

# 00-9159(L)

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

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

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MARCELLA LANDELL,

*Plaintiff-Appellee,*

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

*Plaintiffs-Appellees-Cross Appellants,*

v.

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY,  
LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE,  
JOEL W. PAGE, JAMES MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON,  
TERRY TRONO, DAN DAVIS, ROBERT L. SAND AND DEBORAH MARKOWITZ,  
VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN  
VOTERS OF VERMONT, RURAL VERMONT, VERMONT OLDER WOMEN'S  
LEAGUE, VERMONT ALLIANCE OF CONSERVATION VOTERS, MIKE  
FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN KITZMILLER,  
MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE,  
CHERYL RIVERS AND MARIA THOMPSON,

*Intervenors-Defendants-Appellants-Cross-Appellees.*

*Defendants-Appellants-Cross-Appellees,*

(Caption continued on inside cover)

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

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**BRIEF FOR THE INTERVENORS-DEFENDANTS-  
APPELLANTS-CROSS-APPELLEES**

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**PRELIMINARY STATEMENT**

The Vermont Public Interest Research Group, The League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Gray, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson, Intervenor-Defendants-Appellants-Cross-Appellees ("Defendant-Intervenors") seek review of portions of the final judgment entered on August 10, 2000, by the Honorable William K. Sessions, III, in the United States District Court for the District of Vermont. A. 0151; *see Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000). Defendant-Intervenors seek

reversal of those portions of the District Court’s decision striking down several provisions of the 1997 Vermont Campaign Finance Reform Act ("Act 64"), codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 (2000 Cum. Supp.) (hereafter “\_\_ V.S.A. § \_\_\_\_”).

### **STATEMENT OF JURISDICTION**

The Defendant-Intervenors filed a timely Notice of Appeal on September 11, 2000. A. 0153. Pursuant to Federal Rule of Appellate Procedure (“Fed. R. App. P.”) 28(i), they adopt by reference the Jurisdictional Statement set forth in the Brief of Defendant-Appellants-Cross-Appellees William H. Sorrell, *et al.* (hereafter, “State Defendants’ Brief”).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether Act 64’s limits on the amounts candidates can spend in political campaigns are constitutional.
2. Whether Act 64’s regulation of related campaign expenditures is constitutional with respect to candidate expenditures.
3. Whether Act 64’s limits on the amounts that a political party may contribute to a candidate are unconstitutionally low.

4. Whether Act 64's limit on the percentage of a candidate's contributions that may come from out-of-state donors is constitutional.
5. Whether the Court lacks subject-matter jurisdiction over several of the claims and parties because plaintiffs lack standing to challenge various provisions of Act 64.

### **STATEMENT OF THE CASE**

Defendant-Intervenors adopt by reference the Statement of the Case set forth in the Brief of the State Defendants. Fed. R. App. P. 28(i).

### **STATEMENT OF FACTS**

Defendant-Intervenors adopt by reference the Statement of Facts set forth in the Brief of the State Defendants. Fed. R. App. P. 28(i).

### **SUMMARY OF ARGUMENT**

Vermont's Act 64 was enacted to further several critical governmental objectives, including preventing political corruption and its appearance and preserving the public's confidence in Vermont elections, officials and government. Its enactment came in response to deep public concern about the detrimental impact of unlimited fundraising and campaign spending on Vermont's political system, a concern shared by Democrats, Republicans,

ordinary citizens, and elected officials alike. Indeed, to their credit, Vermont officials have not shied away from blunt assessments of the need to reform the state’s campaign finance system, describing, for example, how “money does buy access” Exh. Volume-III at E-0902 (Governor Dean); how a massive, successful fundraising effort constituted “one of the most distasteful things that I’ve had to do in public service,” Exh. Volume-I at E-0289 (Senator Peter Shumlin); and how campaigns have come to reflect “a nuclear arms race” in spending that fails to serve the public. Tr. VIII-57 (Peter Smith, former senator, lieutenant governor, and U.S. Congressman from Vermont).<sup>1</sup>

The Vermont Legislature, after careful consideration, determined that limits on candidates’ campaign expenditures, as well as limits on contributions, were necessary to further compelling state interests such as stemming corruption and limiting the time that candidates and elected officials must devote to fundraising rather than to their duties as representatives of all the people. Exh. Volume-I at E-0095-0096. While finding that these important state interests would be served by the

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<sup>1</sup> In this Brief, references to trial exhibits are to the volume and page number at which the exhibit appears in the Exhibit Volumes submitted to this Court: *e.g.*, Exh. Volume-[#] at E-[page]. References to the trial transcript provide the original transcript volume number and page at which the testimony appears, *e.g.*, Tr. [Vol. #]-[page].

expenditure limits of Act 64, 118 F. Supp. 2d at 483, the District Court nevertheless struck down the limits as violative of the First Amendment, concluding, in effect, that limits on campaign spending are *per se* unconstitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

The District Court erred in treating *Buckley* as a *per se* bar to the enactment of any limits on campaign spending. As shown below in Part I of this Brief, *Buckley* need not be read to foreclose the constitutionality of Act 64's expenditure limits. *Buckley* left the door open to proof of new facts and circumstances that would demonstrate why spending limits are necessary to serve the compelling governmental interests of deterring corruption and the appearance of corruption. It also left the door open for a showing that new and compelling governmental interests not directly addressed in *Buckley* – such as the need to free candidates and officeholders from the burden of endless fundraising – would justify a state's decision to limit campaign expenditures. The record in this case fully supports the constitutionality of Act 64's expenditure limits, 17 V.S.A. § 2805a(a), on both these grounds.

The record further demonstrates that Act 64's expenditure limits are closely drawn to serve these compelling interests. As the District Court found based on an extensive record at trial, Vermont's spending limits will permit candidates to run effective, vigorous campaigns. 118 F. Supp. 2d at

471-72. Indeed, by enhancing the competitiveness of elections, the spending limits will promote, rather than hinder, the First Amendment goal of insuring a robust, wide-open public debate.

The Brief also demonstrates that campaign spending limits are necessary to serve Vermont's compelling interest in protecting its citizens' fundamental right to full and equal political participation. Unlimited campaign spending serves to discourage electoral competition and turn the electoral process as a whole into a preserve that is closed to average citizens. A vibrant democratic system depends upon the ability of all citizens to be able to participate fully in that system. The continued upward spiral of unlimited campaign spending threatens that core democratic principle. Although *Buckley* did not accept the interest in equal political access as a basis to uphold congressional spending limits in 1976, recent authority, including Justice Breyer's concurring opinion in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S. Ct. 897 (2000), suggests that this interest deserves further consideration.<sup>2</sup>

Defendant-Intervenors further contend that the District Court erred in striking down, as unconstitutionally low, Vermont's limits on the amounts

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<sup>2</sup> If, contrary to Defendant-Intervenors' arguments, *Buckley* requires invalidation of Vermont's expenditure limits, Defendant-Intervenors

that political parties may contribute to candidates. 17 V.S.A. §§ 2805(a)-(b). Those limits are permissible under the standards of *Shrink*, 120 S. Ct. 897, which counsels deference to a state’s determination of the appropriate level at which campaign contribution limits should be set. 120 S. Ct. at 909. Given the District Court’s finding that “[l]arge contributions to candidates have undermined public confidence in Vermont’s political system,” *Landell*, 118 F. Supp. 2d at 468-69, and its determination that identical limits on the contributions of individuals and PACs are permissible, Vermont’s limits on contributions by political parties should also be upheld.

Similarly, Act 64’s provision barring candidates from accepting more than 25% of their funds from out-of-state contributors, 17 V.S.A. § 2805(c), is constitutional. Vermont’s 25% rule does not entirely bar out-of-state donors from contributing to Vermont campaigns, and is closely drawn to deter corruption and the appearance of corruption created when candidates are financially beholden to persons other than their constituents. *See Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597, 617 (Alaska 1999), *cert. denied*, 120 S. Ct. 1156 (2000) (upholding similar limits).

Finally, the Court lacks subject matter jurisdiction over several of the claims in this action because none of the plaintiffs has suffered an injury-in-

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respectfully wish to preserve their contention that *Buckley* should, to that

fact sufficient to support standing. Several plaintiffs, in addition, lack standing to challenge particular provisions of Act 64.

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extent, be overruled.

## ARGUMENT

### **I. VERMONT’S LIMITS ON CAMPAIGN EXPENDITURES ARE CLOSELY DRAWN TO SERVE COMPELLING STATE INTERESTS AND SHOULD BE UPHELD BY THIS COURT.**

#### **A. The District Court erred in holding that, under *Buckley*, limits on campaign expenditures are prohibited as a matter of law, regardless of the facts or state interests supporting them.**

The extensive record presented at the trial of this case demonstrated exceedingly strong justifications for Vermont’s enactment of limits on candidates’ overall campaign expenditures.<sup>3</sup> As the District Court found:

Spending limits are an effective response to certain compelling governmental interests not addressed in *Buckley*: (1) “Freeing office holders so they can perform their duties,” in the words of Judge Cohn, *Kruse[ v. City of Cincinnati]*, 142 F.3d at 920, or as Justice Kennedy put it, “permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising,” *Shrink*, 120 S.Ct. at 916; (2) “[P]reserving faith in our democracy,” *Kruse*, 142 F.3d at 920; (3) “[P]rotecting access to the political arena” as stated by [Justice] Stevens, *Colorado Republican*, 518 U.S. at 649-650; and (4) “diminish[ing] the importance of repetitive 30-second commercials.” *Id.*

118 F. Supp. 2d at 482-483. The District Court further stated: “This Court would be remiss not to acknowledge that the state proved that each of these concerns exist, and that Vermont’s expenditure limits address them. The state’s factual presentation at trial decidedly sets this case apart from . . .

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<sup>3</sup> Defendant-Intervenors adopt by reference the statement of the Standard of Review set forth in the State Defendants’ Brief. Fed. R. App. P. 28(i).

*Buckley.*” 118 F. Supp. 2d at 482-483; *see also id.* at 463-464 (noting that Vermont’s spending limits served compelling state interests in “minimizing the reality and appearance of corruption, stemming the manipulative practice of bundling, increasing candidate-voter contact, and inspiring participation in the electoral process”). “Given the wealth of evidence gathered by the Vermont legislature in the process of evaluating Act 64,” the Court concluded, “this Court understands why [the legislature] included spending limits as part of its comprehensive campaign finance bill.” *Id.* at 483.

The District Court nevertheless ruled that *Buckley v. Valeo* required invalidation of Vermont’s spending limits as a matter of law, regardless of the demonstrated justifications for Vermont’s enactment of those limits. *Id.* In effect, the District Court ruled, no set of facts may be demonstrated that would permit a lower federal court to uphold limitations on candidates’ campaign spending under *Buckley*. This conclusion, we submit, was in error. A fair reading of *Buckley* establishes that both factual and legal grounds remain available on which spending limits may be upheld consistent with that decision.

Critical to the *Buckley* decision was the Court’s conclusion that government has a compelling interest in deterring corruption and the appearance of corruption of elected officials. *See Buckley*, 424 U.S. at 23-

38. The Court nevertheless rejected the necessity of limits on campaign expenditures, concluding, on the record before it, that the contribution limits of FECA alone would be sufficient to address these governmental interests. While the appellate court in *Buckley* had ruled that “the expenditure restrictions [of FECA] are necessary to reduce the incentive to circumvent direct contribution limits,” the Supreme Court found: “There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political repercussion of such violations will be insufficient to police the contribution provisions.” 424 U.S. at 55-56.

