UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: May 7, 2001 Decided: August 7, 2002)

Docket Nos. 00-9159(L), 00-9180(Con), 00-9231(xap), 00-9139(xap), and 00-9240(xap)

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.—

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,

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

MARKOWITZ,

Defendants-Appellants-Cross-Appellees.

B e f o r e :

WINTER, STRAUB, and POOLER, *Circuit Judges*.

Appeal from the entry of a judgment by the United States District Court for the District of Vermont (William K. Sessions, III, *Judge*), reviewing the constitutionality of Vermont's Act 64, which imposes expenditure and contribution limitations on campaigns for state office. We hold that Vermont's expenditure and contribution limits are constitutional, but that Vermont's attempt to limit contributions from out-of-state sources is unconstitutional. We also remand for further proceedings on Act 64's effects on political action committees that do not contribute to candidates and its effects on money transfers between a political party's national and local affiliates.

The District Court judgment is affirmed in part, vacated in part, and remanded for further proceedings.

Judge Winter dissents in part in a separate opinion.

TIMOTHY B. TOMASI, Assistant Attorney General, Montpelier, VT, (Richard A. Johnson, Jr., Christopher G. Jernigan, Assistant Attorneys General, Office of the Attorney General, William H. Sorrell, Attorney General, Montpelier, VT, of counsel), for *Defendants-Appellants-Cross-Appellees William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono. Dan Davis, Robert L. Sand, and Deborah Markowitz* .

BRENDA WRIGHT, National Voting Rights Institute, Boston, MA, (Bonita Tenneriello, John C. Bonifaz, Gregory G. Luke, National Voting Rights Institute, Boston, MA; Peter F. Welch, Welch, Graham & Mamby, Burlington, VT; of counsel), for *Intervenors-Defendants-Appellants-Cross-Appellees 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 Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria Thompson.*

MITCHELL L. PEARL, Langrock Sperry & Wool, LLP, Middlebury, VT (Peter F. Langrock, Langrock Sperry & Wool, LLP, Middlebury, VT; Joshua R. Diamon, Diamond & Robinson, Montpelier, VT; David Putter, Montpelier, VT; Mark J. Lopez, American Civil Liberties Union, New York, NY; American Civil Liberties Foundation of Vermont; of counsel), for *Plaintiffs-Appellees-Cross-Appellants Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and Vermont Libertarian Party.*

JAMES BOPP, JR., Bopp, Coleson & Bostrom, Terre Haute, IN, (James R. Mason, III, Eric R. Bohnet, Aaron Kirkpatrick, Bopp, Coleson & Bostrom, Terre Haute, IN, of counsel), for *Plaintiffs-Appellees-Cross-Appellants Donald R. Brunelle, Vermont Right to Life Committee, Inc., Vermont Republican State Committee, Vermont Right to Life Committee-Fund for Independent Political Expenditures, and Marcella Landell.*

JANE R. ROSENBERG, Assistant Attorney General, Hartford, CT, (Eliot D. Prescott, Assistant Attorney General, Richard Blumentahal, Attorney General, Hartford, CT, of counsel), for *Amici States of Colorado, Connecticut, Maryland, New York, and Oklahoma*.

GILLIAN E. METZGER, Brennan Center for Justice at New York University School of Law, New York, NY, (Nancy Northup, Brennan Center for Justice at New York University School of Law, New York, NY, of counsel), for *Amicus Brennan Center for Justice at New York University School of Law*.

STRAUB, *Circuit Judge*:

During his 1997 inaugural address, Vermont Governor Howard Dean offered the Vermont General Assembly a moment of telling candor: "As I've said before, money does buy access and we're kidding ourselves and Vermonters if we deny it. Let us do away with the current system." The General Assembly responded by promulgating Act 64, a comprehensive campaign finance reform package. The testimony and statements made during the General Assembly's debate demonstrated that Vermont lawmakers were concerned with more than just the quid pro quo corruption that preoccupies much of campaign finance reform. Typically, this fear of corruption has involved the danger that politicians will sell their votes for campaign funds. The Vermont discussion highlighted something else that public officials can, and apparently do, offer in exchange for funds: time and access. The General Assembly, together with the State's chief executive, concluded that Vermont needed limitations governing its campaigns for state office with respect to expenditures as well as contributions.

This appeal arises from a consolidated suit which brings a First Amendment challenge to key sections of Act 64. The plaintiffs have argued that Vermont's reform violates the United States Constitution's First Amendment, which guarantees that citizens will be free to speak and associate in the political realm. At the conclusion of a bench trial, the United States District Court for the District of Vermont enjoined the enforcement of Act 64's limitations on expenditures, limitations on gifts by non-resident contributors, and limitations on contributions by political parties to candidates. The District Court upheld all other contribution limitations, including limits of between $200 and $400 on contributions to candidates by individuals and political action committees, limits of $2000 on contributions that political parties and political

action committees may accept, and regulations treating coordinated expenditures as contributions.

All parties have appealed that decision. We are therefore asked to determine whether the First Amendment rights of free speech and political association forbid each of the challenged provisions, including Vermont's campaign expenditure limitations, the contribution limits as applied to candidates, political parties and political associations, the limit on contributions by non-residents, and the regulation of coordinated expenditures by political parties.

For the reasons set forth, we affirm in part, and vacate and remand in part.

Regarding the expenditure limitations, we hold that Vermont has established that such limitations serve a sufficiently strong government interest and are narrowly tailored to permit effective campaigns. In particular, Act 64's expenditure limitations serve to safeguard Vermont's democratic process from the corrupting influence of excessive and unbridled fundraising. The evidence considered by the District Court and the Vermont legislature demonstrates that, absent expenditure limitations, the fundraising practices in Vermont will continue to impair the accessibility which is essential to any democratic political system. The race for campaign funds has compelled public officials to give preferred access to contributors, selling their time in order to raise campaign funds. We therefore vacate the District Court's injunction and remand for further proceedings.

Regarding the contribution limitations, we hold that all of Vermont's provisions limiting the size of contributions survive exacting scrutiny, including the treatment of a third party's related expenditures as contributions and the application of contribution limitations to political party donations to candidates. We thus affirm the District Court on this issue in part, but vacate

and remand for further proceedings insofar as the District Court's injunction prohibits enforcement of the political party limit. We also vacate the judgment and remand for further proceedings on Act 64's regulation of plaintiff Vermont Republican Right to Life Committee and its regulation of funds transfers from national to state and local political party entities.

Finally, we affirm the District Court's holding that the First Amendment forbids Vermont's attempt to limit campaign contributions by non-residents to no more than 25 percent of the total contributions received. Vermont has asserted no government interest sufficient to justify such a rule.

BACKGROUND

In 1997, Vermont passed a comprehensive campaign reform act known as Act 64. 1997 Vermont Campaign Finance Reform Act, codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 ("Act 64" or "the Act"). Among other things, the Act controls the flow of money into and out of political campaigns and regulates the receipt of money by political organizations and candidates. A number of Act 64's most significant provisions have been challenged in this appeal. Act 64 establishes contribution and expenditure limits for those running for state offices. It also caps the size of contributions which political parties and political action committees may accept. Additionally, the Act requires that all state candidates, political parties, and political action committees ("PACs") receive no more than 25 percent of their funds from non-Vermont sources.

