the following thought.
7 We don't know who the candidates for State rep are, but
8 we want a Republican slate or we want a Democratic
9 slate. So we get all our \$5 together, give them to the
10 Democratic Party or the Republican Party in Vermont,
11 and lo and behold, that party cannot give more than
12 \$100 in an election to a State rep, et cetera.

13 Now, to the -- to the ear, that sounds as if
14 a challenger or a slate of challengers or a party that
15 wants to challenge is going to have a really tough
16 time. So I want you to explain it.

17 MR. SORRELL: The extensive record below
18 shows that with these contribution limits, attacking
19 the corruption and the appearance of corruption issue,
20 the candidates can amass the resources necessary to run
21 effective campaigns at all levels.

22 JUSTICE SCALIA: It shows that on average.
23 It doesn't show that in the competitive races, which is
24 where the -- where the shoe pinches.

25 MR. SORRELL: The -- the reality is that --

1 that in virtually all classes of races, other than the
2 single-member Senate races, that average spending was
3 below these expenditure limits, and these include
4 contested cases with primaries, without.

5 JUSTICE SCALIA: That's just what I said.
6 Your figures show that the average spending is below,
7 but that's not what's significant. What's significant
8 is what Justice Breyer posed, where -- where there is a
9 contested race and -- and some new candidate wants to
10 unseat somebody who's been in there for years. That's
11 -- that's where the shoe pinches.

12 MR. SORRELL: And, Justice Scalia, under our
13 law, the challenger can spend more than the incumbent
14 because the incumbent has a lid not -- of 85 percent or
15 90 percent of the expenditure limit, depending on
16 whether it's a legislative race or a -- or a statewide
17 race. But the -- the issue here is you're going to
18 have some -- some outliers.

19 But we have core constitutional interests in
20 trying to enhance the integrity of our campaigns. We
21 have this problem. The legislature reached a balance
22 here. It looked at what -- how much you would need to
23 run effective campaigns. It set --

24 JUSTICE KENNEDY: But in -- in any -- or in
25 many campaigns, the -- the issues take shape during the

1 process of the campaign, and there are historical
2 events, national events that suddenly occur that people
3 want to comment on. And I -- I just don't see that
4 there's any capacity for adjusting so that the public
5 can know how candidates are facing issues that are
6 beginning to emerge that the public has a vital
7 interest in.

8 My understanding was that a quarter-page ad
9 in the Burlington newspaper was, I think, \$1,400. Now,
10 it's -- it's gratifying to know that Vermonters are
11 splurging on cable television, but it -- it --

12 (Laughter.)

13 JUSTICE KENNEDY: -- it seems to me that this
14 is a highly restrictive rule insofar as having the
15 campaign be able to address the issues that the voters
16 say that they've become interested in.

17 MR. SORRELL: We have the second lowest --
18 smallest legislative districts in the country, 4,000
19 citizens per single-member legislative district.

20 Sure, that's what it costs to take out an ad
21 in the Free Press, but there's nothing in the record to
22 show that House candidates, legislative candidates,
23 take out those size ads in -- in the Burlington Free
24 Press. The record is otherwise. The record reflects
25 that it's primarily door-to-door campaigning for

1 legislative races. If you're taking out an ad, it's in
2 -- it's a flyer in one of the -- the weekly papers.
3 Petitioner Donald Brunelle admitted that he ran a
4 competitive race for the House, spending \$1,000, that
5 included yard signs, a mailing to his constituents, and
6 flyer advertisements in -- in the newspaper.

7 JUSTICE SCALIA: Did he have a primary?

8 MR. SORRELL: I don't know whether he had a
9 primary or not.

10 JUSTICE SCALIA: That's another feature of --
11 of this scheme that I find quite puzzling. You get the
12 same expenditure limit for the election cycle whether
13 you go through a primary or not. What an advantage
14 that is for the incumbent.

15 MR. SORRELL: The -- there was testimony in
16 the record that those who have a primary might actually
17 get a bump over others who are not challenged.

18 But as the district court pointed out, in
19 Vermont what makes Vermont different is that our
20 primary is late. It's the second Tuesday in September,
21 and so it's less than 8 weeks from the general
22 election. It's not like having a primary in the
23 spring.

