00-9159(L)

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

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARCELLA LANDELL,

Plaintiff-Appellee,

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

Plaintiffs-Appellees-Cross Appellants,

v.

WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN, VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES MCNIGHT, KEITH W. FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND AND DEBORAH MARKOWITZ,

Defendants-Appellants-Cross-Appellees,

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.

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

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

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SUMMARY OF ARGUMENT

Reply Brief

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

This is the wrong lens through which to examine the reforms enacted by Vermont. Indeed, plaintiffs entirely ignore the most essential precondition for any effective political campaign. No campaign, no matter how well-funded, can be truly effective if the targets of all the spending –

the citizens – no longer believe in the integrity of their government. No campaign can be effective if citizens no longer believe that their vote has any significance compared to the dollars wielded by wealthy special interests. Focusing exclusively on whether the highest-spending candidates will be competitively disadvantaged by spending limits, plaintiffs are unable to explain what these candidates are competing for. Under any vision of democracy worthy of the name, our political system must offer more than the right of the highest-spending candidates to compete for the opportunity of doling out governmental favors to the interests capable of bankrolling the most expensive campaigns.

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

Contrary to plaintiffs' assertions, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) does not impose a *per se* bar against spending limits that serve these interests. *See* Part II, *infra*. Plaintiffs also err in asserting that

Vermont's spending limits are too low to permit effective campaigns. The district court's findings to the contrary were based not only on the substantial quantitative analyses of spending patterns over three recent election cycles, but also on the testimony of witnesses – including many of the plaintiffs themselves – confirming that the spending levels are more than adequate for vigorous, effective campaigns in Vermont. As demonstrated below, the Landell plaintiffs' assertions concerning the nature of an "effective" campaign in Vermont, and the funds needed to run such a campaign, distort the record in this case. *See* Part II, *infra*.

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

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[1] Plaintiffs also misapprehend the law and the factual record in this case in arguing that Act 64's limits on contributions to and by political parties and its limits on out-of-state contributions are unconstitutional. Intervenors

Response to Cross-Appeal

As demonstrated in Part IV, *infra*, Act 64's limits on contributions to candidates, § 2805 (a) and (b), were crafted by elected legislators familiar with Vermont's political realities. After extensive hearings, these officeholders found that elected officials give preferential response and access to large donors, and that large contributions pose real threats to public confidence in the state's electoral system. Exh. Volume-I at E-0095-96.

To deny the state's interest in curbing the influence of large contributions, plaintiffs ask the Court to discount a host of experienced witnesses who testified before the Legislature or at trial. Many, like Senate President Pro-Tem Peter Shumlin, were veteran politicians and successful fundraisers, sickened by the growing clout of money in the Vermont state house. During deliberations on the law, Shumlin confessed to a Senate panel, "I've got to tell you that I wish I could walk up and down this hall now as President Pro Tem and tell you that I know with a clear conscience that I'm not making decisions that are based upon that whole lot of money I raised." Exh. Volume-I at E0291. If the state is not entitled to act in

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adopt by reference the Response Brief of the State Defendants on these points, pursuant to Fed. R. App. P. 28(i).

response to a problem so sharply and authoritatively identified, it is hard to imagine when the state's interest would be sufficient.

To address this critical state interest in deterring corruption and its appearance, the Legislature set limits at amounts that are "considered by the legislature, candidates and officials to be large contributions," and that permit contributors adequately to express their opinions while allowing candidates to raise enough money to run effective campaigns. Exh. Volume-I at E-0096. In asking the Court to second-guess the judgment of Vermont's elected lawmakers as to the contribution levels needed for effective campaigning, plaintiffs ignore the Supreme Court's admonition that courts have no "scalpel to probe" the amount at which a contribution limit should be set to achieve its purpose of deterring corruption. *Buckley*, 424 U.S. at 21; *Nixon v. Shrink Missouri Gov't PAC*, 120 S.Ct. 897, 900 (2000). Deference to the legislature's choice of an appropriate limit is required unless the limit is "so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Shrink*, 120 S.Ct. at 909. The record decisively refutes any such conclusion as to the contribution limits enacted by Vermont.