As enacted, Act 64 is a comprehensive campaign finance reform package, regulating contributions, expenditures, and disclosures related to candidates for state office in Vermont and political organizations that participate in Vermont elections. Section 2805a limits the

expenditures that a candidate for office may make during a two-year election cycle. Candidates for statewide office are restricted to varying amounts depending on the position sought, with a candidate for governor limited to $300,000, for lieutenant governor to $100,000, and other statewide offices to $45,000. *See id.* at §§ 2805a(a)(1)–(3). Candidates for state senator and county office are limited to $4000, with state senators permitted an additional $2500 per seat in multi-seat districts. *See id.* at § 2805a(a)(4). Candidates for state representative in single member districts can spend no more than $2000, and those in two member districts no more than $3000. *See id.* at § 2805a(a)(5). Incumbent candidates may spend only 85 percent of the permitted amounts, except for incumbents of the General Assembly who may spend 90 percent. *See id.* at § 2805a(c).

The Act also limits the size of contributions which candidates, political committees, and political parties may receive from a single source during a two-year election cycle. Candidates for state representative or local office may accept no more than $200 from a single source, political party, or political action committee. *See id.* at § 2805(a). Slightly higher limits apply to candidates for state senate or county office ($300) and to candidates for statewide office ($400). *See id.* Political action committees and political parties may accept no contribution greater than $2000. *See id.* For the purpose of all of these contributions limits, a political party's state, county, and local affiliates count as a single unit. *See id.* at § 2801(5).

The Act further imposes limits on the source of such contributions. Although candidates, political parties, and political action committees may accept contributions from out-of-state residents and political organizations, the sum of such amounts may not exceed 25 percent of the total contributions received. *See id.* at § 2805(c).

Finally, the Act treats coordinated expenditures by third parties as both contributions to a candidate (subject to the applicable contribution limits) and expenditures by the candidate (counted against the candidate's permissible budget). *See id.* at §§ 2809(a)–(b). The Act creates a rebuttable presumption that expenditures made by political parties or political action committees that recruit or endorse candidates are related expenditures if they primarily benefit six or fewer candidates. *See id.* at § 2809(d).

In this appeal, we are asked to assess the constitutionality of each provision. The current suit was consolidated from three separate civil actions. On May 18, 1999, Marcella Landell, Donald R. Brunelle, and the Vermont Right to Life Committee, Inc., sued the Vermont Attorney General and Vermont's fourteen state's attorneys ("Vermont"). On August 13, 1999, Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch, and the Vermont Libertarian Party, and then on February 15, 2000, the Vermont Republican State Committee, brought two separate suits. The remaining defendants, including the Vermont Public Interest Research Group, the League of Women Voters of Vermont, and numerous members of Vermont's General Assembly (collectively "Defendant-Intervenors"), successfully intervened in the consolidated action.[1]

The plaintiffs in this case have challenged these provisions of Act 64.[2] They argue that

---

[1] The defendants include a large number of individuals, including the Vermont Attorney General, the Vermont State's Attorneys, and the Vermont Secretary of State (collectively "Vermont"). A number of interested parties, including the Vermont Public Interest Research Group and the League of Women Voters of Vermont, successfully intervened.

[2] Plaintiff Neil Randall is an incumbent representative in the Vermont legislature. Plaintiff George Kuusela is chairman of the Windham County Republican Party and has run for state legislative office. Plaintiff John Patch is chair of the Chittenden County Democratic Party and has plans to run for State Senate. Plaintiff Steven Howard was previously a candidate for State Auditor and a former state representative. Plaintiff Libertarian Party, a political party, is a "third-party" in Vermont and ran 44 candidates for office in 1998. Plaintiff Jeffrey Nelson is a longtime resident of Vermont and a financial supporter of the Republican Party. The plaintiffs also include the Vermont Right

the provisions unconstitutionally infringe their rights to free speech and political association. Specifically, the plaintiffs challenge the Act's expenditure limits on candidate campaigns; its contribution limits of $200, $300, and $400 to candidates by individuals, political action committees, and political parties; its contribution limits of $2000 to political action committees and political parties; its treatment of "related expenditures" by third parties as contributions to and expenditures by candidates; and its overall limit on the percentage of contributions that may come from out-of-state sources.

The District Court held a ten-day bench trial between May 8, 2000 and June 2, 2000. An array of former and current public office holders, private citizens, and electoral experts testified as to Vermont's interest in campaign finance legislation, the history of elections and campaign finance reform in Vermont, the cost of campaigning in Vermont, and the likely effect of Act 64's challenged provisions on Vermont races, candidates and political actors.

The District Court gave "considerable deference" to the General Assembly's findings of fact, and supplemented those findings with evidence adduced at trial. As the District Court noted, the Vermont General Assembly promulgated Act 64 after extensive legislative consideration. Numerous committees considered the Act, holding over 65 hearings with more than 145 witnesses testifying.

The General Assembly closely investigated the history of campaign financing for state races by examining campaign finance summaries for various Senate, House, and statewide races during the period 1978–1996 and reports of spending and contribution patterns in Vermont races.

---

to Life Committee, the Vermont Republican State Committee, and various additional individuals.

Members of the General Assembly analyzed the current status of Vermont's campaign finance law, including the disintegration of Vermont's voluntary expenditure limits. They also spoke with a range of experienced candidates and experts who provided testimony and data regarding the cost of campaigning, including the cost of travel, staff, materials, mailings, phone calls, and television and radio advertisements. Some of these witnesses described the widespread use of manipulative contribution devices, such as "bundling," which enable special interests to direct large quantities of money by way of individual contributions to particular candidates. Polls demonstrated that citizens held deep reservations and suspicions about the influence of money on the political system, particularly the influence of large contributions. Some witnesses provided testimony detailing the role that big donors have played in advocating or blocking particular pieces of legislation in Vermont.

The evidence adduced in those hearings demonstrated broad and powerful support among the Vermont electorate for fundamental reform to the state campaign financing scheme. These legislative hearings culminated in passage of the Act by an overwhelming majority and with strong bipartisan support.

Based on these hearings, reports and data, the General Assembly set forth specific findings which, in its view, indicated the need for comprehensive reform that includes contribution and expenditure limitations in Vermont electoral campaigns:

> The General Assembly finds that:
> (1) Election campaigns for statewide and state legislative offices are becoming too expensive. As a result many Vermonters are financially unable to seek election to public office and candidates for statewide offices are spending inordinate amounts of time raising campaign funds.
> (2) Some candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in

preference to those who make small or no contributions.
(3) In the context of Vermont, contributions larger than the amounts specified in this act are considered by the legislature, candidates and elected officials to be large contributions.
(4) 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.
(5) Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors.
(6) In the context of Vermont, contributions scaled in proportion to the size of the electoral district of the office and up to the amounts specified in this act adequately allow contributors to express their opinions, level of support and their affiliations.
(7) In the context of Vermont, candidates can raise sufficient monies to fund effective campaigns from contributions no larger than the amounts specified in this act.
(8) Limiting large contributions, particularly from out-of-state political committees or corporations, and limiting campaign expenditures will encourage direct and small group contact between candidates and the electorate and will encourage the personal involvement of a large number of citizens in campaigns, both of which are crucial to public confidence and the robust debate of issues.
(9) Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens.
(10) Citizen interest, participation and confidence in the electoral process is lessened by excessively long and expensive campaigns.
(11) Public financing of campaigns, conditioned on an appropriate number of qualifying contributions, will increase citizen participation and will limit the time spent soliciting contributions, and will reduce the need of elected officials to respond to, and provide access to, contributors. As a result candidates will be freed to devote more time and energy to debate of the issues and elected officials will be able to spend more time responding to constituents and to performing their official duties.
(12) Public financing of campaigns, coupled with generally applicable contribution and expenditure limitations, will level the financial playing field among candidates and provide resources to independent candidates, both of which will increase the debate of issues and ideas.
(13) In Vermont, campaign expenditures by persons who are not candidates have been increasing and public confidence is eroded when substantial amounts of soft money are expended, particularly during the final days of a campaign.