Thus, the assertion that spending caps were a necessary concomitant to contribution limits was rejected in *Buckley* only as a matter of fact, not of law. For what if the record in *Buckley* had established that contribution limits, and the criminal and political consequences of violating them, had proved insufficient to serve the government’s compelling interest in deterring corruption and the appearance of corruption? Clearly, *Buckley* leaves the door open for a determination that expenditure limits might be justified upon a factual record different from that presented in *Buckley*.<sup>4</sup>

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<sup>4</sup> The FECA amendments included a special provision for expedited judicial review of any constitutional challenge to the reform legislation. 2 USC § 437h. The provision effectively prevented the possibility of any trial at the

Nor should *Buckley* be read as foreclosing the possibility of identifying new and compelling interests, not specifically discussed and rejected in *Buckley*, that could justify a state’s enactment of campaign spending limits. The *Buckley* Court carefully listed the three specific governmental interests that had been offered as justifying the FECA’s limits on congressional campaign spending limits: (1) deterring corruption and preventing evasion of the contribution limits; (2) equalizing the financial resources of candidates; and (3) restraining the cost of election campaigns for its own sake. *See Buckley*, 424 U.S. at 55-56. The Court did not hold that there could never be a new and compelling governmental interest that could justify campaign spending limits. Rather, the Court stated: “No governmental interest *that has been suggested* is sufficient to justify [the congressional spending limits].” 424 U.S. at 55 (emphasis added); *see also FEC v. National Conservative Political Action Committee (“NCPAC”)*, 470 U.S. 480, 496-97 (1985) (“preventing corruption or the appearance of

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district court level and any development of a full factual record to be weighed in the determination of the constitutionality of the laws under challenge. Because of that provision, the only “facts” available for the Supreme Court’s eventual consideration in *Buckley* were those stipulated to by the parties, without a trial or significant discovery. *See generally* Roland S. Homet, Jr., *Fact Finding in First Amendment Litigation: The Case of Campaign Reform*, 21 Okla. City U. L. Rev. 97 (1996).

corruption are the only legitimate and compelling government interests *thus far* identified for restricting campaign finance”) (emphasis added).

In the 24 years since *Buckley*, the Supreme Court has not again reviewed any statutory scheme establishing limits on the amount that candidates may spend on their election campaigns.<sup>5</sup> In the Court’s most recent cases addressing other campaign finance issues, however, a total of four Justices have now gone on record suggesting (or stating outright) that neither *Buckley* nor the First Amendment should be read as an inflexible bar to campaign finance regulation, even with respect to spending limits. *See Shrink*, 120 S.Ct. at 913 (concurring opinion of Breyer, J., joined by Ginsburg, J.) (calling for approach that balances competing constitutional interests and stating “it might prove possible to reinterpret aspects of *Buckley* in light of the post-*Buckley* experience stressed by Justice Kennedy, making less absolute the contribution/expenditure line, particularly in respect to independently wealthy candidates, whose expenditures might be considered contributions to their own campaigns”); *id.* at 916 (Kennedy, J.,

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<sup>5</sup> Subsequent decisions such as *NCPAC*, 470 U.S. 480 (1985) and *Colorado Republican*, 518 U.S. 604 (1996), on which plaintiffs have relied to argue that spending limits are *per se* unconstitutional, address the constitutionality of limits on *independent expenditures* by political action committees and political parties, not spending limits on expenditures by candidate campaigns.

dissenting) (noting difficulty of constitutional issues surrounding campaign regulation but stating, “For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising”); *Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604, 649-50 (1996) (Stevens, J., joined by Ginsburg, J., dissenting) (“It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment.”).

Two justices have taken the opposite position, stating that limits on contributions, as well as limits on spending, violate the First Amendment. *See Shrink*, 120 S.Ct. at 916 (Thomas, J., joined by Scalia, J., dissenting). The remaining justices, Chief Justice Rehnquist, Justice O’Connor, and Justice Souter, have not spoken on whether the First Amendment presents a

*per se* bar to any and all legislation limiting spending in candidate campaigns.<sup>6</sup>

In recent years, only one circuit has had the occasion to consider the constitutionality of a locally enacted spending limits law. In *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998), the Sixth Circuit struck down spending limits enacted by the City of Cincinnati for its city council elections. *See also Suster v. Marshall*, 149 F.3d 523 (6<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (following *Kruse* and striking down limits on expenditures in state judicial races). Two members of the *Kruse* panel concluded – contrary to the analysis presented above – that *Buckley* should be read as a complete ban on campaign spending limits, regardless of the facts and circumstances that may be presented to support such limits. The third member of the panel, while concurring in the ruling striking down Cincinnati’s limits, disagreed with the majority’s interpretation of *Buckley*, concluding that *Buckley* does not render spending limits unconstitutional as a matter of law:

The Supreme Court’s decision in *Buckley* . . . is not a broad pronouncement declaring all campaign expenditure limits unconstitutional. It may be that the interest in freeing

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<sup>6</sup> Justice Souter’s majority opinion for the Court in *Shrink* studiously declined to take on any issue beyond the constitutionality of Missouri’s contribution limits under *Buckley*. 120 S.Ct. at 909. Its discussion of the Court’s past treatment of campaign expenditure limits is *dicta*.

officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest.

*Id.* at 920 (concurring opinion of Cohn, D.J., sitting by designation).

Notably, Judge Cohn recognized the factually contingent nature of the *Buckley* ruling even before the Supreme Court's *Shrink* decision, in which Justices Breyer and Kennedy added their voices to those of Justices Ginsburg and Stevens in suggesting that *Buckley* need not be read to foreclose the possibility of upholding limits on campaign spending.

Judge Cohn's concurring opinion in *Kruse* is correct. Even when precedent commands "exacting scrutiny" of a law, *scrutiny* is still required. Race-based redistricting plans, for example, can be justified only if they survive strict scrutiny, *see Miller v. Johnson*, 515 U.S. 900 (1995), but that does not mean that a race-based plan is automatically unconstitutional, nor that *Miller* must be overruled in order to sustain the constitutionality of such a plan. *See King v. State Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997) (three-judge court), *aff'd mem.*, 522 U.S. 1087 (1998) (finding that race-based redistricting plan survived strict scrutiny review because it was narrowly tailored to further compelling state interests). By the same token, although *Buckley* requires exacting scrutiny of a limit on campaign expenditures, that does not mean that *Buckley* must be overruled in order to

sustain the limits enacted by Vermont. Rather, the question before this Court is whether Vermont's spending limits satisfy exacting scrutiny; that is, whether, based on the particular factual record presented below, they are closely drawn to serve a compelling governmental interest.

The District Court therefore erred in concluding that *Buckley* automatically mandated invalidation of Vermont's expenditure limits. Indeed, in light of the District Court's own factual findings establishing how those expenditure limits are necessary to serve a variety of compelling interests, the District Court should have sustained the constitutionality of Vermont's limits. The strong justifications establishing the constitutionality of Vermont's expenditure limits are discussed in the following sections of the Brief.

**B. Vermont's Spending Limits Are Constitutional Because They Are Necessary To Serve The State's Compelling Interest In Deterring Corruption And The Appearance Of Corruption.**

As discussed above, *Buckley* and subsequent Supreme Court decisions recognize the strong governmental interest in avoiding not only actual *quid pro quo* corruption of elected officials, but also the appearance of corruption. "Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"

*Buckley*, 424 U.S. at 27 (quoting *U.S. Civil Service Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

While the record before the *Buckley* Court in 1976 may have suggested that contribution limits alone were sufficient to limit the improper influence of money and restore citizens’ faith in the integrity of government, the record before this Court 24 years later demonstrates the opposite. This new record justifies Vermont’s conclusion that limits on campaign spending are necessary to deter real and apparent corruption of the state’s electoral process. *Cf. Kruse*, 142 F.3d at 919 (Cohn, D.J., concurring) (“it does not necessarily follow from the Supreme Court’s rejection of the interest in limiting the high costs of campaigns that the interest in preserving faith in democracy is per se insufficient to justify the expenditure limits.”)

The evidence at trial demonstrated that contribution limits alone, without spending limits, leave candidates locked in an “arms race” mentality in which each candidate feels compelled to raise the maximum amount possible to forestall the possibility of being outspent. Tr.VII-75-76 (Rivers); Tr.V-31-32 (Hooper); Tr.VIII-57-58; Tr. IX-133-34 (Ready). Under such a regime, well-heeled interests, such as industry groups with a stake in particular legislative battles, continue to wield enormous influence regardless of contribution limits. And the public understands this,

perceiving big-money politics as an arena reserved for the wealthy, in which average citizens simply are not “players.” Tr. IX-130 (Ready).<sup>7</sup>

The Brief of the State Defendants aptly explains how Vermont’s spending limits are necessitated by the State’s interest in deterring corruption and its appearance. The Defendant-Intervenors adopt those arguments by reference pursuant to Rule 28(i) and, to avoid unnecessary repetition, would emphasize two related points that differentiate the record in this case from the one that confronted the *Buckley* Court 24 years ago.

The record shows that practices such as “bundling” render contribution limits alone insufficient to deter corruption when campaign spending remains unlimited. Through this practice, which can take a variety of forms, donors affiliated with a particular interest can magnify their

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<sup>7</sup> As former Vermont Secretary of State James Douglas, a Republican, noted in a 1991 speech, big spending means big fundraising, and creates the appearance, if not the reality, of a quid pro quo between donor and donee. Exh. Volume-III at E-0916-17. Numerous newspaper articles introduced into evidence documented the appearance of corruption created when politics is dominated by the need for fundraising. *See, e.g.*, “Money Changes Opinions,” *Burlington Free Press*, April 27, 1997, Exh. Volume-III at E-0763 (reporting Senator Jeb Spaulding’s remarks on Senate floor that “money is a negative influence on the impartial ordering of priorities” by the legislature). *Cf. Shrink*, 120 S. Ct. at 907 (newspaper articles documented appearance of corruption); *Daggett v. Governmental Comm’n on Ethics and Elections*, 205 F.3d 445, 462-463 (1st Cir. 2000) (same). Poll results introduced at trial further documented the public’s suspicion of the role of money in Vermont politics. Exh. Volume-III at E-0847-48 (Declaration of Celinda Lake); *see Landell*, 118 F. Supp. 2d at 469.

influence, despite the existence of contribution limits, by coordinating the timing of their contributions. For example, executives of a particular company can send their \$400 donations to a gubernatorial candidate on the same day, or a company or industry group can sponsor an event where donors with the same interests can make individual contributions at the same time. Candidates and political parties alike recognize the actual, unified source of such aggregated largesse, and they similarly recognize the severe disadvantage they will face in the electoral arms race if they do not accept this type of concentrated financial support.

“Bundling” was described at trial by witnesses such as Donald Hooper, Tr. VII-63-64, and was the subject of testimony before the Vermont legislature during hearings on Act 64. Exh. Volume-I at E-0218-20 (testimony of Anthony Pollina before legislative committee) (noting that states that have limited contributions alone find that it encourages bundling of contributions). It has become a well-known problem at the national level as well.<sup>8</sup> The Legislature as well as the Vermont public also was aware of extensive press accounts discussing how contribution limits can be

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<sup>8</sup> Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126, 1140-42 (1994); Lisa Rosenberg, Center for Responsive Politics: *A Bag of Tricks: Loopholes in the Campaign Finance System* (available at [www.opensecrets.org/pubs/law\\_bagtricks/](http://www.opensecrets.org/pubs/law_bagtricks/)) (visited Dec. 18, 2000).

circumvented in this manner. *See, e.g.*, Def. Exh. Volume-III at E-0783 (“He’s a Lock, But Funds Still Roll Right In,” *Rutland Herald*, Oct. 2, 1996) (reporting how several executives of a Norfolk, Virginia, health care corporation, and their families, bundled large contributions to Governor Dean)).