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

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

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

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

The proposition that appellate courts owe no deference at all to lower court fact-finding in First Amendment cases is clearly inconsistent with Supreme Court and Second Circuit precedent. *See Bose v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499-500 (1984) ("Our

standard of review must be faithful to both Rule 52(a) and the rule of independent review"); *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989) (credibility determinations reviewed for clear error); *Ezekwo v. New York City Health & Hospitals Corp.*, 940 F.2d 775, 780 (2d Cir. 1991) (court must "give considerable deference to the district court's credibility assessments and to its determination as to what inferences should be drawn from the evidence in the record"); *Southside Fair Housing Committee v. City of New York*, 928 F.2d 1336, 1343 (2d Cir. 1991) (applying "clearly erroneous" standard to extent district court resolved disputed questions of fact at hearing). *See also Coogan v. Smyers*, 134 F.3d 479, 484 (2d Cir. 1998) (distinguishing between issues subject to *de novo* review and those reviewed for clear error).

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

I. VERMONT'S LIMITS ON CANDIDATE EXPENDITURES ARE CLOSELY DRAWN TO SERVE COMPELLING STATE INTERESTS AND SHOULD BE UPHELD.

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

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

Plaintiffs, however, fail to rebut Intervenors' key argument that *Buckley* rejected the anti-corruption rationale as a matter of *fact*, rather than as a matter of *law*. *See* Opening Brief at 9-10, 17. That is a critical distinction. If the necessity of spending limits to deter corruption was rejected as a matter of fact, rather than of law, then upholding the constitutionality of Vermont's spending limits does not require that *Buckley* be overruled. *See* Opening Brief at 15-16. Here, the factual record firmly establishes – as the district court found, 118 F. Supp. 2d at 482-83 – that

contribution limits alone have proved in inadequate to deter corruption. *Cf. Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (strict scrutiny should not be a standard "so rigid [as to] become a straightjacket that disables Government from responding to serious problems.").

The post-*Buckley* Supreme Court cases cited by plaintiffs, Landell Brief at 47-48; Randall Brief at 53-54, do not establish that limits on candidate's campaign expenditures are unconstitutional *per se*. *Colorado Republican Campaign Committee v. FEC* ("*Colorado Republican I*"), 518 U.S. 604 (1996), *FEC v. National Conservative Political Action Committee* ("*NCPAC*"), 470 U.S. 480 (1985), and *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"), deal with expenditures made by organizations or political parties *independently* of any candidate's campaign. Even if, *arguendo*, the cited decisions were read to reject the anti-corruption interest as a matter of law with respect to independent expenditures,[2] limits on *candidates*' expenditures stand on a different footing. *See* Opening Brief at

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[2] *Colorado Republican I* also indicates that the Court's ruling was dependent on the factual record before it. In discussing the lack of coordination between the candidate and the source of the expenditure, the Court said: "[the lack of coordination] prevents us from assuming, *absent convincing evidence to the contrary*, that a limitation on political parties'

56-57, and authorities cited therein. Vermont's Act 64 does not impose limits on expenditures made by individuals and organizations independently of candidates or their campaigns, and does not run afoul of the decisions which have invalidated such limits.

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

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

> If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine

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independent expenditures is necessary to combat a substantial danger of corruption of the electoral system." 518 U.S. at 617-18 (emphasis added).

> democratic process, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.

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

The Landell Brief states that *Nixon v. Shrink Missouri Gov't PAC*, 120 S. Ct. 897 (2000), "recently reiterated *Buckley*'s holding that spending limits are unconstitutional direct restraints on speech." Landell Brief at 47. That misstates the holding of *Shrink*. Justice Souter's decision for the majority in *Shrink* studiously declined to take on any issue beyond the constitutionality of Missouri's contribution limits under *Buckley*. 120 S. Ct. at 909. Its discussion of the Court's past treatment of the constitutionality of campaign expenditure limits, an issue not before the Court in *Shrink*, is *dicta*.