> (14) Identification of persons who publish political advertisements assists in enforcement of the contribution and expenditure limitations established by this act. (15) Because it is essential for all candidates to have their names and positions on issues known to the electorate and because incumbents have a substantial advantage in these areas, public grants and campaign expenditures must be reduced for incumbents.

1997 Vt. Laws P.A. 64 (H. 28). On June 26, 1997, Vermont's Governor signed Act 64 into law.

Although the District Court found that Vermont had generally demonstrated several compelling justifications for Act 64's comprehensive reform of the campaign finance system, the court concluded that some of Act 64's provisions violated the First Amendment of the United States Constitution. With the exception of the expenditure limitations, the District Court applied the standard of review of "exacting scrutiny," inquiring whether the provision is narrowly tailored to serve a sufficiently important government interest. With regard to the expenditure limits, the District Court interpreted *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), as forbidding such limitations *per se* and held that any contrary decision would violate the doctrine of *stare decisis*. The Court rejected the expenditure limitations despite its findings that Vermont had established several compelling interests in their favor, namely: (1) freeing office holders from the requirements of excessive fundraising so that they can perform their duties; (2) preserving faith in democracy; (3) protecting access to the political arena for those unable to access large sums of money; and (4) diminishing the importance of repetitive 30-second commercials. Despite holding that the expenditure limitations are illegal under *Buckley*, the District Court did find that the expenditure limits were narrowly tailored and would permit effective campaigning.

The District Court upheld the provisions imposing limitations on amounts that

individuals may contribute to political campaigns, Vt. Stat. Ann. tit. 17, §§ 2805(a)–(b). The District Court found that the Vermont provision, like the statutory provision upheld in *Buckley*, served the compelling government interest in preventing actual and perceived corruption in the political system. As evidence of the existence of such an interest, the District Court relied on citizen polls, comments by public officials, and media accounts of citizen concern with the state of the political system, as well as direct testimony from citizens regarding their views of the political systems. The evidence indicated that the current financing scheme eroded public confidence in the democratic system and contributed to a waning public interest in elections. Finally, the evidence supported the public's perception that large contributions won actual influence over the legislative process. Again, the District Court relied not only on trial testimony, but also on studies showing how the pressure to raise money made legislative initiatives less likely to succeed if contrary to the wishes of well-organized interest groups who frequently contribute to candidates.

The District Court further analyzed the amounts of the limitations, and held that they were narrowly tailored to serve this anti-corruption purpose. In support of the narrow-tailoring conclusion, the court relied upon the cost of previous elections in Vermont, the size of Vermont electoral districts and the corresponding cost-per-voter, the effect of the limitations on the Burlington mayoral election held after the passage of Act 64, the widely-held public view that donations in excess of the Act's limitations were suspicious, and the fact that the limitation did not inhibit "effective campaigning."

The District Court rejected the contention that PACs merit special treatment; it thus upheld the restrictions on contributions by and to PACs pursuant to Act 64. *See* Vt. Stat. Ann.

tit. 17, §§ 2805 (a)–(b). If contributions by individuals may be restricted, the court reasoned, than so too may gifts by individuals to associations that in turn give funds to candidates. The District Court reasoned that Vermont has the same anti-corruption interest in limiting PAC contributions as those by individuals. The contribution limit closes a loophole which individuals could exploit to evade individual contribution limitations.

The District Court held, however, that political parties deserve greater freedom in their ability to make contributions to political candidates. Although the District Court upheld the $2000 limitation on contributions to political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(a), it struck down the provision limiting contributions to candidates insofar as it applies to those candidate's own political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(b). Regarding contributions to political parties, the court relied on Vermont's anti-corruption interest, noting that unrestrained contributions to parties provided a loophole to individuals wishing to evade restrictions on direct contributions. Quoting *Nixon v. Shrink Mo. Gov't PAC* ("*Shrink*"), the District Court found that the limit imposed by the statute is not "so radical in effect as to render political association ineffective, drive the sound of [a political party's] voice below the level of notice, and render contributions pointless." 528 U.S. 377, 397 (2000). Moreover, the District Court found that, given Vermont's electoral situation, the $2000 limit did not inhibit the strength of political parties. The court relied on the evidence specifically concerning Vermont campaigns and politics, a comparison of limits on contributions to candidates in other jurisdictions, and the ability of the Republican Party to raise substantial sums while subject to Act 64's limitations. The District Court, however, did not address the constitutionality of transfers of money to state and local parties from the national affiliated party which are apparently subject to the $2000

limitation.

The District Court held that Vermont could not limit political parties from giving more than $2000 to its own political candidates. The court recognized that the anti-corruption interest may justify some limitations, given that corruption may "filter[] through the party machine." But according to the District Court, those limitations must be balanced against the special role political parties play in the American electoral system. Without much factual discussion, the court concluded that the limits would reduce the party's voice to a whisper—since political parties speak through their candidates and the restrictions were too stringent even for the small scale of Vermont's electoral races.

The District Court also upheld the treatment of state and local parties as a single entity for the purpose of calculating the contribution limitations pursuant to Vt. Stat. Ann. tit. 17, §§ 2801(5) & 2301–20. The court relied on a number of factors, including the fact that notwithstanding its adamant assertions, the defendant Vermont Republican State Committee had never acted as a loose confederation of entities in the conduct of the litigation.

The District Court upheld the provision of Act 64 that treats third party expenditures "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee" as contributions to the candidate pursuant to the Act. *See* Vt. Stat. Ann. tit. 17, § 2809(a) & (c). The purpose of the provision is to close a loophole which would otherwise permit evasion of the legitimate contribution limitations by engaging in coordinated expenditures. The District Court further upheld the provision establishing a rebuttable presumption that any third party expenditure benefitting six or fewer candidates is a related expenditure. *See id.* at 2809(d). The court explained that the presumption is a guideline to assist in compliance, and that since

Vermont's Secretary of State has determined that the presumption is rebuttable, it does not chill otherwise protected speech activity. Although the District Court upheld the provision treating related expenditures as contributions to candidates, it struck down the provisions treating related expenditures as expenditures by candidates, pursuant to Vt. Stat. Ann. tit. 17 § 2809(b).

The District Court struck down the provision that caps out-of-state funds at 25 percent of total contributions received by a candidate, political party, or PAC pursuant to Vt. Stat. Ann. tit. 17, § 2805(c). The court found that the factual record did not establish any legitimate government interest in limiting such contributions. Instead, the record only supported an inference that such contributions raise the risk of corruption when they are large—a problem solved by the contribution limits. The fact that a donor is a resident of another state is not an important factor in either increasing the risk of corruption or the public's perception of corruption. Moreover, the mechanics of the ban indicated a lack of narrow tailoring because it acts as a complete bar to contributions for some would-be contributors and candidates.