Bundling, however, is just one manifestation of a more general problem with relying on contribution limits alone to deter corruption. Limits on the contributions that may be made by a particular individual or corporation do not fully address the concentrated financial power that well-heeled interests can exert when candidates face an unlimited need for funds. Fundraising events, for example, present wealthy special interest donors with an opportunity to make their financial clout clear to legislators despite limits on contributions. The trial testimony showed precisely how this happens in Vermont. For example, in 1999, at least 10 pharmaceutical companies were sponsors of the Rutland County Republican Committee golf tournament, a fundraising event. An important bill on pharmaceutical pricing was under consideration by the Vermont Legislature during that session. Tr. II-104-06 (McNeill). Even under the lowered contribution limits of Act 64, these 10 companies could collectively funnel \$40,000 to the Vermont Republican Party, if they each made the maximum donation of

\$2,000 to the Vermont Republican Party and \$2,000 to the Republican Legislative Election Committee (a party PAC). Tr. II-106-07 (McNeill). That figure does not include amounts that these corporations may donate directly to the party's candidates; nor does it include amounts that executives and employees of the companies may also donate to the party and its candidates. When one industry group with deep pockets can generate multiple contributions that are collectively quite large, and when a candidate needs every possible dollar to avoid being bested in the financial arms race, limits on contributions alone simply cannot solve the problem of improper influence by wealthy interests.

The consequences of losing an entire industry as a source of donations directly influence the actions of legislators. For example, Senator Cheryl Rivers testified that she was unable to attract co-sponsorship from the Senate leadership for a bill on labeling of genetically engineered food. The explanation she was given was that the Democrats could not afford to lose the food industry as a source of donations, having already alienated the pharmaceutical industry because of a prescription drug bill. Tr. VI-67-71 (Rivers). A former Republican Lieutenant Governor of Vermont, Peter Smith, testified that when he was required to cast a tie-breaking vote on legislation affecting ophthalmologists, he took into account the financial

support he had received from the industry and considered the likelihood that he would lose their support if he voted against their interests. Tr. VIII-39-43(Smith). In a gubernatorial race, Howard Dean raised more money just from health industry interests than his opponent, David Kelley, raised for his whole campaign. Exh. Volume-V at E-1706. As one witness who testified before the legislature put it, “David Kelley was not only outspent by Howard Dean, [he] was actually outspent simply by the health care industry.” Exh. Volume-I at E-0213.

Thus, the Vermont legislature was entirely correct to conclude that, without limits on overall spending, contribution limits are ineffective to serve the goals identified as compelling by *Buckley* and subsequent cases. “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.” *Shrink*, 120 S. Ct. at 906 (upholding limits on contributions). For candidates caught up in the arms race of unlimited campaign expenditures, the courtship of sources of concentrated financial power – such as the pharmaceutical industry or other deep pockets – are vital to a successful campaign. With spending limits, however, a candidate’s need to court these deep pockets is substantially reduced. When a candidate knows that her opponent will not be able to raise

and spend unlimited sums on a campaign, she will feel far less pressure to rely upon the fundraising prowess of particular special interests. While limits on campaign spending, of course, do not directly prohibit bundling and related practices, they lessen the clout of those who would engage in such practices, because the funds will no longer be irreplaceable as they are when potential spending is unlimited.

For these reasons, in addition to those stated in the State Defendants' Brief, Vermont had a substantial basis for its conclusion that, even with contribution limits, a regime of unlimited campaign spending would allow interests with great financial clout to continue to wield improper influence over candidates. Only by reducing the overall need for such donations through reasonable spending limits can Vermont assure that such concentrated sources of donations do not exercise improper influence over elected officials.

**C. Vermont's Spending Limits Are Constitutional Because they Serve the State's Compelling Interest In Permitting Candidates And Officeholders to Spend Less Time Fundraising And More Time Interacting With Voters And Performing Official Duties.**

Certain state interests that might prompt a state to adopt spending limits simply were not addressed by the *Buckley* Court, and thus are not foreclosed as a potential basis for state regulation in this area. For example, the *Buckley* Court did not consider whether a state's interest in preserving

the time of officeholders from the demands of fundraising, so as better to perform their duties as representatives, would provide a compelling interest in limiting campaign spending. *See Kruse*, 142 F.3d at 920 (Cohn, D.J., concurring) (“It may be that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties, or the interest in preserving faith in our democracy, is compelling, and that campaign expenditure limits are a narrowly tailored means of serving such an interest”). *See also Shrink*, 120 S.Ct. at 916 (“For now, however, I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising”) (Kennedy, J., dissenting). *See Vincent Blasi, Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 COLUM. L. REV. 1281 (1994).

As canvassed in the Brief of the State Defendants, concerns over the inordinate amount of time that candidates devote to fundraising was a critical part of the public and legislative debate leading to the enactment of Act 64’s spending limits. *See, e.g.,* David Wilson, “Vermont Legislature Needs Campaign Finance Reform”, *Burlington Free Press*, Jan. 30, 1997,

Exh. Volume-III at E-0773 (“Politicians are forced to spend as much time begging as they do campaigning”); Exh. Volume-I at E-0092 (Floor Speech of Senator Bill Doyle) (noting that bill was necessary so that “there will be increased time for real debate; that candidates will be able to concentrate more on issues rather than raising public money”).

At trial, legislators described how the pressure of fundraising allows donors to claim the attention of officeholders. As Senator Cheryl Rivers noted, legislators – especially if they are in leadership positions – must spend time attending party fundraising events that give donors access to elected officials. Tr. VII-58-59. Committee chairs and party leadership are asked to divide up lists of potential corporate and individual donors to receive phone calls. *See id.* at VII-60-61 (Rivers) (describing call to corporate donor not located in her district and noting she would have no interest in making call apart from necessity of fundraising). Similarly, Senator Elizabeth Ready noted that if she has only one hour a night to return telephone calls, donors who have supported her will get their calls returned. Tr. IX-166-167 (Ready); *see also id.* (noting that large donors are also more likely to get their calls returned from Senate floor). By contrast, if campaigns are governed by spending limits, explained Senator Ready, “I am not going to be locked away, you know, in the Democratic Party somewhere

or in my own office somewhere making fundraising calls.” Tr. IX-129. *See also* Tr. V-29-30 (Hooper); Tr. VII-72 (Rivers); Tr. VIII-23-24 (Smith); Tr. IX-194-195 (Pollina).

Based on the entire record, the District Court correctly found that “the need to solicit money from large donors at times turns legislators away from their official duties.” 118 F. Supp. 2d at 468. Vermont thus had a compelling interest in adopting spending limits, which, as the District Court found, are an “effective response” to this concern. *Id.* at 482-483.

**D. Vermont’s Expenditure Limits Are Closely Drawn to Further the State’s Compelling Interests.**

**1. The spending limits will permit Vermont candidates to run effective campaigns.**

The evidence demonstrated that the spending limits established by Act 64<sup>9</sup> are closely drawn to serve compelling state interests. The spending caps will not prevent candidates from communicating their messages to the public

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<sup>9</sup> Act 64 establishes spending limits of \$300,000 for Governor, \$100,000 for Lieutenant Governor, and \$45,000 for Secretary of State, State Treasurer, Auditor of Accounts or Attorney General. 17 V.S.A. §2805a(1)-(3). For the Legislature, the limit is \$4,000 for a single-member senate district, with an additional \$2,500 for each additional seat in the district, and \$2,000 - \$3,000 for a house seat, depending on whether it is a single-member or two-member district. *Id.* §2805a(a)(4)-(5). For statewide offices, incumbents are limited to spending 85% of the applicable amount; for the Legislature, incumbents are limited to spending 90% of the applicable amount. *Id.* §2805a(c).

and running vigorous campaigns. The District Court so found after canvassing extensive evidence on Vermont campaigns and past spending patterns. 118 F. Supp. 2d at 471 (“The evidence demonstrated that spending limits would have very little effect on House, Senate, and statewide races”). This conclusion is fully supported by the record. As Professor Gierzynski’s analysis demonstrated, the spending limits are in keeping with past patterns of spending in Vermont elections. With respect to the Legislature, most candidates over the past three election cycles have spent less than the amounts allowed under the new limits. *See* 118 F. Supp. 2d at 471-472.

For the Senate, average spending by major party candidates in all but the single member senate districts was below the spending limits for those districts. *See* 118 F. Supp. 2d at 471. Senate challengers as a group will not be adversely affected by the limits; to the contrary, senate incumbents spent more money than challengers in each of the three election cycles that were studied, and thus would be more affected by the limits than challengers. Exh. Volume-III at E-0990.

Vermont House candidates are even less likely to be hampered by the new spending limits, given their past patterns of spending. In 1998, all categories of House candidates – incumbents, challengers, Democrats, Republicans, Progressives – spent less than the new spending limits on

average. Incumbents, on average, spent \$623 less than the limit, while nonincumbents spent \$493 less than the limit on average. Exh. Volume-III at E-0991.

Similarly, the spending limits will not impede the ability of statewide candidates to mount effective campaigns. In 1994 and 1996, neither of the major party gubernatorial candidates spent in excess of the limits that will now apply to gubernatorial races. In the 1998 race, only the incumbent, Governor Dean, would have exceeded the new spending limit. The majority of all major party candidates for all statewide offices in the three election cycles spent less than what the spending limits set by Act 64. None of the third party candidates for statewide office came anywhere near the new limits in their spending. Exh. Volume-III at E-0987-89; *see also Landell*, 118 F. Supp. 2d at 472.

In tailoring the spending limits, the Legislature took into account the view that some challengers may need to spend more than an incumbent because of the incumbent's greater name recognition and other advantages. Incumbents for statewide office are limited to spending 85% of what challengers may spend. For the legislature, the limits for incumbents are 90% of the limits for challengers. 17 V.S.A. § 2805a(c) As already noted, this feature of the law drew praise even from plaintiffs' expert, Dr. Lott, for

its effort to take into account the possible advantages of incumbency. Tr. III-218-19.

The State Defendants' Brief includes an extensive discussion of factors the Vermont Legislature considered in setting the spending caps in Act 64 and the evidence demonstrating that Vermont candidates will be able to run effective campaigns under the limits. *See* Brief of State Defendants at Section III:B:2. Defendant-Intervenors adopt that discussion by reference pursuant to Fed. R. App. P. 28(i).

**2. Spending limits will promote, rather than hinder, the First Amendment goals of fostering a vibrant public debate and an active, informed citizenry.**

The narrow tailoring of Vermont's limits was further confirmed by evidence demonstrating that the limits will promote, rather than hinder, vigorous public debate and citizen confidence in the electoral process. Although *Buckley* stated that a restriction on spending "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," 424 U.S. at 19, the record before the Court in *Buckley* did not demonstrate otherwise. The record before this Court, 24 years, later is different.

Perhaps the most striking confirmation of this comes from the research of *plaintiffs'* expert, Dr. John Lott, who testified that increasing

campaign expenditures in state and federal elections in recent years are *not* the result of an increase in the cost of getting the candidate's message out to voters. Tr. III-205-07 (Lott). Instead, as Dr. Lott's report for this case states:

“My research indicates that most of the increase in campaign donations over the last couple of decades is due to the government getting larger. *The more favors the government has to give out, the more resources that people will spend to obtain those favors.*”

Exh. Volume-VI at E-2202 (emphasis added). Thus, increased spending is not a function of increased communication and debate, but of special interests' determination to secure favorable governmental policies.

Indeed, the evidence further demonstrated that high-spending campaigns are often detrimental to the goal of an informed, politically active citizenry. After extensive legislative hearings, the Vermont Legislature found:

Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased. Exh. Volume-I at E-0095-96.

Citizen interest, participation, and confidence in the electoral process is lessened by excessively long and expensive campaigns. Exh. Volume-I at E-0096.

Social science evidence presented at trial, as well as the testimony of legislators and other active participants in Vermont elections, confirmed the

accuracy of these findings. First, the evidence demonstrated that high-spending campaigns are not necessary to stimulate voter participation. Empirical analysis of congressional elections, in fact, provides evidence that the likelihood of an individual's participating in an election decreases as spending increases. Tr. IX-56-57 (Gross). This may be because high spending campaigns tend to be media focused, leading citizens to view politics as a spectator sport. High-spending advertising in campaigns is sometimes used to alienate voters and dampen turnout rather than to encourage participation. High-spending campaigns also dampen participation by reinforcing the public's cynicism about the impact of money on the political process. Tr. X-61-63 (Gross); Exh. Volume-III at E-1040-41 (Gross report). *See also* Tr. VIII-58-59 (Smith); (“[Fundraising leads to the people’s] sense that the process is about someone else and for someone else and available to other people.”); Exh. Volume-V at E-1831-32.