24 And as the legislature during those 65
25 hearings considered the campaigning, they considered

1 all kinds of campaigns, including contested primaries
2 and not, and again, average spending in these campaigns
3 was, with minor exception of the single-member Senate
4 districts, of which there are three -- that average
5 spending was below these expenditure limits. So in the
6 average campaign, you could actually spend more than --
7 than on average is being spent.

8 And the issue, when you've got competing
9 constitutional interests, is whether we address our
10 problems of corruption, appearance of corruption. We
11 try to free up candidates' and public officials' time
12 from fund raising. We try to create competitive
13 elections and bring more citizens into the process
14 voting, grassroots campaigning, and standing for
15 election. We want more people to run.

16 JUSTICE SOUTER: Mr. Sorrell, would you go
17 back to the -- your comment on -- on average
18 expenditures? Do we know from the record how many of
19 the -- how many of the contests, on the basis of which
20 the average was calculated, were contests in which
21 there was a -- a contested primary?

22 MR. SORRELL: We don't have that evidence in
23 the record. What we have is that we -- the experts
24 looked at total spending, which would include primary
25 spending and general election spending, and our figures

1 went from that. And our expert, by the way, considered
2 all races, even those for which campaign finance
3 reports were not filed, meaning that the candidate
4 hadn't raised or expended more than \$500, and assumed
5 \$500 in spending in each one of those -- each one of
6 those races. So our average spending figures actually
7 might be a little higher than -- than reality.

8 JUSTICE GINSBURG: Was there any testimony or
9 evidence on the other side of the point that Judge
10 Winter makes? That is, you have someone running in a
11 primary and then faces an incumbent in the general
12 election, but there's nothing left in the till because
13 it was a hard-fought primary. That -- the advantage to
14 the incumbent in that situation was a large concern to
15 at least some of the judges on the Second Circuit.

16 MR. SORRELL: And that might be an issue that
17 on remand -- and this case is being remanded on a
18 couple of issues that aren't even before this Court.

19 JUSTICE GINSBURG: Not on the contributions,
20 is it?

21 MR. SORRELL: No, it's not on the
22 contributions, but it is going back to the court on
23 issues of transfers of money from national parties to
24 State parties and on whether related or coordinated
25 expenditures are, indeed, allowed to be an expenditure.

1 So the case is going back to the trial court on those
2 bases anyway.

3 JUSTICE SOUTER: But it's not going back on
4 the expenditure limit.

5 MR. SORRELL: I --

6 JUSTICE SOUTER: I mean, the problem, I mean,
7 I was getting at and Justice Ginsburg is getting at,
8 Judge Winter got at it. The -- the problem is -- is
9 the -- the total limitation on an election cycle,
10 including the primary, when the primary involves a
11 challenge so that the challenger has an uphill fight
12 presumably to start with in the primary. And if he's
13 going to maintain an effective uphill fight in the
14 primary and he's lucky enough to win, he's going to get
15 to the general election and he's going to be broke.
16 That's -- I mean, that's -- that's the problem that
17 we're concerned with.

18 MR. SORRELL: That has not been a problem
19 that was reflected in the record either before the
20 legislature or at trial. This is a facial challenge
21 for the law, and you know, that situation of a primary
22 candidate who, for whatever reason, felt that he or she
23 needed to expend up to close to the expenditure limit
24 -- it wouldn't be very prudent, but that could be an
25 issue.

1 But, you know, we do not control independent
2 expenditures under our law, and we certainly don't
3 limit volunteer services. There's a tremendous amount
4 of campaigning that can go on between a primary and a
5 general election even with a limited amount of funds
6 available.

7 JUSTICE SCALIA: If the burden is on the
8 candidate to establish that -- that somebody's
9 expenditure is independent and shouldn't be counted
10 against his expenditure limit.

11 MR. SORRELL: No. There is a presumption
12 under our law --

13 JUSTICE SCALIA: A presumption, which means
14 the burden, to go forward and show the opposite, is on
15 him. Right?

16 MR. SORRELL: Well, but it could be on the --
17 on the party because --

18 JUSTICE SCALIA: And the money that he spends
19 in overcoming that presumption is charged against his
20 expenditure. Isn't that right?