The District Court held that the plaintiffs have standing to challenge the subject provisions of the Act. Finally, the court held that, pursuant to Vermont Law, the unconstitutional provisions may be severed from the rest of Act 64.

Accordingly, the ten-day bench trial resulted in the District Court's upholding most of the challenged provisions, but striking down Act 64's expenditure limitations, its limitations on contributions by parties to candidates, and its restriction on contributions from out-of-state sources. Vermont and the other defendant-appellants timely appeal from the District Court's order holding those portions of Act 64 unconstitutional. Vermont is joined by *amici*, the Brennan Center for Justice at New York University School of Law and the States of Colorado,

Connecticut, Maryland, New York, and Oklahoma. The plaintiffs have cross-appealed, contending that the District Court should have also enjoined the enforcement of the other disputed provisions of the Act.

DISCUSSION

Although we review the District Court's factual findings for clear error pursuant to Federal Rule of Civil Procedure 52(a), *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498 (1984), the breadth of review is greater in cases raising First Amendment issues: "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Id.* at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–286 (1964)). The appellate court must also be vigilant for errors of law that "may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose*, 466 U.S. at 501.

As a threshold matter, the defendants have challenged the plaintiffs' standing to assert this facial challenge to Act 64's expenditure and contribution limitations. In order to present a "case or controversy" within the meaning of Article III of the Constitution, the plaintiffs seeking relief must have a sufficient "personal stake in the outcome of the controversy." *Buckley v. Valeo*, 424 U.S. 1, 11 (1976) (internal quotation omitted). The District Court provided careful analysis demonstrating that each of the challenged provisions arguably affects the First Amendment rights of one or more of the plaintiffs. *See Landell v. Sorrell*, 118 F. Supp. 2d 459, 474–76 (D. Vt. 2000). For the reasons set forth by the District Court, we uphold its

determination that the plaintiffs have standing to assert their challenge to Act 64's expenditure and contribution limits.

The District Court's legal conclusions regarding the campaign finance reform legislation are subject to *de novo* review. Review of a provision in the campaign finance reform area proceeds according to a three part test: (1) whether the restricted activity is entitled to full First Amendment protection; (2) whether the restrictive statute serves a sufficiently strong government interest; and (3) whether the statute is narrowly tailored to achieve that government interest. *See, e.g.*, *Shrink*, 528 U.S. at 387–88; *Buckley*, 424 U.S. at 25, 44–45; *see also Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985). Moreover, "limits on political expenditures deserve closer scrutiny than restrictions on political contributions." *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 472 (2001) ("*Colo. Republican II*"). For reasons we set forth below, we reject the contention that *Buckley* established a *per se* rule against the constitutionality of expenditure limitations.

The First Amendment fully protects the activity restricted by the challenged provisions of Act 64. Restrictions on contributions and expenditures implicate both the First Amendment rights of political expression and political association. *Buckley*, 424 U.S. at 14–15. In the case of political expression, an expenditure cap "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." *Id.* at 19. Contribution limits are less harmful to First Amendment political expression values than expenditure limits, but they still fall within the ambit of full protection. They are less harmful because they involve "little direct restraint" on the contributor's political communication. *Id.* at 21. "The quantity of communication by the contributor does not increase

perceptibly with the size of his contribution . . . ." *Id.*

Expenditure and contribution limitations also curtail the freedom of association protected by the First Amendment. Contributions serve to affiliate one with a group of people. *See id.* at 22. Expenditures by an association permit the association to communicate and "amplify[] the voices of [the group's] adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Id.*

The question then is whether each of the provisions survives the "exacting scrutiny" standard: the provision must be narrowly tailored to serve a sufficiently strong government interest. Expenditure limitations, being more severe, require "closer scrutiny," and, relatively speaking, the government interest must meet a more demanding test. *Colo. Republican II*, 533 U.S. at 472; *see also Buckley*, 424 U.S. at 44. We review each of the challenged provisions in turn.

I. Act 64's Expenditure Limitations

A. The Rule of *Buckley*

In the history of campaign finance reform, courts have had numerous opportunities to review expenditure limitations and have typically found that such limits do not survive constitutional review. *Buckley v. Valeo* remains the seminal case governing the constitutional review of campaign finance reform efforts, including expenditure limitations. The *Buckley* Court considered and rejected a variety of expenditure limitations, including a ceiling on independent, campaign-related expenditures, a ceiling on a candidate's use of personal or family resources, and a ceiling on a candidate's campaign expenditures. Like the federal statute reviewed in *Buckley*, Act 64 limits the total campaign funds that a candidate for state office may spend.

Although the clear language of *Buckley* requires that courts should review expenditure limits with exacting scrutiny, the District Court (and it is by no means alone) apparently felt constrained by *Buckley*, concluding that the decision categorically prohibits expenditure limitations. *See, e.g., Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001); *Kruse v. City of Cincinnati*, 142 F.3d 907, 919–20 (6th Cir. 1998). We disagree. The *Buckley* Court's rejection of particular federal campaign expenditure limitations was rooted in Congress's purported reasons for such legislation and the failures of those interests to demonstrate any need for expenditure limits. 424 U.S. at 55–58. Ultimately, the Court concluded that the federal government had failed to assert any sufficiently important interest that its expenditure limitations served. *See id.* at 55. Examining the federal government's interest in eliminating corruption from federal elections, the Court concluded that the government's asserted rationale only applied to large contributions—that is, eliminating large contributions fully satisfied the government's anti-corruption interest. *See id.* at 56–57. The federal government claimed that expenditure limitations were necessary to make contribution limitations easier to enforce, arguing that when candidates cannot spend large quantities of money, they have a weaker incentive to accept illegally large contributions. The Court concluded that the contribution limitations promised to be sufficiently effective on their own. *See id.* at 56–57. In addition, the Court found that allowing candidates to retain funds in excess of the limits "undercuts whatever marginal role the expenditure limitations might otherwise play in enforcing the contribution ceilings." *Id.* at 56. Based on the Court's review of the record, "[t]here [was] no indication that the substantial criminal penalties" attached to violations of contribution limits, as well as the "political repercussion of such violations," would not suffice to realize this anti-corruption interest. *Id.*

Nor was the Court persuaded that the federal government had a sufficient interest in utilizing expenditure limitations to equalize the financial resources of candidates competing for office. *See id.* at 56-57. The contribution limits would assure that any difference in resources "var[ies] with the size and intensity of the candidate's support." *Id.* at 56. Finally, the Court addressed the argument that expenditure limitations served the federal government's interest "in reducing the allegedly skyrocketing costs of political campaigns." *Id.* at 57. The Court rejected the idea that the state had a sufficient interest in setting the appropriate scope of the "quantity and range of debate on public issues in a political campaign." *Id.* In other words, *Buckley* did not hold that large campaign expenditures are themselves inherently suspect.

We conclude, then, that Vermont cannot sustain Act 64 by asserting a need to control excessive campaign spending *per se*. In addition, the *Buckley* Court addressed two other justifications for expenditure limitations, rejecting both on the grounds that the record failed to demonstrate sufficient state interest in them. The record failed to demonstrate how contribution limitations were not an effective remedy for campaign corruption. Nor did the record demonstrate how the ability to spend unlimited amounts on campaigns would distort the campaign process—fundraising ability, the Supreme Court surmised, would vary with the size of a candidate's public support. Based on the record before the Court in *Buckley*, the contributions and disclosure limitations were sufficient to address each of these concerns. *Id* at 56. Critically, the Court never concluded that the Constitution would always prohibit expenditure limits, regardless of the reasons and the record supporting the limitations. It simply held that based on the record before it, "[n]o governmental interest that has been suggested is sufficient to justify" the federal expenditure limits. *Id.* at 55. After *Buckley*, there remains the possibility that a

legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review.