Analysis of congressional campaign spending also shows that voter participation is much more likely to be stimulated by direct contact between voters and candidates or parties than by high-spending campaigns. Tr. X-59, 61-63, 71 (Gross). *See also* Tr. V-139-40 (David Friedman); Tr. VIII-58-60 (Smith). Spending limits thus can be expected to have a positive impact on

voter participation by encouraging more emphasis on direct forms of mobilization in election campaigns. Tr. X-59, 61-63, 70-71 (Gross).

Second, social science research also contradicts the contention that unlimited campaign spending is necessary as a means for citizens to make a more informed voter choice. Research demonstrates that campaign spending does little to enhance voters' cognitive engagement with the electoral process. "Cognitive engagement" is measured by such things as whether voters say that they are interested in the election, whether they care about the results of the election, whether they are familiar with the candidates' names, and whether they know the positions or ideology of the candidates. Tr. X-71-74 (Gross).

Professor Gross's study found that campaign spending generally had no statistically significant effect on the likelihood that a voter would be interested in the election or concerned about its outcome. While voters might be better able to identify candidates' names, they were not better able to discern the ideological placement of the candidates. Tr. X-71-74 (Gross).

Again, in contrast to the ineffectiveness of high campaign expenditures, direct contact by a candidate or political party with a voter significantly increased voters' interest in the election, their concern about the outcome, and their ability to accurately place the candidates on ideological

scales. “Just as direct personal contact with citizens seems to be the key to stimulating voter participation, it also seems to be the key to enhancing voter information and citizens’ connection to the electoral process.” Exh. Volume-III at E-1044 (Gross report).

Professor Gross’s insights were also echoed by other participants in Vermont elections. For example, Senator Cheryl Rivers explained how more professionalized campaigns result in less-informed voters. The advice she has received from professional strategists is that attempting to engage the voters in a discussion of the issues is the worst thing you can do. Tr. VII-78 (Rivers). *See also* Tr. V-147-48 (David Friedman). In Senator Rivers’ most expensive campaign, the increased spending was used for a television ad that did not discuss or mention any issues whatsoever, but simply projected an image. Tr. VII-78 (Rivers).

Other evidence confirmed that Vermont’s spending limits were already encouraging candidates to put more emphasis on direct contact with voters during the 2000 campaign. For example, the campaign manager for gubernatorial candidate Ruth Dwyer testified that the Dwyer campaign was using “town meetings” at which the candidate met with local residents, shared her views with them, and listened to their concerns. She was attempting to hold 100 of these meetings across Vermont. Summers

testified that if Act 64 had not been enacted the Dwyer campaign would have limited the number of these town meetings. Tr. IV-107, 109-10 (Summers).

Indeed, the evidence discussed in this section demonstrates that spending limits not only are narrowly tailored to avoid hindering public debate, but will affirmatively further the state's goal of promoting public engagement with and confidence in the political process. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983) (noting, in context of ballot access restrictions: "There can be no question about the legitimacy of the state's interest in fostering informed and educated expressions of the popular will in a general election."); *Colorado Republican*, 518 U.S. 649-650 (Stevens, J., joined by Ginsburg, J., dissenting) ("It is quite wrong to assume that the net effect of limits on contributions and expenditures – which tend to protect equal access to the political arena, to free candidates and their staffs from the interminable burden of fund-raising, and to diminish the importance of repetitive 30-second commercials – will be adverse to the interest in informed debate protected by the First Amendment.")

**E. Because Political Equality Among Citizens Is Fundamental to American Democracy, Protecting Political Equality Should Be Recognized as an Additional Basis for Reasonable Limits on Candidates' Campaign Spending.**

- 1. Unlimited campaign spending undermines the promise of equal political opportunity and harms first Amendment values.**

From its beginning, America's constitutional thought recognized "establishing a political equality among all" as the primary remedy to political evils.<sup>10</sup> As James Madison famously noted:

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people. . .<sup>11</sup>

Although limitations on the franchise in Madison's time immediately raised the question whether this principle truly would guide our democracy, over time the answer has become clear: the political equality of all citizens is a fundamental requirement of a democratic system of government.

The Supreme Court's decisions striking down wealth barriers to voting and running for office are a vital expression of that principle. In *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966), the Court

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<sup>10</sup> James Madison, 14 THE PAPERS OF JAMES MADISON 197 (Robert A. Rutland *et al.* Eds., 1983); *see also* FEDERALIST NO. 57, at 305 (J. Madison) (J. Cooke, ed. 1961).

<sup>11</sup> FEDERALIST NO. 57, at 385 (J. Madison) (J. Cooke, ed. 1961).

invalidated a poll tax of \$1.50 in Virginia state elections, declaring that “Voter qualifications have no relation to wealth . . . .” Moreover, the right of voters, regardless of wealth, to participate meaningfully in the electoral process is not isolated from the ability of candidates, regardless of wealth, to participate meaningfully as well. *Id.* In *Bullock v. Carter*, the Court recognized the “real and appreciable impact on the exercise of the franchise” caused by a system that excludes candidates on the basis of their lack of wealth, striking down filing fees ranging from \$150 to \$8,900 for candidates for local office in Texas were required to pay to their political parties. 405 U.S. 134, 143 (1972). The Court concluded that heightened scrutiny of such candidate filing fees was warranted because the high cost of running in a primary election would limit voter choice. As the Court noted:

Many potential office seekers lacking both personal wealth and affluent backers are in every practical sense precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support.

*Id.* “We would ignore reality,” the Court continued, “were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status.” *Bullock*, 405 U.S. at 144. *See also Lubin v. Panish*, 415 U.S. 709 (1974) (striking down \$700 filing fee for local California election).

Against these ideals of a political system in which wealth does not determine the ability to participate stand the realities of the political world that has evolved under a regime of unlimited campaign spending. In the 24 years since *Buckley* was decided, Vermonters and the nation as a whole have witnessed how unlimited campaign spending serves to discourage electoral competition and turn the electoral process as a whole into a preserve that is closed to average citizens. At the federal level, a regime of unlimited spending has led to congressional elections in which the winners outspent the losers, on average, by more than two to one in 1996. *See* Exh. Volume-III at E-1059 n.28 (Gross report). Out of a combined House and Senate membership of 535, over 100 members were millionaires as of January 2000. Amy Keller, *The Roll Call 50 Richest*, ROLL CALL, Jan. 24, 2000, at B30.

In Vermont as well, the increasing importance of money in political campaigns has left average citizens feeling that they are not “players” in the system. Tr. IX-130 (Ready). Campaign war chests, rather than fostering greater public debate, instead have the effect of scaring off potential challengers who are unable to raise similar sums. Tr. VIII-57 (Smith); Tr. IX-132-33 (Pollina). Spending in a campaign frequently reflects not the amounts needed for communicating effectively about the issues, but simply

the desire of electoral competitors to match the spending of their opponents. In his 1992 campaign, former Secretary of State Donald Hooper was fearful that his opponent had raised a large amount of money, “[s]o I guarded against that by raising more money than I thought that I’d need and more money than I thought he would raise or spend.” Tr. V-32. *See also* Tr. VII-76, 79 (Rivers) (campaign spending in Rivers’ Senate races reflects fear of “unilaterally disarming”).

Vermont’s experience thus shows how “[f]or many politicians the situation is a classic prisoners’ dilemma. Each would prefer expenditures to be limited, but if they are not limited, each must struggle to raise and spend as much as possible.” Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in *IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS* 83 (E. Joshua Rosencranz, ed. 1999).

Incumbents benefit most from this arms-race mentality, because donors have far more incentive to contribute to those who already hold sway over important public policy initiatives than to candidates who have not yet won office. Tr. III-212 (Lott); Tr. X-80 (Gross); Tr. IX-231-32 (Pollina).

As a result, more and more elections are decided without a serious contest, or any contest at all. Exh. Volume-V at E-1692-94. As State Senator Elizabeth Ready explained, the need to raise unlimited funds

“precludes normal people, even people that have a lot of political experience, from getting into the running for lieutenant governor, governor, because who wants to go out and raise, ... a hundred thousand, two hundred thousand, a half million dollars?... And quite frankly, who can amongst normal members of the public?” Tr. IX-132. Such testimony was supported by recent Vermont election data: for the office of State Treasurer, the incumbent had no major opposition in five of the last nine races (through 1996); for Secretary of State, the incumbent had no major challenge in four of the previous nine races; for Attorney General, the incumbent had no major challenge in six of the last nine campaigns. During the nine election cycles through 1996, only one incumbent had lost a statewide campaign. Int. Exh. Volume-V at E-1692-94.

Witnesses before the Vermont Legislature repeatedly cited the negative effect of campaign war chests on electoral competition in Vermont. Exh. Volume-I at E-0394-96 (testimony of Nat Frothingham) (pointing out how "war chest" phenomenon "has a chilling effect on the democratic process and frightens people from participating"); *see also* Exh. Volume-II at E-0648-49 (Testimony of Anthony Pollina). Even plaintiffs' witnesses acknowledged that spending limits could encourage more challengers to run. Exh. Volume-VIII at E-3076-77 (Wright deposition) (spending limits would

have benefited his effort to defeat incumbent in Burlington mayoral race); Tr. I-68-71 (Snelling) (challengers are typically underfunded, so the spending limits may help challengers).

As a result of such evidence, the Legislature concluded that many Vermonters are unable to seek election to public office due to the great financial burden of running campaigns, Act 64, Finding (a)(1), Exh. Volume-I at E-0095, and that “Robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased.” Act 64, Finding (a)(4), Exh. Volume-I at E0094-0096.

The implications for democratic governance are deeply disturbing. As Professor Gross’s report points out:

Electoral competition is . . . a central component of democratic governance. In many respects, the ultimate weapon of public accountability in a democratic system is the ability of citizens to remove political actors through elections. And, electoral competition is the mechanism that keeps accountability viable.

Electoral competition requires that voters be given a choice among at least two viable candidates. High levels of campaign spending poses a threat to such competition because large incumbent war chests tend to discourage serious challengers.

Exh. Volume III at E-1044-45 (Gross report). *See also* Tr. X-80 (Gross)

("incumbent war chests tend to have a negative effect on the quality of challengers"); Janet Box-Steffensmeier, “A Dynamic Analysis of the Role of

War Chests in Campaign Strategies,” *American Journal of Political Science*, 40: 352-371 (1996). Unlimited campaign spending, by undermining the very conditions needed to promote a debate that is “uninhibited, robust, and wide open”,<sup>12</sup> thus threatens, rather than promotes, First Amendment values. *See Clifton v. FEC*, 114 F.3d 1309, 1319 n.6 (1st Cir. 1997) (dissenting opinion of Bownes, J.).

A further disturbing consequence is the increasing alienation of average citizens from the political process. When campaign spending reaches exorbitant levels, even middle-class citizens no longer can conceive of Congress or a state legislature as a body in which someone like themselves can serve. The isolation of poor persons from politics, under such a regime, is even more extreme. As Professor Roger Wilkins has observed:

To the poor and the uneducated, the current system looks like exactly what it is, a tightly wrapped plutocracy that breeds the idea “they are rich, that’s not for me, I can’t get in, so what’s the use.” That is the attitude that destroys democratic participation just as surely as the poll tax ever did.

Remarks of Roger Wilkins, *Campaign Finance As a Civil Rights Issue*, 43 How. L. J. 41, 45 (1999). Our democracy is incomplete, as Professor Dworkin has written, if average citizens act only as judges of election

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<sup>12</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

outcomes, and cannot participate as equals in the election process itself.

Dworkin, *Free Speech and the Dimensions of Democracy*, at 72-79

(comparing “majoritarian” and “partnership” conceptions of democracy).