21 MR. SORRELL: No, Justice Scalia. The
22 Secretary of State reached a -- issued an opinion that
23 we -- our office agrees with, that expenditures on
24 attorneys for, you know, ballot access questions and
25 the like are not in furtherance of the candidacy and

1 would not apply against the expenditure --

2 JUSTICE SCALIA: The other side says the
3 opposite. I'll ask them whether that's --

4 MR. SORRELL: But the -- the Secretary of
5 State's public opinion that we, the enforcement
6 authority, agree with is to the contrary.

7 JUSTICE SOUTER: May -- may I ask --

8 JUSTICE KENNEDY: Well, I suppose the Vermont
9 courts could construe it more narrowly at some later
10 point. I would hate to rest the opinion on that.

11 MR. SORRELL: The -- the -- under Vermont
12 law, a presumption such -- such as this is not a burden
13 -- creates no burden of persuasion, nor does it change
14 the burden of proof.

15 JUSTICE SOUTER: Well, you know, I looked at
16 your -- the -- the references in your brief for that
17 proposition, and I did not see them borne out. You
18 referred to a -- a footnote in the district court
19 opinion which, in turn, refers to the remark of a
20 sponsor of the amendment that -- that resulted in the
21 presumption being in the law. And the only thing that
22 was attributed to the sponsor was that the presumption
23 should be regarded as rebuttable. The -- the footnote
24 in the statement did not indicate that the presumption
25 was a disappearing presumption, once the other side

1 went forward with any evidence. So I don't see, based
2 on your -- your citations, that the presumption goes
3 away simply by -- by one party going forward with
4 evidence.

5 MR. SORRELL: Well, if you -- if some entity
6 that has the burden of proof to show, in fact, that it
7 was a related or coordinated expenditure has the party
8 on the one hand and the candidate on the other saying,
9 we did not coordinate here, I didn't ask for it, I
10 didn't approve it, and then where is the evidence?

11 JUSTICE SOUTER: The -- the point is what if
12 we don't have that simple of a situation.

13 Let -- let me ask you this. Maybe we can
14 short-circuit this. I mean, do you represent as an --
15 as a statement of Vermont law that this Court should
16 decide the case on the assumption that the presumption
17 is a disappearing presumption, once evidence is offered
18 against it?

19 MR. SORRELL: Yes.

20 JUSTICE SOUTER: Okay.

21 MR. SORRELL: Well, credible evidence, yes.
22 Yes.

23 CHIEF JUSTICE ROBERTS: Is -- is an affidavit
24 from the candidate enough credible evidence in your
25 view?

1 MR. SORRELL: Yes.

2 JUSTICE SCALIA: And thereafter, all the --
3 all the candidate has to say is in an affidavit, no, it
4 wasn't coordinated, and then the burden is on the State
5 to show that it was.

6 MR. SORRELL: If the State is the party
7 that's trying to prove that it was, in fact, a
8 coordinated expenditure, under the law -- it would
9 typically be a opposing candidate who tries to --

10 JUSTICE SCALIA: Okay, the opposing candidate
11 or the State.

12 MR. SORRELL: So Justice Brandeis said that
13 there's room under our system for a courageous State to
14 experiment.

15 JUSTICE BREYER: Just can I ask a technical
16 question here?

17 MR. SORRELL: Yes.

18 JUSTICE BREYER: Just -- is -- is it the case
19 or not the case that if I contribute my car to drive
20 the candidate for Governor, let's say, between
21 Burlington and Montpelier, and I buy the gas, does that
22 count against the limit? Yes or no. I'm a volunteer
23 and I buy gas and drive him back and forth.

24 MR. SORRELL: Yes, you drive. Then the
25 answer is no.

1 JUSTICE BREYER: No. He drives.

2 MR. SORRELL: Well, but it's your car, you're
3 there. No.

4 JUSTICE BREYER: No, I'm not there. I lent
5 him the car.

6 (Laughter.)