B. Post-*Buckley* Interpretations

We disagree with the District Court's interpretation of *Buckley* as establishing an absolute ban on expenditure limitations. We are not alone in concluding that *Buckley* did not permanently foreclose any consideration of future campaign expenditure limitation legislation. In *Shrink*, Justices Breyer, Ginsburg and Stevens all recognized that our post-*Buckley* experiences with campaign finance have demonstrated that we need a flexible approach to the constitutional review of campaign finance rules. Justice Breyer, who was joined by Justice Ginsburg, concluded that courts must resist a static interpretation of *Buckley*'s mandate, which may require reinterpretation in light of subsequent experience, including a legislature's "political judgment that unlimited spending threatens the integrity of the electoral process." 528 U.S. 377, 403–04 (Breyer, J., concurring). Legislatures may protect the electoral process not only from quid pro quo corruption, but also from the threat that campaign funding may pose to the "integrity of the electoral process." *Id.* at 401. Campaign finance restrictions may "aim to democratize the influence that money itself may bring to bear upon the electoral process" thus "encouraging the public participation and open discussion that the First Amendment itself presupposes." *Id.* Because campaign finance regulations serve constitutionally protected interests, *id.* at 400, the Constitution would require adaptation in the face of evidence that existing precedent unduly hampered the freedom of legislatures to address the issue. "Suppose *Buckley* denies the political branches sufficient leeway to enact comprehensive solutions to the problems posed by campaign finance. If so, like Justice Kennedy, I believe the Constitution would require us to reconsider

Buckley." *Id.* at 405.

Indeed, Justice Kennedy argued that the post-*Buckley* experience requires a wholesale abandonment of the approach adopted in *Buckley*, leaving 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 effort on official duties rather than on fundraising" *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting). Justice Stevens, articulating the need for "a fresh reexamination" of *Buckley*, concluded that "Money is property; it is not speech." Id. at 398 (Stevens, J., concurring). He advocated the replacement of the Court's First Amendment review of campaign finance laws with an analysis based on prohibitions against deprivations of liberty or property. *Id.* at 398–99.[3]

In addition, one judge on the Sixth Circuit has also pointed out that *Buckley* was "decided on a slender factual record" and that a fuller record might satisfy the constitutional requirement that expenditure limits be narrowly tailored to a compelling interest. *Kruse*, 142 F.3d at 919 (Cohn, J., concurring). Judge Cohn also noted that although high campaign costs may not be inherently problematic, it might be shown that the need to raise ever larger amounts of funds might undermine public faith in democracy, justifying expenditure limits. *See id.* at 919–20.

Reconsideration might be required were a court faced with evidence that unlimited expenditures posed great dangers to the very political process that *Buckley* sought to safeguard. Justices Stevens and Ginsburg have supported the constitutionality of spending limits on political

---

[3] Unease with *Buckley* is not limited to those who argue that campaign finance regulations have a proper place in our constitutional system. In *Shrink*, Justices Thomas and Scalia both advocate overruling *Buckley* not to give legislatures greater leeway to pass needed campaign finance reform, but to heighten the constitutional review given to contribution limits. *See Shrink* at 528 U.S. at 410–12. Justice Kennedy expressed sympathy for their view. *Id.* at 409–10 (Kennedy, J., dissenting).

parties for, among other reasons, the likelihood that such limits would improve, rather than inhibit, a flourishing political system:

> 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.

Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, 649–50 (1996) ("*Colo. Republican I*") (Stevens, J., dissenting). In part, they reached this conclusion because of the comparative competency of the different branches of government: "Congress surely has both wisdom and experience in these matters that is far superior to ours." *Id.* at 650.

The academic literature also contains persuasive analyses that our post-*Buckley* understanding of campaign finance requires a careful evaluation of the evidence in support of expenditure limits. *See, e.g.*, Richard Briffault, Nixon v. Shrink Missouri Government PAC*: The Beginning of the End of the* Buckley *Era?*, 85 Minn. L. Rev. 1729, 1765–69 (2001) (arguing that fair and competitive elections may require some form of expenditure limitations); 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, 1288–89 (1994) (noting that changed circumstances and never before considered government interests, including the protection of candidates' time, might permit expenditure limits to survive *Buckley*'s test).

Although we recognize that there is considerable dissatisfaction with *Buckley*'s approach, we still premise our conclusions on the assumption that *Buckley* continues to govern the constitutional review of campaign finance laws. We do not accept an unyielding interpretation of *Buckley* that expenditure limits are *per se* unconstitutional, because such a static approach to

Buckley's import would require us to ignore not only *Buckley*'s own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy.

Like the federal expenditure limitations considered in *Buckley*, Act 64's expenditure limitations rise or fall on whether they have been narrowly tailored to a sufficiently important governmental interest. It is to that question that we now turn.

After our independent review of the evidence, we hold that the record supports the conclusion that Vermont has a sufficiently strong government interest to justify the adoption of expenditure limitations under the *Buckley* standard. By reaching this conclusion, we join the Vermont General Assembly, the Vermont Governor and the District Court in their assessment that Vermont has sufficiently strong interests that are served by limiting campaign expenditures. Fundamentally, Vermont has shown that, without expenditure limits, its elected officials have been forced to provide privileged access to contributors *in exchange for* campaign money. Vermont's interest in ending this state of affairs is compelling: the basic democratic requirements of accessibility, and thus accountability, are imperiled when the time of public officials is dominated by those who pay for such access with campaign contributions.

The record considered by the General Assembly demonstrates how the Vermont system of unbridled expenditures has created situations where public officials are functionally compelled to sell privileged access through the fundraising system. The Vermont legislature explained that a number of phenomena conspire to yield this result: (1) that campaigns were too expensive; (2) that candidates were forced to spend too much time fundraising; (3) that fundraising requires candidates to give preferred access to contributors over non-contributors; and (4) that this system

of increasing expenditures has hindered the robust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process. Our review of the evidence has led us to conclude that this is not simply a concern about large contributions. A number of distinct factors require expenditure limits. In particular, Vermont candidates feel the need for ever greater funds and the set of contributors in Vermont is limited. As a result, Vermont candidates and officials give preferred access to contributors over non-contributing constituents. This is especially true of contributors whose special interest influence can deliver other contributors. Moreover, candidate dependence on fundraising from the limited group of contributors has given them the ability to influence the legislative process.

Vermont has a compelling interest in safeguarding its political process from such contributor dominance, because it threatens the accessibility and accountability of state officials and candidates. Money—and the special interests that wield it—has a great influence on candidate behavior in Vermont, at the expense of the electorate as a whole, since candidates depend on it in order to run for office. Where influence can be bought, citizens are less willing to believe that the political system represents the electorate, exacerbating cynicism and weakening the legitimacy of government power. The accessibility and accountability of public officials—and the public's faith that Vermont's government is accessible and accountable—are fundamental to any democratic system. The state's expenditure limits, in conjunction with the contribution limits, are necessary to ensure that access is not available only to those who pay for it. Vermont's expenditure limits, by removing the financial pressures and spiraling campaign costs that have conspired to privilege monied special interests, can uniquely ensure that government accessibility is not a commodity for sale.