In sum, none of plaintiffs' authorities forecloses the constitutionality of limits on candidate campaign spending when the record – unlike that in *Buckley* – demonstrates that limits on candidate contributions are insufficient to deter corruption and the appearance of corruption. *Kruse v. City of Cincinnati*, 142 F.3d 907, 919 (6th Cir.), *cert. denied*, 525 U.S. 1001 (1998) (Cohn, D.J., concurring). The record here demonstrates that Vermont's spending limits are necessary to serve that compelling interest, and should be sustained.

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

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

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

stated that the interest must be rejected because *Buckley* struck down spending limits:

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

Id. at 916-917. The *Kruse* court's discussion simply does not advance the analysis, because it neglects the fact that *Buckley* did not directly consider the state interest in preserving the time of elected officials to govern. Significantly, the concurring judge in *Kruse* specifically disagreed with the majority on this point, noting that *Buckley* should not be read to foreclose the constitutionality of spending limits if the record demonstrated that limits were tailored to preserve the time of officeholders for governing. *Kruse*, 142 F.3d at 920 (Cohn, D.J., concurring) ("It may be that the interest in freeing officeholders from the pressures of fundraising so they can perform their duties . . . is compelling, and that campaign expenditure limits are a

narrowly tailored means of serving such an interest"). *See also* Opening Brief at 24.

The state interest in preserving the time of elected officials to govern clearly is distinct from an interest in holding down campaign spending merely because it is deemed wasteful or excessive. The former is based not on an arbitrary view of how much spending is "too much", but instead on the critical goal of assuring that officeholders can carry out the duties for which they are elected – a condition necessary to the proper functioning of government. "Legislators and aspirants for legislative office who devote themselves to raising money round-the-clock are not in essence representatives." Vincent Blasi¸ *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All,* 94 COLUM. L. REV. 1281, 1283 (1994). *Buckley* did not address this issue and should not be read as foreclosing states from protecting the time of officeholders to govern by instituting reasonable campaign spending limits. Moreover, although the pressures of fundraising for Vermont offices are not yet as intense as those experienced by federal candidates, Vermont should not be required to wait until its legislature is composed solely of full-time fundraisers before taking action. *Cf. Munro v. Socialist Workers' Party*, 479 U.S. 189, 195-96 (1986) (rejecting requirement that "a State's political system sustain some level of damage before the legislature could take corrective action" in regulating ballot access).

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

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

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

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

NAACP v. Jones, 131 F.3d 1317 (9th Cir. 1997), *cert. denied*, 525 U.S. 813 (1998), cited by the Randall plaintiffs, Brief at 60 n.5, is inapposite. *NAACP v. Jones* merely held that the state was not constitutionally *required* to provide public financing for state election campaigns. The decision did not confront the issue presented here: whether a state may voluntarily act to protect equal access to the political system by establishing reasonable spending limits. There are many compelling interests that states are entitled to recognize even though they are not constitutionally compelled to do so. For example, states may ban electioneering near a polling place consistent with the First Amendment, *Burson v. Freeman*, 504 U.S. 191 (1992), although they are not constitutionally required to do so.

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

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

As demonstrated in the Defendant-Intervenors' Brief, 26-34, and in the State's Brief, 42-54, the record overwhelmingly demonstrates that candidates will be able to communicate effectively with voters and run vigorous campaigns under Act 64's spending limits. *See also Landell*, 118 F. Supp. 2d at 471. Contrary to plaintiffs' contentions, these findings were based not only on analyses of average spending levels, but on testimony of

individual witnesses – including many of the plaintiffs themselves – confirming that vigorous, effective campaigns can be run under Act 64's limits. Plaintiffs' myopic focus on a tiny subset of the highest-spending races cannot overcome the extensive evidence that the limits are appropriately tailored.