7 JUSTICE BREYER: Okay. I got the idea. If
8 he does -- if I do, it's not.

9 What about I have a coffee -- coffee. I
10 wanted to get the line. I see it. Coffee. I want to
11 have coffee and donuts, free donuts because -- and
12 coffee for people to come in. Is that counted or not?

13 MR. SORRELL: As long as it's under \$100.

14 JUSTICE BREYER: No, no. It's \$200. Coffee
15 and donuts are expensive.

16 (Laughter.)

17 JUSTICE BREYER: Okay? Count it or not?

18 MR. SORRELL: We don't -- our coffee is not
19 that expensive, but --

20 JUSTICE BREYER: Donuts and coffee. In other
21 words, it counts as long as it's over \$100.

22 MR. SORRELL: Yes.

23 JUSTICE BREYER: Under \$100. Under \$100.

24 MR. SORRELL: No. Over \$100 counts.

25 JUSTICE BREYER: Counts.

1 MR. SORRELL: Under \$100, it does not.

2 My time is expired.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 MR. SORRELL: Thank you.

5 CHIEF JUSTICE ROBERTS: Ms. Wright.

6 ORAL ARGUMENT OF BRENDA WRIGHT

7 ON BEHALF OF RESPONDENT

8 VERMONT PUBLIC INTEREST RESEARCH GROUP

9 MS. WRIGHT: Mr. Chief Justice, and may it
10 please the Court:

11 I'd like to return to a question that Justice
12 Kennedy asked earlier about why, if there are examples
13 of corruption that the public becomes aware of, why the
14 public doesn't respond simply by voting the individual
15 out of office. And I think it's important to point out
16 that some of the most serious examples of corruption on
17 this record or of the undue influence achieved by
18 monetary concerns were not examples that ever became
19 public except in the course of the trial of this case
20 when we had witnesses come forward to testify about
21 some of their own personal experiences in the
22 legislature. By the very nature of the problem of
23 candidates becoming unduly beholden to the interests
24 that can provide the greatest sums for their campaigns,
25 those kinds of incidents are not going to typically be

1 a matter of discussion --

2 JUSTICE SCALIA: No, but I -- I thought that
3 the point was that the public mistrusts their
4 representatives because of large donations, and I
5 thought the point being made was, well, if that's the
6 case and the public sees that this fellow has gotten a
7 \$10,000 donation, the public will say this -- this
8 fellow is in that -- is in that corporation's or that
9 person's pocket.

10 MS. WRIGHT: But the --

11 JUSTICE SCALIA: And I won't vote for that
12 person. You -- you don't have to show that -- out of
13 the mouth of the candidate, that -- that he voted for
14 the bill because he got \$10,000. The mere fact that
15 it's on the public record that he got \$10,000, if -- if
16 what you say is correct, that -- that people are
17 worried about, the -- the corruptive effect of such
18 donations, people should logically vote against that
19 candidate who accepts so much money.

20 MS. WRIGHT: Two points on that, Your Honor.

21 First of all, the problem of holding candidates
22 accountable in that manner is greatly exacerbated when
23 you have a system of unlimited spending in which all of
24 the candidates involved feel compelled to go out and
25 raise as much as they can in order to forestall the

1 possibility of being outspent. Then when a voter says,
2 well, why are you doing this, the candidate has a
3 ready-made answer. If I don't do this -- you know,
4 maybe I'd rather not, but if I don't, I'm going to be
5 bested in the fund-raising arms race. And voters
6 reluctantly have come to --

7 CHIEF JUSTICE ROBERTS: But I thought --

8 MS. WRIGHT: -- understand that that's --

9 CHIEF JUSTICE ROBERTS: -- when you look at
10 the -- the record, Vermont would be the last place that
11 you'd be worried about it. The political culture, as
12 we just heard, is that it's easy to go door to door,
13 and that's what the Vermonters expect. And it doesn't
14 take an arms race to get on your feet and go door to
15 door. And it seems to me that there's a real dilemma
16 on the respondents' side of the case between justifying
17 low limits by saying you don't really need money to run
18 effectively and at the same time suggesting that
19 there's a serious problem with too much money.