In reaching this view, we do not need to conclude that a thriving democracy requires that every person have equal influence in government affairs. *See Buckley*, 424 U.S. at 48–49 ("[T]he 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 . . . ."). *But see Shrink*, 528 U.S. at 401 (Breyer, J., concurring) (suggesting that contribution limits may be justified because "such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process"). In our view, the influence of campaign contributors is pernicious because it is bought. Certain private citizens and organizations should not be given greater access to public office holders—and thus greater influence—*on account of* those citizens' ability and willingness to pay for candidates' campaigns. Similarly, quid pro quo corruption is troubling not because certain citizens are victorious in the legislative process, but because they achieve the victory by paying public officials for it.

C. The History of Campaign Finance Reform in Vermont

Before discussing the specific evidence produced at legislative hearings on Act 64 and also during the trial below, we note that Vermont's decision to impose these expenditure limitations has been the result of a century-long effort to safeguard the accessibility and accountability of its elected officials. In 1916, Vermont took early steps to ensure the accountability of its elected officials by passing direct primary elections and mandating the post-primary disclosure of candidate expenditures. 1915 Vt. Laws 4, § 22; 1916 Vt. Laws (Sp. Sess.) 4, § 1. In 1961, the legislature adopted mandatory expenditure limits in primary elections, 1961 Vt. Laws 178, and applied those limits to general elections in 1971, 1971 Vt. Laws 259. In 1975, Vermont repealed its expenditure limits but continued to limit the maximum contribution that

candidates might accept. 1975 Vt. Laws (Adj. Sess.) 188. Over several decades, Vermont witnessed a period of growing disillusion with its electoral system, and in 1993 instituted a system of voluntary expenditure limits. Former Vt. Stat. Ann. tit. 17, §§ 2841–42 (1991) (repealed 1997). Participation in the voluntary system fell dramatically each year, with 90 percent of candidates participating in the first year and less than 20 percent in the second year. By 1998, not a single candidate for statewide office chose to participate in the voluntary expenditure limits. At the time that the voluntary expenditure system ended in failure in 1998, the legislature had concluded that mandatory expenditure limitations, together with contribution limitations, were essential to protect the public's faith in its electoral system.

It is also worth noting that other state legislatures apparently share Vermont's conclusion that a campaign finance system requires expenditure limitations if democracy is to thrive. Our examination of the election laws of other states supports our conclusion that Vermont's claimed interests in expenditure limitations, and the reasons offered in their favor, are highly persuasive. The widespread presence of voluntary expenditure limits reflects the prevalent view of citizens and politicians that these limitations are necessary and desirable. Numerous states have established voluntary expenditure limits. While these schemes are enforced with the carrot of state campaign funds rather than the stick of penalties as in Vermont, campaign expenditure limitations of one sort or another have been promulgated by governments in Florida, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Rhode Island, and Wisconsin. *See, e.g.*, Fla. Stat. Ann. § 106.34 (West 2001); Haw. Rev. Stat. § 11-219 (2001); 220 Ill. Comp. Stat. 10/12-5(c) (2001); Ky. Rev. Stat. Ann. § 121A.030 (Banks-Baldwin 2001); Me. Rev. Stat. Ann. tit. 21-A, § 1015 (7–9) (West 2001); Md. Code Ann.,

Election Code § 15-103 (2001); Mass. Gen. Laws Ann. ch. 55A, § 6 (West 2001); Mich. Comp. Laws Ann. § 169.267 (West 2001); Minn. Stat. § 10A.25 (2000); N.H. Rev. Stat. Ann. § 664:5-a (2000); R.I. Gen. Laws § 17-25-20 (2001); Wis. Stat. Ann. § 11.31 (West 2001). Upon review, it has been found that such voluntary schemes survive strict scrutiny because the government has a compelling interest in reducing "the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1552–53 (8th Cir. 1996) (upholding Minnesota's voluntary public financing scheme); *see also Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993) (holding that statute survives exacting scrutiny because Rhode Island has "a valid interest in having candidates accept public financing because such programs 'facilitate communication by candidates with the electorate' [and] free candidates from the pressures of fundraising.") (quoting *Buckley*, 424 U.S. at 91).

D. Compelling Interests

As mentioned, a number of distinct phenomena conspire to foster a situation where those who pay for candidate campaigns are given privileged access while regular citizens are denied such contact. First, the Vermont legislature considered powerful evidence concerning the pressures which the prospect of unlimited expenditures places on candidates for office. In particular, there is strong evidence that unlimited expenditures have compelled candidates to engage in excessively lengthy fundraising in order to preempt the possibility that political opponents might develop substantially larger campaign war chests. The Vermont General Assembly found that fundraising requires an "inordinate[] amount of time." 1997 Vt. Laws P.A. 64 (H.28) (finding No.1). The large and growing (and constantly record-breaking) campaign war

chests in Vermont have created strong pressures on elected officials to ensure that they can raise funds comparable to any opponent. One witness, former State Senator and Lieutenant Governor Peter Smith, described the "stampede or nuclear arms race mentality that we currently have, which is just keep building the bank because you never know what's going to happen." Another witness, former State Representative and Secretary of the State Donald Hooper, testified that expenditure limits would "take[] all the agony away from worrying about the money, about harvesting the money, soliciting it." Under the current system, Vermont candidates feel like "you had two races you were running. The first was for the money . . . ." (testimony of Donald Hooper).

Although there might not be any inherent problem with candidates competing to raise large quantities of funds, the evidence in Vermont is clear that the pressure to raise the large sums of money greatly affects the way candidates behave. Special interests, well placed to take advantage of candidates' fear of losing this fundraising war, have been able to exercise substantial control over the information that passes to candidates. They do this by increasingly dominating the opportunities candidates have for meeting with constituent groups and forcing candidates to choose contributors over private citizens who make small or no contributions. This domination reduces opportunities that candidates have to meet with non-contributing citizens. Every hour spent with financial contributors is an hour that cannot be spent independently studying legislative proposals or meeting with citizens. As one senator, William T. Doyle, testified, without the need to raise such large sums of money "there will be increased time for real debate . . . candidates will be able to concentrate more on issues rather than raising public money." Even if candidates receive valuable information during every hour spent fundraising,

their time is being controlled by those who control the campaign cash, and the effect is corrosive. Contributors dominate candidate's time on account of their willingness to fund campaigns and, as a corollary, contributors determine a significant percentage of the information candidates receive. The General Assembly minced no words when describing this phenomenon: "Some candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions." 1997 Vt. Laws P.A. 64 (H.28) (finding No.2).