The majoritarian conception of democracy insists on equal suffrage because only in that way can elections hope to measure the will of the largest number of citizens. The partnership conception insists on equal suffrage too, but it requires that citizens be equal not only as judges of the political process but as participants in it as well . . . . But partnership democracy is damaged when some groups of citizens have no or only a sharply diminished opportunity to appeal for their convictions because they lack the funds to compete with rich and powerful donors. People cannot plausibly regard themselves as partners in an enterprise of self-government when they are effectively shut out from the political debate because they cannot afford a grotesquely high admission price.

*Id.* at 78.

The Vermont legislature was right to conclude that a vibrant democratic system depends upon the ability of all citizens to feel a part of that system, and that the continued upward spiral of unlimited campaign spending threatens that core democratic principle. Indeed, the consequences of unlimited spending pose a particular threat to Vermont’s political system. Vermont has a cherished tradition of a citizen legislature – a legislature in which anyone could reasonably aspire to serve. A public servant such as Rep. Karen Kitzmiller was able to win a seat in the Vermont House in 1990 through a campaign consisting almost entirely of her work sponsoring charity drives to benefit the community -- such as collecting used coats for

the poor, collecting paint to be donated for affordable housing, and collecting magazines for recycling. Tr. X-181-82 (Kitzmiller). By campaigning this way, Kitzmiller testified that she “involved oodles of people in the community in my campaign, and also did what I believe to be good things.” Tr. X-182. Former Representative Toby Young similarly testified that in the 1980s she won election “almost entirely by door-to-door campaigning,” and attending “any meetings that were being held by groups in the district,” with no paid advertising of any sort. Tr. VII-16 (Young).

Citizens’ faith in the legitimacy of the political process is enhanced when they perceive that the ability to become an elected representative is open to all, not just to those with unlimited campaign budgets. But Vermont has watched as elections in other states, and at the federal level, become contests not about leadership, ideas, or serving the community, but about who can raise the most cash. *See* Tr. X-163 (Kitzmiller); Exh. Volume-V at E-1737 (statement of David Wilson, prominent Vermont lobbyist and former Secretary of Administration, circulated to legislators during debate on Act 64, expressing concern that “Vermont is at risk of slipping into the same special interest swamp that has become our nation’s capital.”); Exh. Volume-III at E-0811-26 (press accounts of national level corruption). And when the Vermont Legislature considered the adoption of spending limits,

the signs were clear that Vermont was in danger of losing its tradition of a citizen legislature. The Governor's inaugural address expressed concern that, in the eight years between 1988 and 1996, the amount spent in the highest-spending Vermont State Senate campaign had more than doubled, from \$14,500 in 1988 to \$30,600 in 1996. Exh. Volume-III at E-0903. *See also* Exh. Volume-V at E-1701. Thus, even races for the "citizen legislature" in Vermont were beginning to consume amounts approximating the entire annual income of the average Vermont household. Exh. Volume-III at E-1740 (\$32,358 in 1996). For offices at the statewide level, the spending arms race has been even more pronounced. Exh. Volume-I at E-0092 (Floor Speech of Senator William Doyle). Such realities led Representative Marion Milne, a Republican, to voice concerns about

candidates who will do anything to raise money. What they have to offer is the same commodity as in Washington – access to the leaders, access to the full attention of those who are supposed to be our models of integrity. All for money.

Exh. Volume-II at E-0732 (floor speech). Senator Ready testified that as a result, ordinary people have begun to feel disengaged from politics -- that "[t]he big money controls everybody in Montpelier anyways. There's no reason to vote." Tr. IX-119.

Preserving citizens' faith that they are truly governed by the principle of one person, one vote – that wealth or access to wealth is not a prerequisite

to holding state office – is a state interest of the highest magnitude.

Stemming the arms race in campaign spending is necessary to protect that interests.

**2. *Buckley* should not be read to bar all consideration of political equality as a basis for campaign finance regulation.**

Despite the importance of these issues, *Buckley* itself dismissed the applicability of cases such as *Harper* and *Bullock*, 474 U.S. at 49 n. 55, and stated, in an often-quoted passage, that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” 424 U.S. at 49. Plaintiffs would read this statement in *Buckley* as establishing that the principle of equal political participation is permanently barred from discussion as a basis for campaign finance regulations.

As Justice Breyer pointed out in a recent discussion of this passage, however, “those words cannot be taken literally.” *Shrink*, 120 S. Ct. at 912 (Breyer, J., joined by Ginsburg, J., concurring). The Constitution, he points out,

often permits restrictions on the speech of some in order to prevent a few from drowning out the many – in Congress, for example, where constitutionally protected debate, Art. I., §6, is limited to provide every Member an equal opportunity to express his or her views. Or in elections, where the Constitution tolerates numerous restrictions on ballot access, limiting the political rights of some so as to make effective the

political rights of the entire electorate. *See, e.g., Storer v. Brown*, 415 U.S. 724 (1974).

*Id.*<sup>13</sup> As Justice Breyer explained, one valid basis for upholding limits on campaign contributions is that “such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. *Cf. Reynolds v. Sims*, 377 U.S. 533, 565 (1964) (in the context of apportionment, the Constitution ‘demands’ that each citizen have ‘an equally effective voice’).” 120 S. Ct. at 911 (Breyer, J., joined by Ginsburg, J., concurring). Accordingly, Justice Breyer emphasized, the Court’s approach should be informed by the fact that “constitutionally protected interests lie on both sides of the legal equation.” *Id.*

Other cases subsequent to *Buckley* confirm that the Court has not turned a blind eye to the harmful effects of concentrated wealth on the political process, even when considering restrictions on expenditures. In *Austin v. Michigan Chamber of Commerce*, the Court upheld a Michigan criminal statute preventing corporations from spending general treasury

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<sup>13</sup> Additional examples may readily be supplied. For example, courts do not allow attorneys representing wealthy interests to purchase the right to submit a brief twice as long as the opponent’s, even though this restricts the speech of some in order to magnify the voices of others. *See* C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, at 21-22 (1998); *The Supreme Court 1999 Term – Leading Cases*, 114 HARV. L. REV. 299, 307 (2000).

funds as independent expenditures in support of candidates in state elections. 494 U.S. 652 (1990). The Court found that Michigan had a compelling interest in combating a “different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.” 494 U.S. at 660. As one constitutional scholar writes, the *Austin* Court “squarely acknowledged – for the first time in constitutional discourse – that inequalities of private economic power tend to reproduce themselves in the political sphere and displace legitimate democratic governance.” Stephan Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1285 (1993).

There is further reason to doubt that *Buckley*’s statement bars all consideration of principles of equal political participation in considering campaign finance regulations. In fact, considerations of political equality lie at the heart of the state interest recognized as compelling in *Buckley* itself – the interest in deterring corruption and the appearance of corruption. As commentators such as Professor David Strauss have pointed out, the concern about financial corruption is derivative, because it is inexplicable without reference to the larger goal of political equality. David A. Strauss,

*Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1370-75 (1994). A politician's responsiveness to financial contributions is troubling at least in part, if not primarily, because citizens stand on a vastly unequal footing in their ability to secure a politician's responsiveness in that manner. In a world where all citizens had equal financial resources, and thus equal ability to purchase political influence through contributions, political donations would become an accurate proxy for political support. Explaining why the receipt of such contributions should be deemed "corrupting," rather than merely a reflection of democracy in action, would become far more difficult under such a scenario. (This assumes, of course, that political contributions do not enrich the candidate personally, but must be used only for campaigning; the problem of bribery through payments that enrich a candidate personally would remain.)

In the real world, however, what makes our concern about the corrupting potential of campaign contributions so natural and instinctive is precisely the fact that the economic resources of citizens are vastly different. When that is true, a candidate's greater responsiveness to wealthy donors at the expense of non-contributors is offensive to our concept of democracy. At bottom, then, a concern for equality of political access and influence among citizens is inextricably intertwined with the core state interest in

preventing corruption and its appearance recognized as compelling in *Buckley*. Strauss, 94 COLUM. L. REV. at 1371-73. By recognizing the prevention of corruption as a compelling interest, the Court was necessarily, if tacitly, recognizing the importance of the principle of political equality as well.

While some of *Buckley*'s language suggests a flat rejection of political equality as a value to be balanced in the constitutional analysis of spending limits, *Buckley* also contains at least some factually dependent analysis of the question. *Buckley*'s harshest language criticizing reliance on the equality principle was in its discussion of the \$1,000 limit on independent expenditures – a limit applicable, by definition, only to political spending by non-candidates carried out independently of any candidate's campaign. It was this restriction that *Buckley* referred to as “wholly foreign to the First Amendment.” 424 U.S. at 48-49. Cf. Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. at 47-48 (discussing distinction between caps on independent expenditures and caps on candidates' campaign spending).

By contrast, in discussing a different spending restriction – FECA's limits on overall campaign spending – the Court relied in part on factual, not merely doctrinal, assertions. The Court stated that “[g]iven the limitation on

the size 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." *Buckley*, 424 U.S. at 56. This is a factually contingent observation; a factual record demonstrating that the financial resources of a candidate may not be commensurate with the candidate's popular support could have prompted a different result. A further observation underlying the Court's rejection of overall campaign spending limits also was factual in nature: "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." 424 U.S. at 56-57.

Unlike the FECA regulatory scheme reviewed by the Supreme Court in 1976, the spending limits of Vermont's Act 64 apply only to candidates' overall spending, and not to spending of individuals or organizations that is independent of a candidate's campaign. *See* 17 V.S.A § 2805 *et seq.* (1999) Here, the record refutes the factual bases for the Supreme Court's holding that FECA's limits on overall candidate campaign spending were not justified by Congress's interest in equalizing the resources of candidates. First, candidates' campaign funds often have little relationship to the

candidate's actual support. Candidates raising similar amounts of money may have broadly different numbers of contributors, and candidates with similar numbers of contributors may raise very different total amounts. For example, plaintiff Steve Howard had fewer contributors in his 1996 State House campaign than in his 1992 race, yet raised nearly twice as much money in 1996. Exhs. Volume-IV at E-1467, E-1491 (61 contributions totaling \$4,091 in 1992 compared with 49 contributions totaling \$7,375 in 1996).