1. Plaintiffs' Focus on Only the Highest-Spending Elections Is Inherently Flawed.

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

The record overwhelmingly confirms that higher and higher spending levels will simply deter more and more potential challengers from entering the political arena. Opening Brief at 37-45. While that might indeed

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

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

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

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

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[4] A number of the Republican candidates McNeill identified as potentially harmed by spending limits actually *lost* their election in 1998 to candidates who outspent them. For example, Susan Sweetser and Dennis Delaney lost their Chittenden County senate races while being outspent by James Leddy and Janet Munt, who both won. Exh. Volume-VII, at E-2355, Col. H.

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

It adds nothing to the analysis for plaintiffs to declare that only the select handful of races they rely upon should be deemed "competitive." They merely ask the Court to assume that "competitive" races are those in

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Similarly, Republican candidates Harvie, Welch and Tully all lost their races for Windsor County senate seats after being outspent by incumbent Ben Ptashnik. *Id*. at E-2358, Col. H. It is difficult to argue that these candidates would have been harmed had their opponents *not* been able to outspend them.

which the most money was spent.[5] These assumptions are unwarranted. Indeed, nine House challengers defeated incumbents in 1998 while spending less than $2,000, and two of them spent less than $500. Exh. Vol.-III at E-0945 (Gierzynski Report).[6] It defies logic to suggest that these races should not be deemed "competitive", and yet plaintiffs would leave them out of the analysis simply because they were not high-spending races.

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

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

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

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

In *Nixon v. Shrink Missouri Gov't PAC*, the Supreme Court rejected the contention, similar to that advanced by plaintiffs here, that any reduction in the funds available to run a candidate's campaign creates a violation of that candidate's First Amendment rights. The Court in *Shrink* was willing to assume, for the sake of its decision, that the campaign contribution limits at issue there would affect respondent Fredman's ability to run an effective campaign, but held that the constitutionality of the limits could not be judged based on such a narrow focus. "[A] showing of one affected individual does not point up a system of suppressed political advocacy that would be unconstitutional under *Buckley*." 120 S. Ct. at 900; *see also id.* at 913 (Breyer, J., concurring) (campaign finance laws will always have an adverse impact on some candidates). *Cf. Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 215 (1996), (examining national averages to determine whether FCC's must-carry regulations unduly burdened First Amendment rights, and turning aside cable companies' argument that a burden affecting any substantial number of cable operaters rendered the regulations invalid).

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

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

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

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

With respect to Vermont House elections, plaintiff Donald Brunelle's *maximum* expenditure in any of his past House campaigns was $1,007. In one year, he ran successfully while spending $437. Exh. Volume-V at E-1755. Brunelle did not testify that his past campaigns were ineffective; to the contrary, he testified there was "no question in my mind" that the voters understood his views and those of his opponents, and chose to support his opponents. Exh. Volume-VII at E-2700. Plaintiff George Kuusela spent a *maximum* of $1,550 on his past House campaigns; the new limits allow him to spend $3,000, nearly double that amount. Tr. III-7-8, 26. There is no evidence that Kuusela could even raise campaign funds in excess of $3,000. Further, although plaintiff Steve Howard criticized the spending limits for House races, he himself ran a successful race for the House as a 22-year-old,

non-incumbent candidate in 1994, while spending only $1,700. Tr. IV-158, 187.

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

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

Plaintiffs attempted to overcome Meub's testimony by bringing forward another witness, Steve Howard, who had also run for Senate in Rutland County. Howard spent about $24,000 in his 1998 Rutland County

race, Tr. 162-163, and claimed he would have needed $30,000 -$50,000 to wage an effective campaign.[7] The District Court's decision to treat the testimony of one plaintiff witness, William Meub, as more reliable on the issue of Vermont Senate campaign costs than that of another plaintiff, Howard, is clearly the kind of credibility determination to which this Court owes deference. *See also* Tr. IV-206-207; Exh. Volume-V at E-1869-E-1870.