The General Assembly's findings on this point are corroborated by pages of testimony demonstrating how fundraising requires that politicians offer greater access to contributors than to those who donate little or no money. One former Vermont legislator testified that contributors receive a higher quality of consideration, stating that "as I progressed through my political career, [] the farther you went, ineluctably, the more time you spent . . . raising money and the more attention you paid to the people who gave you big money, which I would call 500, a thousand . . . dollars pledge contributions." (testimony of Peter Smith). That same witness also noted that a crucial part of any deliberation on a bill involves speculation about the reaction of contributors because they control the money: politicians are forever asking "what's the industry position, what's the union position, what's—you know, and what they're talking about is where [is] the money behind the issue, what does the money want, where is the conflict between and among the power brokers." Perniciously, it also affects the behavior of elected officials in the context of agenda-setting, since officials pay attention to which contributor "wants what to happen in terms of language of the bill, in terms of calendaring the bill, in terms of writing the rules." (testimony of Peter Smith). One former state representative, Toby Young, prosaically explained that

politicians "certainly pay attention to [important] donors, and they do get [the politicians'] ear. I think everybody has admitted that. The governor has . . . even said that publicly in the newspapers . . . ." One witness, Senator Cheryl Rivers, testified that campaign contributors, by virtue of their role as contributors, can dominate the attention of party leadership or a committee chair, and thereby influence the legislature's agenda. In her words, "there is kind of an atmosphere that is created that there is [an] assumption that phone calls [of contributors] will get taken and [their] policy issues will be considered." Another senator, Elizabeth Ready, recognized that "there is an agenda out there that is pretty much set by folks that are not elected."

Candidates, often with great reluctance, accept the bargain with contributors so that they do not lose large sources of potential fundraising. And public officials agree that the financial necessity imposed by fundraising, and bred by the need to spend ever increasing amounts of money, requires that candidates spend time with donors rather than on their official duties. One member of the legislature stated that fundraising forces her to "be locked away" in party offices instead of "out with the public." (testimony of Elizabeth Ready). Contributors are likely to get attention, and officials are more likely to return phone calls of donors than non-donors. "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call then I would [a non-donor's] . . . . [W]hen you only have a few minutes to talk, there are certain people that get access." (testimony of Elizabeth Ready). A former candidate for Congress and current lobbyist in Vermont, Anthony Pollina, described the process:

> [C]andidates and policymakers . . . can only talk to so many people in a day. They can only respond to so many phone calls. The governor can only have so many meetings in a day. And if in fact large contributors are using their contributions to buy access to the governor or other policymakers, and are spending time that they are successful in doing that, then that means that the policymaker, the governor and others are not spending their

> time talking to other people who have not provided other large contributions. . . . [S]o it becomes a cycle where the large contributors get more and more access and the average folks stop trying to get it.

Nor is this just a theoretical concern. One widely reported case involved the differing access that state officials granted to interested groups as the state government considered whether to label milk produced using genetically engineered hormones. Major dairy companies, who in the past had been contributors, were able to arrange meetings with critical state leaders, whereas local farmer organizations which lacked importance as contributors could not arrange similar meetings. The evidence adduced at trial supports the District Court finding of fact that "the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters," and that "the need to solicit money from large donors at times turns legislators away from their official duties." The record is replete with remarkably candid explanations of how parties arrange their fundraising in such a way as to provide more personal attention to contributors. One political consultant testified to the techniques used to woo donors: "High dollar donations usually occur with events; with Republican dignitaries, if it's the Republican Party, and Republican club type events . . . Things that are maybe more personal in nature or attendance." (testimony of Darcie Johnston). By giving money, contributors "haven't bought the person, but they have certainly bought a piece of that time there where they have that person's attention." (testimony of Elizabeth Ready).

Citizens in Vermont apparently share this view, and have consistently demonstrated a belief that the attention of their public representatives may be available for a price. As a result, public faith in the democratic system has declined. The General Assembly described the effects of a need to raise ever growing amounts of funds: "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." 1997 Vt. Laws P.A. 64 (H.28) (finding No. 4); "Large contributions and large expenditures by persons or committees, other than the candidate and particularly from out-of-state political committees or corporations, reduce public confidence in the electoral process and increase the appearance that candidates and elected officials will not act in the best interests of Vermont citizens." *Id.* (finding No. 9). At trial, one expert witness, Celinda C. Lake, concluded that "[v]oters are extremely concerned about the influence of special interests in the political process." In fact, according to polling data considered below, nearly 75 percent of voters say that ordinary voters do not have enough influence over Vermont politics and government, and more than two thirds believe that "large corporations and wealthy individuals have too much influence." (expert report of Celinda C. Lake). Most citizens are bothered by the fact that "political fundraising took away time from important government business." (testimony of Celinda C. Lake). Newspaper articles demonstrated the public perception that certain special interests dominated candidate contributions. The Vermont legislature considered one article in the Burlington Free Press stating that "[m]oney not only threatens to corrupt the process, it sabotages the political dialogue as well. Candidates spend too much time begging for dollars and too little time talking issues . . . [I]t breeds cynicism . . . For proof, look in part to the large number of folks who simply don't vote, staying home with a 'why bother' shrug on election day." *See Democratic Process Relies on Reform*, Burlington Free Press, Oct. 6, 1997 at 6A. Testimony by Vermont's elected officials exposed how the disenchantment and loss of public faith play a critical role in their belief that expenditure limits are necessary. The goal of the legislation is to ensure the accessibility and

accountability of Vermont's political system. One State Senator, and a sponsor of Act 64, testified that "I would hope that it's going to give folks running for office more of an opportunity to go out and engage the voters on the issues. I hope it's going to help turn around the cynicism and the lack of participation on the part of many ordinary people that believe that their government is not about them, but about powerful, special interests." (testimony of Cheryl Rivers). Another sponsor of Act 64, Representative Karen Kitzmiller, presented the Vermont House of Representatives with evidence showing that 94 percent of Vermonters believe that too much money is spent in politics, and 76 percent believe that ending private contributions would "reduce the power of special interest groups." Another state legislator, Gordon Bristol, described his concern "about the regular guy on the street, and I think if they feel that candidates are spending a modest amount of money, that they are going to get candidates in there who are representing issues and not a special interest . . . ." According to one legislator, citizens have reported that they do not vote because "'All the big money controls everybody in Montpelier anyways.' . . . They think it's all wrapped up and that the special interests control it and, quite frankly, they aren't that wrong." (testimony of Elizabeth Ready). In the word of one legislator, "it's the monied interests that control the process, and that cynicism . . . , it keeps people from participating, from engaging . . . ." (testimony of Donald Hooper).

Contribution limits, though highly effective at eliminating the actual and perceived quid pro quo corruption that accompanies large gifts, do not address these noxious effects of an unrelenting drive for campaign funds. So long as the danger remains that a political opponent might severely out-strip a candidate's financial resources, candidates have continued to feel it necessary to raise ever larger sums of money. For elected officials, this will mean giving more

time to contributors over non-contributors, and expending more effort on relatively generous contributors over less important ones. In other words, even with contribution limits, the arms race mentality has made candidates beholden to financial constituencies that contribute to them, and candidates must give them special attention and time *because* the contributors will pay for their campaigns. Vermont has concluded that widespread presence of this arms race mentality, however irrational, can only be effectively controlled by spending limits. One elected official shared her sense of how spending limits will liberate public officials: "[The spending limit] lessens the pressure. . . . I am not going to be locked away . . . in the Democratic Party somewhere or in my own office somewhere making fundraising calls." (testimony of Elizabeth Ready). Without expenditure limits, she said, "it's an escalating kind of a thing. The more money gets spent, the more money everybody has to spend in order to look like they are in." (testimony of Elizabeth Ready). Contribution limits have not tamed this escalating phenomenon in Vermont.