In addition, as the District Court specifically found, Act 64's limits on campaign spending will be effective in "[P]rotecting access to the political arena." 118 F.Supp. 2d at 483 (quoting *Colorado Republican*, 518 U.S. at 649-50 (Stevens, J., concurring)). Indeed, the limits include a unique feature not addressed in *Buckley* at all: Act 64 allows challengers to spend more than incumbents. See 17 V.S.A. § 2805(c). This directly addresses Buckley's concern about the possibility that challengers with less name recognition might not benefit from spending caps that place the same limits on challengers as on incumbents. See 424 U.S. at 56-57. Act 64, with its higher caps for challengers, will help to offset the traditional advantage enjoyed by incumbents. Tr. X-81-85 (Gross). In fact, plaintiffs' expert, Dr. John Lott proposed such higher spending caps for challengers in his writings

a decade ago, and conceded at trial that Vermont should be given credit for helping challengers to make campaigns more competitive. Tr. III-218-19 (Lott); Exh. Volume-V at E-1773 (article by Dr. Lott); Exh. Volume-V at E-1783 (article by Dr. Lott); Exh. Volume VI. at E-2201. The record also showed that Albuquerque, New Mexico, has maintained spending limits in mayoral campaigns since the mid-1970s, yet no incumbent has won re-election. Tr. X-87-88 (Gross).<sup>14</sup>

Constitutional precedents confirm that lower appellate courts do not necessarily overstep their bounds in recognizing that new factual realities may prompt a different analysis of the constitutionality of state enactments. The development and eventual repudiation of the *Lochner* doctrine presents one example. *Lochner v. New York*, 198 U.S. 45 (1905), established the substantive due process doctrine under which, in subsequent years,

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<sup>14</sup> It is short-sighted to assume that governmental action to protect the political sphere against economic inequalities can only endanger, and never promote, First Amendment values. See Cass Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 255, 273-277, 291-292 (1992); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1416 (1986). Indeed, following that argument to its logical conclusion would require a constitutional ban on all efforts to alleviate economic inequalities. After all, when state governments enact progressive income taxation schemes, they restrict the ability of the wealthy to use the taxed funds for political speech. Cf. Strauss, *Corruption, Equality and Campaign Finance Reform*, 94 COLUM. L. REV. at 1384. Yet few today would suggest that the risk of state misuse of power requires a total ban on such regulations in the name of individual liberty.

numerous statutes attempting to regulate economic conditions such as wage and hour laws, price regulations, and limits on business entry were invalidated by the courts. See William B. Lockhart, Yale Kamisar, Jesse H. Choper, & Steven H. Shiffrin, CONSTITUTIONAL LAW 351-353 (7th ed. 1991). Not until *Nebbia v. New York*, 291 U.S. 502 (1934), did the Supreme Court clearly break with the *Lochner* era by approving a far more deferential standard of review for economic regulations, upholding a New York regulatory scheme setting price controls for milk. In doing so, it affirmed the ruling of the Court of Appeals of New York, which had upheld New York's price controls as a valid exercise of legislative authority, despite the *Lochner* doctrine. *People v. Nebbia*, 262 N.Y. 259, 186 N.E. 694 (1933). The decision of the Court of Appeals recognized that "constitutional law is a progressive science", 262 N.Y. at 270, 186 N.E. at 699, and held:

[W]ith cheerful submission to the rule of the Supreme Court that legislative authority to abridge property rights and freedom of contract can be justified only by exceptional circumstances and, even then, by reasonable regulation only, and that legislative conclusions based on findings of fact are subject to judicial review, we do not feel compelled to hold that the 'due process' clause of the Constitution has left milk producers unprotected from oppression and to place the stamp of invalidity on the measure before us.

"The policy of noninterference with individual freedom," the court continued, "must at times give way to the policy of compulsion for the general welfare." 262 N.Y. at 272, 186 N.E. at 699. In concluding that New

York's regulations should be upheld, the Court of Appeals of New York did not purport to overrule *Lochner* nor its progeny, but recognized that emerging social conditions required a thoughtful rather than mechanical application of Supreme Court precedent in determining the constitutionality of the statute before the court.<sup>15</sup> *Cf. Nixon*, 120 S. Ct. at 911 (Breyer, J., joined by Ginsburg, J., concurring ) (noting that judicial review of campaign finance regulations properly calls for a balancing approach, and noting that *Buckley* “might be interpreted as embodying sufficient flexibility for the problem at hand”).

For all these reasons, states must be permitted to consider the compelling goal of political equality as an interest supporting reasonable limits on campaign spending.

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<sup>15</sup> Similarly, in one of the four cases consolidated before the Supreme Court in *Brown v. Board of Education*, 387 U.S. 483 (1954), the lower court had found that Delaware's segregated elementary schools violated the Fourteenth Amendment, although *Plessy v. Ferguson*'s “separate but equal” doctrine was still controlling, 163 U.S. 537 (1896). See *Belton v. Gebhart*, 32 Del. Ch. 343 (Del. Ch. 1952), *aff'd sub nom. Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), *aff'd sub nom. Brown v. Bd. of Education of Topeka*, 387 U.S. 483 (1954). In *Belton v. Gebhart*, Chancellor Seitz ruled that *Plessy* did not prevent him from finding a Fourteenth Amendment violation, because the plaintiffs' schools were not in fact equal to those provided to white children. 32 Del. Ch. at 350. In *dicta*, however, Chancellor Seitz suggested that the effects (both material and psychological) of segregation themselves created a comparatively inferior education for African American children, but found it unnecessary to rest his decision on that ground. *Id.* at 348-349.

**F. If *Buckley* does not permit states to consider the goal of political equality as a basis for campaign regulation, or otherwise requires invalidation of Vermont's expenditure limits, *Buckley* should be overruled.**

Defendant-Intervenors respectfully submit that, if *Buckley* must be overruled in order to permit Vermont to enforce its campaign spending limits, then the decision should, to that extent, be overruled. Defendant-Intervenors recognize, of course, that this Court does not have the power to overrule directly controlling Supreme Court precedent. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). It is not beyond the power of a lower court, however, to comment upon serious infirmities in a Supreme Court precedent. *See Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996) (criticizing, but following, Supreme Court precedent treating maximum resale price fixing as illegal per se under Sherman Act); *reversed*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and holding that rule of reason standard should apply).

All of the evidence canvassed above concerning the compelling justifications for Vermont's enactment of limits on campaign spending also supports the conclusion that, if *Buckley* forbids these limits, *Buckley* should to that extent be overruled. For example, the discussion in Part E, above, demonstrates that an absolute ban on spending limits would unjustifiably elevate the First Amendment right of candidates to deploy wealth above the

fundamental constitutional value of political equality.<sup>16</sup> A few additional comments are appropriate to explain the infirmities of a First Amendment interpretation that denies states the power to enact reasonable limits on candidates' campaign spending.

First, an absolute ban on state-enacted expenditure limits fails to recognize that regulation of the electoral process, and of candidates' activities within that process, stands on a different footing from state regulation of political speech generally.<sup>17</sup> First Amendment analysis should take into account the legitimate role that states must play in structuring the electoral process, and allow appropriate deference to a legislative determination that campaign spending limits are necessary to protect the integrity of the process. *Cf. Storer*, 415 U.S. at 730 ("[T]here must be a substantial regulation of elections if they are to be fair and honest");

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<sup>16</sup> See also J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM L. REV. 609, 625 (1982) (Political equality is "the cornerstone of American democracy." John Rawls, *POLITICAL LIBERALISM* 356-357 (1993) ("[t]he basic liberties constitute a family, and . . . it is this family that has priority and not any single liberty by itself."))

<sup>17</sup> Unlike the law at issue in *Buckley*, nothing in Act 64 limits the amounts that groups or individuals may spend, on their own, to promote a candidate. Vermont's law regulates only the expenditures of candidates and coordinated payments that are tantamount to contributions.

*Celebrezze*, 460 U.S. at 788-790 (applying balancing test, rather than strict scrutiny, to ballot access restrictions). As one commentator has explained:

By running for office, candidates enter a legally structured realm that offers clear benefits, including a chance to be elected. A possible view is that voluntary participation in this realm justifies restrictions on their expenditures. Candidates accept conditions designed to make the electoral contest open and fair in return for an opportunity to be listed on the ballot and, potentially, to be elected.

Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. at 47-48; *see also* Frederick Schauer and Richard H. Pildes, *Electoral Exceptionalism*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 103-120 (E. Joshua Rosencranz, ed., 1999).

Second, an absolute ban on campaign spending limits is unjustified because, as Justice Stevens has pointed out, “Money is property; it is not speech.”

Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results.

120 S.Ct. at 910 (Stevens, J., concurring). As Justice Stevens explains, “The right to use one's own money to hire gladiators, or to fund ‘speech by proxy,’ certainly merits significant constitutional protection. These

property rights, however, are not entitled to the same protection as the right to say what one pleases.” *Id.* See also Spencer A. Overton, *Mistaken Identity: Unveiling the Property Characteristics of Political Money*, 53 VAND. L. REV. 1235 (2000) (arguing that First Amendment doctrine must take into account the property characteristics of political money).

Third, and related to the preceding point, *Buckley* erred in rejecting the argument that restrictions on campaign spending should be analyzed under the more flexible First Amendment analysis applicable to speech-related conduct outlined in *United States v. O’Brien*, 391 U.S. 367 (1968). As demonstrated above, the facts presented at trial, and the nation’s experience as a whole in the 24 years since *Buckley*, refute *Buckley*’s assumption that a limit on campaign spending constitutes a direct restriction on expression. The more flexible analysis outlined in *O’Brien* better fits the reality that campaign finance regulations are regulations of conduct, not of speech.

Fourth, limitations on campaign spending, alternatively, should be analyzed as time, place, or manner regulations, rather than as direct restrictions on speech. See, e.g., *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding against First Amendment challenge an ordinance barring the use of truck-mounted loudspeakers on city streets); J. Skelly Wright, *Politics*

*and the Constitution: Is Money Speech?* 85 YALE L. J. 1001, 1010-11, n.41 (1976) (questioning *Buckley*'s effort to distinguish *Kovacs*).

**II. THE JUDGMENT SHOULD BE REVERSED TO THE EXTENT IT INVALIDATED ACT 64'S REGULATION OF "RELATED EXPENDITURES."**

Act 64 regulates "related expenditures" – that is, campaign expenditures by non-candidates that are coordinated with a candidate or group of candidates. 17 V.S.A. § 2809. For example, a donor who pays for a campaign ad drafted by a candidate would be treated as making a contribution to the candidate under § 2809, and that expenditure would also count against the candidate's expenditure limit. While upholding Act 64's regulation of "related expenditures" as campaign contributions, the District Court held the provision unconstitutional to the extent they were counted against the expenditure limit. 118 F.Supp. 2d at 492. Because, as shown above, Act 64's overall spending limits are constitutional, the District Court's judgment striking down this aspect of the "related expenditure" provision should also be reversed.

**III. ACT 64'S LIMITS ON POLITICAL PARTY CONTRIBUTIONS TO CANDIDATES ARE CONSTITUTIONAL.**

Defendant-intervenors adopt by reference the State Defendants' Brief on this point. Fed. R. App. P. 28(i).

**IV. ACT 64'S LIMITS ON OUT-OF-STATE CONTRIBUTIONS ARE CONSTITUTIONAL.**

Defendant-intervenors adopt by reference the State Defendants' Brief on this point. Fed. R. App. P. 28(i).

**V. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER SEVERAL CLAIMS ADVANCED BY PLAINTIFFS BECAUSE PLAINTIFFS LACK STANDING.**

The District Court held that plaintiffs had standing to challenge all of the contribution limits embodied in § 2805 of the Act, all of the spending limits in § 2805a of the Act, and the "related expenditures" provisions in § 2809 of the Act. 118 F.Supp. 2d at 475-76. The Court did not specifically address Defendants' and Intervenors' contentions regarding the speculative nature of the injury to some plaintiffs and the plaintiffs' lack of standing to bring claims on behalf of third parties. *Id.* Neither did the Court explain its holding that plaintiffs could challenge particular limits which are not directly applicable to any plaintiff, beyond rejecting the contrary view as "excessively meticulous." *Id.* at 475.

In order to have standing to challenge a provision of law, plaintiffs must suffer an injury that is “both concrete in nature and particularized to them.” *In Re United States Catholic Conference v. Baker*, 885 F.2d 1020, 1023-24 (2d Cir. 1989), citing *Allen v. Wright*, 468 U.S. 737, 755 (1984); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 482-87 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The injury must also be “actual or imminent, not ‘conjectural’ or ‘hypothetical’.” *Lujan*, 504 U.S. at 560. Constitutional challenges to campaign finance laws provide no exception: the courts carefully examine standing in these cases as well. See *Renne v. Geary*, 501 U.S. 312, 316-20 (1991); *Daggett*, 205 F.3d at 462-463.

None of the plaintiffs has established an injury that is “actual or imminent” and “concrete and particularized” from three provisions of the campaign finance reform law: the limits on spending in statewide campaigns at § 2805a(a)(1)-(3); the limits on spending in state senate and county-wide campaigns, at § 2805a(a)(4); and the limits on out-of-state contributions to political committees, at § 2805(c). In addition, various plaintiffs lack standing to litigate other claims that they assert.

Furthermore, there are no grounds for plaintiffs to be granted standing to litigate the claims of parties absent from this lawsuit. A ruling on these provisions should wait until suit is brought by a party with a sufficient stake in the matter to ensure the adversarial interest required for litigation.

*Singleton v. Wulff*, 428 U.S. 106, 113 (1976).