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

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

1994, Tr. I-135, although Carroll also spent only slightly over $200,000. Exh. Volume-IV at E-1462.

3. Plaintiffs' "objective" definition of an effective campaign does not establish that Vermont's limits are unconstitutionally low.

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

Of course, there is no quarrel about the fact that candidates need to communicate with voters. But there was overwhelming evidence from persons familiar with elections for Vermont state office – unlike Johnston – that such communication can be carried out inexpensively in Vermont state elections.

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

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

Tr. II-72 (emphasis added).[8] A voter who each day drives by a lawn sign saying "Vote Jones for Lower Taxes" receives the candidate's message more

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

than five times in just one week. *See also* State Defendants' Opening Brief at 44-45 (noting witnesses' testimony, including that of plaintiffs, describing the prevalence of inexpensive methods of reaching voters in Vermont); Randall Brief at 58 ("many candidates without [financial] means are able to run effective campaigns" in Vermont).

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

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[9] Plaintiffs relied heavily on the testimony of witnesses such as Kathleen Summers, who has never lived in Vermont, never served in office in Vermont, and began involvement in her very first Vermont election campaign shortly before the trial; and Darcie Johnson, who has worked on

Further, the testimony demonstrates that certain types of inexpensive contacts with voters are more effective than any number of repetitions of more expensive but passive communications such as television ads. Direct voter contact by a candidate or a political party – in contrast to passively viewing an advertisement – significantly increases voters' participation, their interest in the election, their concern about the outcome and their ability to place the candidates on ideological scales. Tr. X-56-57, 61-62; Exh. Volume-III at E-1338-62 (Gross report). *See also* Intervenors' Brief at 31-33; State's Brief at 35-40. George McNeill acknowledged that voters in many districts expect to see personal campaigning, such as door-to door

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only one Vermont state campaign and draws her experience from her work on campaigns for U.S. Senate and House of Representatives. Tr. IV-99, Tr. I-119-121. The State and Intervenor witnesses, on the other hand, had extensive experience working in Vermont state campaigns. For example, Senator Cheryl Rivers, a lifelong resident of Vermont, has served in the Senate for the past ten years, where she chairs the Finance Committee. In addition to her five Senate campaigns, she has worked on numerous other Vermont campaigns including Jerome Diamond's, Madeline Kunin's, and Peter Welch's campaigns for governor; and Donald Hooper's and Deborah Markowitz's campaigns for Secretary of State. Tr. VII-53-55. Senator Elizabeth Ready had been a State Senator for 12 years, was running for state-wide office at the time of trial, and is a lifelong resident of Vermont. Tr. IX-83. *See also* Tr. V-12-13 (describing campaign experience of Donald Hooper); Exh. Volume-IV at E-1343 (campaign experience of Peter Brownell); Tr. VIII-19 (campaign experience of Peter Smith); Tr. IX-42 (campaign experience of Gordon Bristol). These are only some of the experienced witnesses who testified that the contribution and spending limits will permit effective campaigns for Vermont office.

campaigning and passing out literature, and that this is an important way that candidates can be effective and get their issues, their name and their philosophy out. Tr. II-127-128. *See also* Exh. Volume-V at E-1841-E-1842 (Fiorillo); Tr.VII-17-18 (Young).

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

The final point ignored by plaintiffs is that effective political campaigns cannot be conducted, even with unlimited funds, if most eligible voters are so distrustful of and alienated from the political process that they see no point in voting. The Intervenors' Opening Brief extensively canvassed the record evidence establishing that high-spending campaigns are often detrimental to the goal of an informed, politically active citizenry, Opening Brief at 30-34, and that unlimited spending serves to discourage

electoral competition and destroy citizens' faith in the efficacy of their vote, *id.* at 37-44. Restoring citizens' faith that their government is controlled by the votes of average citizens and not the dollars amassed from the wealthiest interests is the fundamental pre-condition for any effective political campaign. Vermont's spending limits are closely drawn to serve that critical goal and should be upheld by this Court.