20 MS. WRIGHT: Well, but --

21 CHIEF JUSTICE ROBERTS: Which is it?

22 MS. WRIGHT: -- what we do have is candidates
23 -- even though it is possible to run effective
24 campaigns in Vermont for lower amounts, candidates
25 nevertheless go out and raise often much more than what

1 they need. Here's an example from the record. We had
2 Senate candidate Vincent Illuzzi. In 1998, he raised
3 \$39,000, almost \$40,000, for his Senate campaign. His
4 challenger was able to raise almost nothing. He only
5 spent \$30,000 worth of that. Candidates don't need
6 \$39,000 or \$30,000 to run an effective Senate campaign,
7 but an incumbent that builds a war chest has the
8 ability to deter serious challenges.

9 JUSTICE ALITO: Could candidates --

10 JUSTICE BREYER: On your question -- the --
11 I'm sorry.

12 JUSTICE ALITO: Could candidates run
13 effective campaigns if there were no -- with these
14 contribution limits if there were no expenditure
15 limits?

16 MS. WRIGHT: Yes, Your Honor. The -- we
17 believe the record strongly shows that. For example,
18 there was a mayoral election in Burlington run under
19 these limits during the time that the case was --

20 JUSTICE ALITO: No. I mean, if there were no
21 expenditure limits, if candidates could expend as much
22 as they want, could they raise enough money with these
23 contribution limits --

24 MS. WRIGHT: Yes.

25 JUSTICE ALITO: -- to run effective

1 campaigns.

2 MS. WRIGHT: Yes, Your Honor, because this
3 Burlington mayor's race, as an example, was one in
4 which there was no limit on -- on spending, and both
5 candidates were able to raise amounts either similar to
6 what they had raised in the past or at least amounts
7 that met the campaign budget that they had sought to --
8 to follow.

9 I think in looking at the level of the
10 contribution limits, it's important again to understand
11 the scale of politics in Vermont. If we want to
12 compare them to Missouri, a \$2,000 limit for a
13 gubernatorial race in Missouri was approved by this
14 Court, and in Missouri you had an election in 2000
15 where each candidate was spending \$8 million or \$9
16 million in a gubernatorial race. I mean, that compares
17 very directly if you --

18 JUSTICE BREYER: I thought the --

19 MS. WRIGHT: -- did the same ratio for
20 Vermont. Pardon me?

21 JUSTICE BREYER: Wasn't it the State auditor?

22 MS. WRIGHT: Not the \$8 million or \$9
23 million.

24 JUSTICE BREYER: No, I know, but didn't we
25 have in front of us a limit, which I wrote was rather

1 border, that involved a State auditor campaign?

2 MS. WRIGHT: In Missouri?

3 JUSTICE BREYER: I thought so, in Shrink
4 Missouri.

5 MS. WRIGHT: It may have been the State
6 auditor, but it also the --

7 JUSTICE BREYER: Which is not quite the same
8 political volatility perhaps, but --

9 MS. WRIGHT: No, but the --

10 JUSTICE BREYER: I have a different question
11 I'd like to ask you which I haven't heard addressed
12 yet. On the expenditure limits, there is a case,
13 Buckley v. Valeo, and the Court held in that case that
14 expenditure limits are not constitutional. Now,
15 whether I agree with that or don't agree with that, am
16 I not bound by that?

17 And insofar as you try to distinguish it,
18 you've read what Judge Winter said about your efforts
19 to distinguish it. And therefore, I'd like to hear why
20 you think I'm not bound by a past precedent in an
21 important matter, with which I may or may not have
22 agreed at the time.

23 MS. WRIGHT: Yes, Your Honor. We believe
24 expenditure limits can be upheld without overruling
25 Buckley v. Valeo, and that's for several reasons.

1 First, Buckley created a rule of exacting
2 scrutiny that applies to expenditure limits. That is
3 not a rule of automatic invalidation.