**A. Standing to Challenge Each of the Various Provisions Must Be Established Independently.**

In examining challenged campaign finance statutes, courts determine standing separately as to each provision of the statute. For example, the First Circuit recently ruled that plaintiffs lacked standing to challenge Maine's contribution limits on gubernatorial campaigns, while at the same time adjudicating plaintiffs' challenges to contribution limits for other offices. *See Daggett*, 205 F.3d at 462-463; *see also Russell v. Burris*, 146 F.3d 563, 567 (8th Cir. 1998), *cert. denied*, 525 U.S. 1145 (1999) (plaintiffs have standing to challenge limits on contributions to candidates and PACs but not limits on contributions to independent expenditure committees).

In determining the scope of plaintiffs' standing to challenge the constitutionality of a statute, courts have looked to the severability of statutory provisions, denying plaintiffs standing to challenge severable provisions that cause them no injury. As the Third Circuit has explained:

Courts considering constitutional challenges to statutes often analyze standing problems in terms of the severability doctrine....Severing statutes to limit standing promotes the twin goals of avoiding unnecessary constitutional adjudication and sharpening the presentation of the issues.

*Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 996-97 (3rd Cir. 1993), *cert. denied*, 519 U.S. 1113 (1997) (citing cases) (plaintiffs who were construction contractors had standing to challenge the constitutionality of a city set-aside ordinance, but only as it applied to construction contracts; plaintiffs could not challenge the ordinance as it applied to vending and service contracts because those provisions were severable); *see also Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir.), *cert. denied* 464 U.S. 1002 (1983) (member of county board of supervisors had standing to challenge state constitutional provision restricting the ability of state and local officeholders to seek federal office as it applied to plaintiff and other members of Boards of Supervisors, but not as it applied to holders of other state or local offices); *Smith v. Bentley*, 493 F. Supp. 916, 921 n. 5 (E.D. Ark. 1980) (plaintiff physicians had standing to challenge constitutionality of state abortion statute as it imposed sanctions on abortion providers, but provisions granting immunity to physicians refusing to perform abortions were severable and thus plaintiffs had no standing to litigate those provisions).

Like the challenged provisions in the above cases, the challenged provisions in the instant case are severable. Vermont law determines whether a given provision is severable, as this Court has noted in another case challenging Vermont's campaign finance reform legislation. *See Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000); *see also Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 59-60 (2d Cir. 1988) (applying New York law to determine severability).

Vermont law provides that “[t]he provisions of any act are severable. If any provision of an act is invalid, the invalidity shall not affect the other provisions or applications which can be given effect without the invalid provision or applications.” 1 V.S.A. § 215 (1999). Thus all Vermont acts are severable regardless of whether they contain a severability clause. In addition, Vermont case law has unwaveringly recognized the severability of its statutes. *See Veillux v. Springer*, 300 A.2d 620, 625 (1973)(quoting *United States v. Jackson*, 390 U.S. 570, 585-86 (1968); *see also Bagley v. Vermont Department of Taxes*, 500 A2d 223 (1985)(severing unconstitutional portion of tax credit statute); *State v. Stevens*, 408 A.2d 622, 627 (1979)(severing the words “or breath” from the phrase “by weight of alcohol in the person’s blood or breath.”).

Each of the limits at question in this lawsuit is clearly severable under Vermont’s liberal standard. The court in *Veillux* found severability where the severed provision was “a functionally independent part of the statute” and its elimination “in no way defeats the purpose” of the law in question. 300 A.2d at 625. Here, the limits on statewide races are not functionally dependent on the other limits; it would be well within the legislature’s capacity to impose any one of these provisions alone. *Cf. Russell*, 146 F.3d at 567.

Severability must be found unless it is apparent that the legislature intended otherwise. *Veillux*, 300 A.2d at 625; *see also Bagley*, 500 A.2d at 226. There is no reason to conclude the legislature would not wish to maintain any of these limits in question here separately from the rest.

**B. No Plaintiff in the Lawsuit has Standing to Challenge the Limits in 17 V.S.A. §§ 2805a(a)(1)-(3), 2805a(4), or 2805(c).**

The record demonstrates that plaintiffs have not established an actual or imminent injury from the statewide spending limits at 17 V.S.A. §§ 2805a(a)(1)-(3), the limits on state senate and countywide races at 17 V.S.A. § 2805a(4), or the limits on out-of-state contributions to political committees at 17 V.S.A. § 2805(c). A plaintiff seeking a remedy in federal court bears the burden of establishing the fact necessary to support standing, *Warth v. Seldin*, 422 U.S. 490, 518 (1975), and facts supporting standing, if

controverted, must be adequately supported by evidence at trial. *Lujan*, 504 U.S. at 561. Plaintiffs have not carried the burden of establishing injury from the provisions in question.

**1. No plaintiff suffers injury from the statewide spending limits.**

Not a single plaintiff can claim an actual or imminent injury from the limits on spending in statewide races at 17 V.S.A. § 2805a(a)(1)-(3). No plaintiff in this case ran for statewide office in 2000, and no plaintiff had any other than the most vague and speculative plans to run for statewide office in future.

Plaintiffs Landell, Brunelle, Patch, Randall, Kuusela, Nelson, Vermont Libertarian Party (VLP), and Vermont Republican State Committee (VRSC) do not allege that they were, or intended to be, candidates for statewide office in 2000 and therefore none can establish injury from these provisions.

A sole plaintiff, Steven Howard, claimed that he would have run for one of the lower statewide offices, state auditor, in 2000 but was deterred by the contribution and spending limits. However, Howard's mere assertion that he would have run, without more concrete plans, is insufficient to create an imminent or actual injury to him. In a similar context, the First Circuit held that plaintiffs lacked standing to challenge contribution limits where

they failed to show specific plans to donate in excess of the limits; plaintiffs' affidavits alleging they had given amounts over the limits in the 1998 campaign "failed to "provide enough specificity about future plans for contributions to display a real or even a threatened injury." *Daggett*, 205 F.3d at 463, citing *Lujan*, 504 U.S. at 560; *see also Russell v. Burris*, 978 F. Supp. 1211, 1217 (E.D. Ark. 1997) (plaintiffs lacked standing to challenge limits on contributions to independent expenditure committee because "plaintiffs' stated desire to contribute to independent expenditure committees is too conjectural to support a finding of credible threat of present or future prosecution), *aff'd in relevant part, Russell*, 146 F.3d at 567, *cert. denied*, 525 U.S. 1145 (1999).

Nor did Howard have more than speculative plans to run for any future office, legislative or statewide.<sup>18</sup> These kinds of vague intentions do not establish Howard's standing. The trial record amply demonstrates that Howard's injury from the statewide limits is merely conjectural and

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<sup>18</sup> Howard had briefly run for the statewide office of secretary of state in 1998, before the limits were in effect, but dropped out before the election. Tr. IV-205-10. Given the absence of any concrete plans at present, his past, non-viable, run for statewide office does not establish an imminent or actual harm from the statewide limits. *Daggett*, 205 F.3d at 463 (plaintiffs' contributions above the limits which were made before the limits became effective did not create the injury necessary for standing).

hypothetical, not actual or imminent, and therefore inadequate to support his standing to challenge those limits. *Lujan*, 504 U.S. at 560.

Even if Howard had standing to challenge the spending limit for the auditor's race, he could not claim injury from limits on races for governor, lieutenant governor, secretary of state, state treasurer, or attorney general. As discussed above, these limits are severable and each limit must be considered separately.

**2. No plaintiff has standing to challenge the limits on spending by candidates for state senate or countywide office.**

Plaintiffs Landell, Brunelle, Howard, Patch, Vermont Libertarian Party, Randall, Kuusela, Nelson, and VRSC lack standing to challenge 17 V.S.A. § 2805a(a)(4), which sets expenditure limits on candidates for the Vermont Senate or for county office. None of these plaintiffs, with the exception of Brunelle, showed that they were candidates for the Vermont Senate or for county office in 2000. Furthermore, none of these plaintiffs indicated that they had any more than the most vague and speculative plans to run for such an office in the future. They have not suffered an “injury in fact” and they, therefore, fail to satisfy the constitutional requirements for standing with respect to this provision. *See Daggett*, 205 F.3d at 462-63.

While Brunelle testified that he intended to be a candidate for the State Senate in 2000, he fails to show how this provision would adversely

impact his First Amendment rights. In all of his past campaigns, Brunelle spent much less than the limit set forth in Act 64 for candidates for the Vermont House. Exh. Volume-V at E-1755 (campaign finance report). For example, in 1994, as a challenger for a seat in the Vermont House, Brunelle spent \$436, *see id.* at E-1755, and in 1998, as an incumbent for the Vermont House, Brunelle spent only \$1,007.90. *See id.* at E-1756. In 2000, under Act 64, Brunelle could spend \$16,500 to run for a Chittenden County Senate seat. While he speculates that he needs to spend \$27,000 in order to have a chance to win, Exh. Volume-VII at E-2702 (Brunelle trial deposition), he fails to provide any specific explanation on how he arrived at such a figure and/or why his expenditures would increase exponentially from one year to another. Such unsupported speculation does not satisfy the “injury-in fact” requirement. *See In Re United States Catholic Conference*, 885 F.2d at 1023-24; *Daggett*, 205 F.3d at 462-63; *United States v. AVX Corp.*, 962 F.2d 108, 115 (1st Cir. 1992).

**3. No plaintiff has standing to challenge the limits on out-of-state contributions to political committees.**

The VRSC and the *Randall* plaintiffs -- Howard, Patch, Vermont Libertarian Party, and Nelson -- all lack standing to challenge the provision in 17 V.S.A. § 2805(c), which limits the amount of contributions a political committee may receive from out-of-state sources. Because this provision

applies only to political committees and their out-of-state donors, which none of these plaintiffs are, they cannot demonstrate an “injury in fact” from this provision. None of the *Landell* plaintiffs, including the Vermont Right to Life Committee-Political Committee (VRLC-PC) and Fund for Independent Expenditures (FIPE), challenged this provision. Therefore, no plaintiff has standing to challenge this provision.

**4. No plaintiff has standing to represent the interests of parties absent from this lawsuit challenging these provisions.**

Plaintiffs’ lack of standing to challenge the above provisions is not cured by any claim of injury to parties absent from this case. Parties normally may assert only their own legal interests rather than those of third parties. *Powers v. Ohio*, 499 U.S. 400, 410-411 (1991); *Warth*, 422 U.S. at 499; *Phillips Petroleum Co. v. Shults*, 472 U.S. 797, 804 (1985); *Valley Forge Christian College*, 454 U.S. at 474. This federal rule of standing stems from (1) a reluctance to adjudicate rights unnecessarily; (2) the recognition that a non-party may not actually wish to assert the claim in question; and (3) an appreciation that “third parties themselves usually will be the best proponents of their rights.” *Singleton*, 428 U.S. at 113-14; *see also Kane v. Johns Manville Corp.*, 843 F.2d 636, 643 (2d Cir. 1988).

While a court may relax these prudential considerations in certain First Amendment contexts, a litigant must still “have suffered an ‘injury in

fact,’ thus giving him or her a ‘sufficiently concrete interest’ in the outcome of the issue in dispute,” before raising that issue on behalf of non-parties.

*Powers*, 499 U.S. at 411; *see also Sierra Club v. Morton*, 405 U.S. 727, 737 n. 12, 740 n. 15; *Virginia v. American Booksellers Ass’n, Inc.*, 484 U.S. 383, 392-93 (1988).

In addition, there must be a hindrance to the absent party’s participation in the lawsuit severe enough to constitute a daunting barrier. *Powers*, 499 U.S. at 414. Where there is no such barrier, the third party’s absence from the suit is more likely due to disinterest rather than disability, and their interest may not be represented by another. *Singleton*, 428 U.S. at 116; *Miller*, 523 U.S. at 1445 (O’Connor, J. concurring); *Radio & Television News Ass’n v. District Court*, 781 F.2d 1443, 1448 (9<sup>th</sup> Cir. 1986). Thus, when there is no barrier to the third party, the litigant may represent only his own rights. *Kane*, 843 F.2d at 644, citing *Warth*, 422 U.S. at 499.