4 And very importantly, when Buckley declared
5 that the interest in deterring corruption and its
6 appearance was not adequate to support the expenditure
7 limits, that was on a record in which neither spending
8 nor contributions had been subject to meaningful limits
9 prior to the time of FECA and the amendments that the
10 Court was considering. There simply was no record to
11 show the Court of how contribution limits alone would
12 really work to address the problem of corruption and
13 the appearance of -- of corruption and encouraging
14 public confidence in government. Now --

15 JUSTICE SCALIA: I thought -- I thought what
16 that case said and what many of our other cases say,
17 with regard to expenditures in particular, is that
18 you're not talking about money here. You're talking
19 about speech. So long as all that money is going to
20 campaigning, you're talking about speech.

21 And when you say you don't need any more
22 speech than this, that's a very odd thing for -- for a
23 -- a United States Government to say. Enough speech.
24 You don't need any more than this. And that's the
25 reason the expenditure limits, as opposed to

1 contribution limits, were regarded quite differently in
2 Buckley and I think should still be regarded
3 differently today. You're constraining speech. It's
4 not money you're constraining. Contribution limits,
5 you're constraining money, but when you say you can't
6 expend more than this on your campaign, you're saying,
7 no, no, no, this is enough speech. We're going to --
8 we, the State, are going to tell you how much you
9 should campaign. That's very unusual in -- in American
10 democracy.

11 MS. WRIGHT: Your Honor, I think that's
12 certainly why Buckley applied exacting scrutiny. But I
13 think what Vermont understood is that political
14 spending has inescapably a dual character. Yes,
15 campaign spending enables many forms of speech, but it
16 also has another side because higher and higher levels
17 of campaign spending result in candidates who are
18 beholden to the constituencies that can provide the
19 greatest amounts of funds for their campaigns. And
20 what you end up with, the consequence, is legislators
21 who say, you know, I've lost the drug money and I can't
22 afford to lose the food manufacturer money --

23 JUSTICE SCALIA: Limit the contributions.

24 MS. WRIGHT: -- so I'm not going to --

25 JUSTICE SCALIA: That solves that problem.

1 Limit the contributions.

2 MS. WRIGHT: Well --

3 JUSTICE SCALIA: But you want to limit
4 expenditures, even if it's the person's own money. No
5 possibility of corruption. You're saying, no, this is
6 enough speech. We don't want to hear any more from
7 you. We, the State, will tell you how much campaigning
8 is enough. That's extraordinary.

9 MS. WRIGHT: Because the -- the interests
10 that Vermont is seeking to serve are fundamental to the
11 core functions of government, preserving the quality of
12 representative government, preserving the integrity of
13 government, assuring the public that its officeholders
14 can act in the best interests of the public and make
15 decisions on the merits, not simply based on their need
16 for campaign cash.

17 And this question of accountability that's so
18 important is tied to the ability to say, I've -- I've
19 met my spending limits, I've raised all that I need to
20 -- to raise. If somebody comes to me with
21 contributions from a source that I don't feel
22 comfortable taking, I can turn that down without
23 suffering a tremendous competitive disadvantage.

24 I think one of the other key features of the
25 expenditure limits that Vermont seeks to impose here is

1 that they will do so much to encourage competitive
2 campaigns. We had a record in Vermont that showed that
3 for the previous nine election cycles before the act
4 was enacted, only one incumbent had been defeated for a
5 statewide office. In the meantime, in the City of
6 Albuquerque where they had spending limits for 25
7 years, every challenger who came out to challenge an
8 incumbent mayor was successful. No one can say on that
9 record that spending limits would do anything but to
10 enhance competition.

11 In the -- one of the other interests that I
12 would like to turn to, before we close, is Vermont's
13 interest in protecting the time of officeholders from
14 the burdens and distractions of fund raising. We had a
15 record in which seasoned politicians in Vermont were
16 saying that candidates for office, even in Vermont,
17 were spending as much time begging for funds as they do
18 campaigning. We had a record in which a Senator
19 reported leaving the floor of the Senate during a floor
20 debate to take a call from a donor.

21 CHIEF JUSTICE ROBERTS: How do you -- how do
22 you police that, though? Because an incumbent can --
23 has so many opportunities to go before the public that
24 wouldn't necessarily be categorized as campaigning but
25 as part of his or her official duties, while everything

1 a challenger does is going to be credited against his
2 account.