The VRSC claims to represent the interests of Republican candidates, among others, in challenging the limits at issue here. However, neither the VRSC nor any of the other organizational plaintiffs (VLP, VRLC-PC, or VRLC-FIPE) may represent the interests of non-parties to this lawsuit, because (1) these plaintiffs themselves suffer no cognizable injury from the

limits in question, and (2) the absence of parties suffering injury from these limits is not due to any barrier beyond the control of those absent parties.

None of the organizational plaintiffs can be injured by the campaign expenditure limits set forth in § 2805a, because these limits apply only to candidates for office. As for the limit on out-of-state contributions to political committees included in § 2805(c), only two of the organizational plaintiffs are political committees, VRLC-PC and FIPE, and neither of these plaintiffs have challenged this provision. Neither the VRSC nor the VLP are political committees, so they are not affected by this provision. While the VRSC claims that the Act overall impairs its ability to associate with Republican candidates, neither the candidate spending limits nor the limit on out of state contributions to political committees in any way restrict the VRSC's ability to contribute money to, or associate with, candidates. Therefore these provisions do not cause associational harm to the VRSC.

Even if the organizational plaintiffs could show that they suffered some injury from these provisions, they have not shown a barrier to third party participation in the lawsuit and thus may not represent third party interests. *See Powers*, 499 U.S. at 414; *Singleton*, 428 U.S. at 116; *Kane*, 843 F.2d at 644. Examining third party claims in an analogous context, the Supreme Court has said that a party committee may not assert the rights of

candidates absent from the lawsuit, without such an “obvious barrier” to the candidates’ participation. *Geary*, 501 U.S. at 20, citing *Powers*, at 414-415. No such barrier exists in this case.

In order to justify third party standing, the barrier to participation must be beyond the control of the non-party. *See Holdel v. Irving*, 481 U.S. 704, 711-12 (1987) (plaintiffs have standing to assert the rights of their deceased parents); *Carey v. Populations Servs. Int’l*, 431 U.S. 678, 684 (1977) (vendor has standing to challenge law on behalf of purchasers of contraceptives, whose desire to avoid publicity would deter them from defending their own rights); *Singleton*, 428 U.S. at 108 (physicians have standing to assert the rights of indigent women denied funding for abortion because imminent mootness prevented the women from bringing their claims); *NAACP v. Alabama*, 357 U.S. 449, 459 (organization can raise privacy rights of its members because participation by the members would destroy the very privacy they sought to protect.)

There is no evidence in this case of any such barrier preventing candidates or donors directly injured from the provisions in question from participating in this lawsuit. The VRSC has argued that unwelcome political consequences and the monetary expense from participating in the lawsuit deterred candidate participation. These are hardly the kinds of

barrier anticipated by the above cases. In any event, the former claim is entirely belied by the fact that a Republican candidate for Governor, William Meub, testified at trial, as did the campaign manager for Republican gubernatorial candidate Ruth Dwyer. As for the cost of participation, there has been no evidence that would-be parties were in any different financial position than the plaintiffs who did choose to participate.

None of the organizational plaintiffs can circumvent these third party standing requirements by claiming standing to sue on behalf of their members, for such organizational standing also requires cognizable injury to the organization itself. “This Circuit has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured.” *League of Women Voters v. Nassau County Board of Supervisors*, 737 F.2d 155, 160 (2d Cir. 1984).

An organization claiming an associational injury may litigate on behalf of its members. *Albany Welfare Rights Org. v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, *Lavine v. Albany Welfare Rights Organization*, 419 U.S. 838 (1974). However, as discussed above, the organizational plaintiffs cannot claim that the candidate spending limits cause this type of injury. The only plaintiffs who might claim associational injury from the

limits on out-of-state contributions to political committees, VRLC-PC and FIPE, do not challenge those provisions.

The VRSC's claim to associational harm is further undermined by the fact that its membership has shown no interest in challenging any provisions of the Act. No Republican candidates for state legislature informed the VRSC that Act 64 prevented their participation in the 2000 election. Tr. I-212 (Garahan). Republican County and Local Committees did not vote to initiate or support this lawsuit. Tr. I-226-27. Numerous Republican legislators voted in favor of the Act. Exh. Volume-I at E-91 (roll call vote of Senate); Exh. Volume-I at E -106 (roll call vote of House). One of the defendant-intervenors in this case, Marion Milne, is a Republican member of the General Assembly, and several witnesses for defendants and defendant-intervenors were Republicans, including Smith, Bristol, Hooper, and Brownell.

Finally, Landell alleges that she should be permitted to raise the rights of third parties to communicate with her. In order to have so-called "listener standing," a plaintiff must point to specific speech from a specific speaker that will be compromised by the challenged provisions. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (noting that a definite speaker existed who attested that but for statute

at issue he would advertise certain information); *Daggett*, 205 F.3d at 462-63 (finding no listener standing due to lack of real or threatened injury and noting that plaintiffs failed to point to specific speech that was being compromised by challenged provisions); *Dow Jones & Co. v. Simon*, 842 F.2d 603, 606-07 (2nd Cir. 1988) (finding listener standing because plaintiffs had satisfied both Article III requirements and prudential considerations and had pointed to willing speakers that were prevented from speaking due to a court-imposed gag order).

Landell does not have listener standing because she fails to point to specific speech from a specific speaker that will be compromised by these provisions. Exh. Volume-VII at E-2662-68 (Landell trial deposition). In the past, Landell received candidate information from a variety of news outlets and directly from the candidates. *See id.* at E-2642, E-2646, E-2649-50, E-2652, E-2654-59, E-2690-91. Landell fails to show with particularity that she will not be able to receive such candidate information in the future. *See id.* at E-2662-68. Furthermore, she fails to recognize that Vermont Right to Life's endorsements of candidates and their voter guides are independent expenditures that will not be affected by these provisions. *See id.* at E-2664-68.

### **C. Individual Plaintiffs Lack Standing To Assert Particular Claims.**

In addition to plaintiffs' lack of standing to challenge the above provisions, a number of plaintiffs lack standing to assert particular claims. As noted above, each plaintiff may only challenge those provisions that cause them actual or imminent injury. Applying this standard, only Randall has standing to sue under §2805a(a)(5), which sets expenditure limits on candidates for the Vermont House of Representatives. Only Randall, Kuusela, and the VRSC have standing to sue under § 2809(b), which provides that a "related expenditure" of over \$50 counts as an expenditure by a candidate. Only Randall and Kuusela have standing to sue under § 2805(c) with respect to out-of-state contributions accepted by candidates. Only VRSC has standing to sue under § 2805(c) with respect to limits on out-of-state contributions to political parties and § 2805(a) and (b) that set a limit on political party contributions to candidates. As discussed above, no plaintiff has standing to raise the claims of parties absent from this lawsuit.

#### **1. Expenditure Limits On Campaigns For Vermont House Of Representatives**

Plaintiffs Landell, Brunelle, Howard, Patch, Vermont Libertarian Party, Kuusela, Nelson, and Vermont Republican State Committee lack standing to challenge 17 V.S.A. § 2805a(a)(5), which sets expenditure limits on campaigns for the Vermont House of Representatives. All of these

plaintiffs, with the exception of Kuusela, failed to show that they were or intended to be candidates for the Vermont House of Representatives in 2000. Furthermore, none of the individual plaintiffs indicated that he or she had any more than the most vague and speculative plans to run for such an office in the future. They have not suffered an “injury in fact” and they, therefore, fail to satisfy the constitutional requirements for standing with respect to this provision. *See Daggett*, 205 F.3d at 462-63.

While Kuusela was a candidate for the Vermont House in 2000, he failed to show how the spending limits would adversely impact his First Amendment rights. Kuusela previously ran for the House in 1992, 1994, and 1998. The most he has ever spent in a campaign was in 1998, when, as a candidate for the Vermont House, Kuusela spent about \$1,550. Tr. III-21 (Kuusela). Under Act 64, Kuusela would be permitted to spend \$3,000. Unsupported speculation that he would like to spend more does not satisfy the requirement that Kuusela show an actual “injury-in fact.”

## **2. Limits on Related Expenditures**

Plaintiffs Landell, Howard, Patch, Vermont Libertarian Party, VRLC-FIPE, and Nelson lack standing to challenge the provision in 17 V.S.A. § 2809(b), which provides that a “related expenditure” of over \$50 counts as an expenditure by a candidate. None of these plaintiffs is a candidate or

contributor who makes and receives or desires to make and receive contributions that satisfy the definition of related expenditure. Thus, these plaintiffs fail to show that they have suffered an “injury in fact” with respect to this provision. *See, e.g.*, Tr. II-313 (Vermont Libertarian Party did not make any related expenditures on behalf of six or fewer candidates in 1998 and fails to show that it intends to make such expenditures in 2000); Exhs. Volume-VII at E-2437 (VRLC Executive Committee minutes); E-2438 (VRLC FIPE Policy LR-32); Tr. IV-124 (VRLC-FIPE does not make “related expenditures” on behalf of candidates).

### **3. Limits on Out-Of-State Contributions to Political Parties.**

Plaintiff Howard, Patch, Vermont Libertarian Party, and Nelson lack standing to challenge the provision in 17 V.S.A. § 2805(c), that limits the amount of contributions a political party may receive from out-of-state sources. Because this provision applies only to political parties, Howard, Patch, and Nelson are unaffected by it. In addition, the Libertarian Party does not actively solicit out-of-state contributions, Tr. II-36-37, and thus fails to show how it has been injured by this provision.

### **4. Limits on Out-Of-State Contributions to Candidates**

Plaintiffs Howard, Patch, Vermont Libertarian Party, Nelson, and VRSC lack standing to challenge the provision in 17 V.S.A. § 2805(c) that

limits the amount of contributions a candidate may receive from out-of-state sources. None of these plaintiffs is a candidate for office in 2000, nor have any of these plaintiffs indicated any more than the most vague and speculative plans to run for such an office in the future. Thus, these plaintiffs fail to show that they have suffered an “injury in fact” with respect to this provision. *See Daggett*, 205 F.3d at 462-63. Neither are any of these plaintiffs out-of-state donors wishing to contribute to Vermont candidates.

#### **5. Limits on Contributions From Political Parties to Candidates**

Plaintiff Vermont Libertarian Party lacks standing to challenge the provisions in 17 V.S.A § 2805(a) and (b) that set a limit on political party contributions to candidates. The Libertarian Party has never contributed money to candidates in amounts that exceed the limits established in §2805(b). Tr. II-30-31; Tr. IV-248. As of the time of trial, it has not engaged in any direct fundraising for the 2000 election cycle. Tr. II-27. The total amount in the Libertarian Party’s treasury ranged from \$0 to \$1,500 over the past year. Tr. II-28. Consequently, the Libertarian Party had no money in its coffers to be used for candidate contributions. Tr. IV-248. It suffers no “injury in fact” from the contribution limit.

## CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court reverse the judgment of the court below to the extent that it invalidated Act 64's expenditure limits, 17 V.S.A. § 2805a(a); Act 64's regulation of "related expenditures" as it relates to candidate expenditures, 17 V.S.A. § 2809(a)-(c); Act 64's limits on political party contributions to candidates, 17 V.S.A. §§ 2805(a)-(b); and Act 64's limits on out-of-state contributions, 17 V.S.A. §§ 2805(c).

They further request that the Court vacate the judgment, for lack of subject matter jurisdiction, as to those provisions with respect to which no plaintiff has standing, which include the limits on spending in statewide, state senate and countywide races at 17 V.S.A. §§ 2805a(a)(1)-(4) and the limits on out-of-state contributions to political committees at 17 V.S.A. § 2805(c). Additionally, each plaintiff's claims should be dismissed, for lack of standing, with respect to any provision of Act 64 from which that plaintiff suffers no injury, as discussed at Section V:C, above.

Respectfully submitted

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