3 MS. WRIGHT: Well, Your --

4 CHIEF JUSTICE ROBERTS: You may answer the
5 question.

6 MS. WRIGHT: Yes, Your Honor.

7 We believe that under almost any system,
8 incumbents are going to still have advantages and no
9 campaign finance system can fully address that. But we
10 believe that if the challenger now has the ability to
11 outspend the incumbent and the incumbent doesn't have
12 that additional advantage of being able to outspend the
13 challenger, as is most often the case, then competition
14 can only be enhanced.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Bopp, you have 4 minutes remaining.

17 REBUTTAL ARGUMENT OF JAMES BOPP, JR.

18 ON BEHALF OF THE PETITIONERS

19 IN NOS. 04-1528 AND 04-1530

20 MR. BOPP: Thank you.

21 The one example that they keep going back to
22 regarding the President of the Senate tells the breadth
23 of this challenge. As long as Vermont allows periodic
24 elections, incumbents are going to consider the effect
25 that their votes have on future elections. And -- and

1 while it makes it more scandalous to say we will lose
2 the food manufacturers' money, what they are concerned
3 about is losing the food manufacturers' support. So as
4 -- if this the definition of corruption, it is
5 sufficient now to -- for the State of Vermont to
6 abolish elections generally.

7 Now, secondly, as to the effect on
8 challengers, the record demonstrates that challengers
9 -- and there's expert testimony to the fact that
10 challengers are more frequently challenged in primaries
11 than are incumbents, and the Randall brief on pages 16
12 and 17 point out the testimony of people who have been
13 subject to a primary and demonstrates that they are not
14 able to mount an effective campaign in the general.

15 Furthermore, the expenditure limits have the
16 perverse result of depriving challengers of more money
17 than incumbents, probably making them attractive to
18 incumbents. In the Senate, for instance, incumbents
19 would be deprived of 20 percent of their total
20 resources, while challengers would be deprived of 36
21 percent of their total resources.

22 JUSTICE SCALIA: I don't understand how that
23 comes. How does that come about?

24 MR. BOPP: It comes about because challengers
25 frequently in Vermont actually spend more than do

1 incumbents. I -- I know that -- that the general
2 perception is the opposite, but the general perception
3 is not true in Vermont. And -- and that points to the
4 -- the fact that the way this law is constructed
5 strongly suggests that is -- it is seeking to favor
6 incumbents.

7 Furthermore, we had expert witness testimony
8 on the effect of contribution limits on competitive
9 races. The -- we had -- Mr. McNeil testified in
10 examining the competitive races in the 1998 election
11 that the vast majority in both the House and the Senate
12 would not be able to mount an effective campaign with
13 the available resources that would have been available
14 after imposing the contribution limits. And, of
15 course, these were in the amounts of 28 percent in the
16 Senate, 22 percent in the House, which is way beyond
17 the 5.1 percent that this Court in Buckley thought that
18 could be made up by the imposition of a \$1,000 limit.

19 I mean, this -- this law is so constructed
20 that it would make it virtually impossible for, for
21 instance, countywide candidates in Chittenden County, a
22 county of 150,000, the largest county in Vermont --
23 they would be limited to \$4,000 for the primary and the
24 general election. That's 3 cents for each person in
25 Chittenden County. And, of course, this is an

1 important county. Senator Leahy came from that county
2 as State's attorney and became the United States
3 Senator.

4 And finally, with respect to the rebuttable
5 presumption, actually the -- the statute answers the
6 question of whether or not this presumption disappears.

7 If you look at 2809, subsection (e), the last sentence
8 says, the findings and determination of the court --
9 and this is in this court proceeding by your opponent
10 that is trying to claim that this spending over here is
11 actually yours -- that the findings and the
12 determination of the court shall be prima facie
13 evidence in any proceeding brought for violation of the
14 chapter. So it doesn't go away. The rebuttable
15 presumption never goes away. And, in fact, each person
16 -- each candidate and each independent spender can look
17 at the rebuttable presumption requirement and say, I
18 have to file a report and that governs my report.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 The case is submitted.

22 (Whereupon, at 11:12 a.m., the case in the
23 above-entitled matter was submitted.)

24

25