Nor have contribution limits significantly sapped the influence of "well-heeled" special interests. Discrete interest groups, whose members individually control substantial financial resources, continue to exercise disproportionate control over what candidates in Vermont hear and discuss. They do this by virtue of the interest group members' cumulative ability to shift resources toward particular candidates. Put another way, the record vividly establishes that insofar as contributors effectively buy candidates' time and attention, this distortion of the democratic process is caused not only when contributors give single, large gifts, but also when they are members of organized, wealthy interest groups that "bundle gifts." *Cf. Homans v. City of Albuquerque*, 160 F. Supp. 2d 1266, 1273 (D.N.M. 2001) (discussing bundling phenomenon).

In Vermont, these interest groups often sponsor political fundraisers where many smaller donations are solicited. For example, Vermont's slate industry allegedly gave bundled gifts to senators sitting on the committee that, in the words of one legislator, determined "the future of this particular industry." (testimony of Elizabeth Ready). When the industry won an exemption from the committee, citizens were reportedly "irate. . . . They felt angry and helpless and they felt that they were not being listened to." One legislator, a supporter of campaign finance reform, candidly reported one incident where he received five smaller checks in a single envelope, and it turned out that one of those people had an interest in a matter before his committee. (testimony of Donald Hooper). The bundling phenomenon in Vermont was evidently not anticipated by the Supreme Court in *Buckley*. Indeed, the *Buckley* Court seemed to assume that many small contributions could not raise the specter of corruption. "If a senatorial candidate can raise $1 from each voter, what evil is exacerbated by allowing that candidate to use all that money for political communication?" 424 U.S. at 56 n.64 (internal quotations omitted). The reality of campaign financing in Vermont is a far cry from this idyllic vision of political fundraising, in large part because not every voter has the desire or financial ability to participate by giving campaign contributions. "[T]he average Vermonter has been, to some degree, disenfranchised because the average Vermonter cannot afford the price of admission." Senate J. of the State of Vt., at 1338 (Biennial Session, 1997) (statement of William T. Doyle). That difference has had pernicious effects on the support for and participation in the democratic process in Vermont by requiring that candidates for public office rely on special interests for financial support, produced directly or by way of devastatingly broad and cumulatively overwhelming bundling.

Moreover, there is substantial evidence that candidates cannot easily raise funds if they

alienate these significant and organized interest groups, thus heightening a candidate's dependence on special interest groups. In other words, because of the limited number of participants in campaign financing, candidates feel themselves unable to oppose too many special interests, no matter how unpopular, because they will be cut off from funds. The General Assembly described the effects of a need to raise ever growing amounts of funds: "Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors." 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5). If legislation alienates one major special interest group, officials are reluctant to alienate others because the number of entities and people making political contributions is finite and small. One Vermont official and campaign organizer, Mark Snelling, simply stated "there's a relatively limited number of people in Vermont that are interested in participating through actually either spending their time or writing a check . . . ." Another campaign consultant conceded that there is a practical limit to the ability to continue to get donors, testifying that "[i]t becomes more and more expensive to find donors. If you have to keep prospecting deeper and deeper, the cost goes up and return is much less." (testimony of Darcie Johnston). The limited number of fundraising sources in Vermont makes it difficult for candidates to alienate the few that support them. One state legislator admitted that, when considering a piece of legislation, "You have to initially consider it as whether or not you want to risk losing the financial support or, in the worst case, having that financial support go to a primary opponent or to a person who opposes you in a general election." (testimony of Peter Smith). A lobbyist who supports Act 64 noted that contribution limits coupled with unlimited expenditures would require that candidates "continue to spend more time and energy raising

those smaller contributions to see who could raise the most money and outspend their opponent and therefore win the race. So the spending limits, tied to the contribution limits, create a situation where the candidates simply don't have to spend as much time and energy raising money. . . . [The limits] change the way campaigns are run, in a sense, and make them more people oriented or voter oriented as opposed to fundraising oriented . . . ." (testimony of Anthony Pollina). Unfortunately, the contributions limits, though necessary to eliminate the excessively large contributions, do not address the problem.[4] That same lobbyist also explained that "the unfortunate thing is that candidates would feel compelled to look for those other sources because they would still be trying to outspend . . . their opponents, and that would cause them to then spend more time and more energy into looking for those other sources of funding. It might then encourage the bundling practices that were referred to earlier, and . . . it would not address the problem that we are hoping to address." (testimony of Anthony Pollina). Candidates realize that a large contributor who is denied "preferential access or treatment" might refuse to make a contribution in the next election, or worse yet, direct contributions to an opponent. (testimony of John Patch, Chairman of Chittenden County Democratic Committee). One candidate recalled being told by another lawmaker, "We've already lost the drug money [because of the pharmacy bill], and I don't need to lose the food manufacture money too. So I'm not going to sign the bill." (testimony of Cheryl Rivers).

Faced with this evidence and the compelling nature of the General Assembly's findings, we conclude that *Buckley*'s standard of review requires us to hold that Vermont has a compelling

---

[4] We note that one unintended side effect of contribution limits might be to make it more difficult to raise funds, thus potentially aggravating these problems. Since candidates bound by contribution limits would rely on a larger number of contributors, they might have to spend more time raising funds.

interest in maintaining campaign expenditure limits. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. Regardless of whether one finds Vermont's justification novel, the quantum of evidence demonstrating the depth of the problem in Vermont campaigns is great. The drive for campaign funds has created a situation where candidate time is effectively for sale. Unfortunately, the war-chest mentality has caused the cost of campaigning to grow so rapidly that more and more candidates believe that they have no alternative but to participate in the fundraising process. In any government, access to public officials is a valuable commodity. Vermont has a compelling interest in ensuring that, as a democracy, access is not available only—or mostly—to the people who are willing and able to pay for it. Moreover, the record demonstrates that expenditure limits coupled with contribution limits, but not contribution limits alone, will alleviate this problem.

The defendants have also asserted that Vermont has a sufficiently compelling interest in (1) encouraging public debates and other forms of meaningful constituent contact in place of the growing reliance on 30-second commercials and (2) increasing the ability of non-wealthy Vermonters to run for state office in Vermont. Because we find Vermont's interest in alleviating the above fundraising problems to be sufficient, we need not address these additional justifications.

E. Narrow Tailoring

The third part of *Buckley*'s test requires a determination as to whether the particular limits are narrowly tailored to serve the compelling interest offered. Certainly, expenditure limits will reduce the race to raise campaign funds, will lower candidates' dependence on fundraisers and

will thus curtail the incentive that candidates have to prefer contact with contributors over non-contributors. In other words, we have every reason to expect that expenditure limits in conjunction with contribution limits will ameliorate the effect of fundraising on Vermont's electoral process, primarily by limiting the campaign financing's role as a dominant determinant of whether one has access to candidates and elected officials. We must ensure, however, that the expenditure limits are not so low that they also sacrifice candidates' ability to communicate with the electorate and campaign effectively.

This narrow-tailoring inquiry is fact-intensive. A district court should look to a variety of factors, including the previous pattern of campaign spending. We consider expenditure limits that approximate actual spending patterns to be presumptively narrowly tailored for two reasons. First, actual patterns indicate the amounts that candidates believe they need to spend to run for office. Second, the patterns show the amount of money that is available from contributors with a reasonable effort. As Vermont has found, the pressures on candidates to raise funds, and to sell access, increase as candidates begin seeking amounts of money in excess of what is readily available. The inquiry into existing spending patterns is particularly useful in the case of Vermont, where Act 64 introduces limits on a campaign system where candidates have been previously free to spend without limit. Besides actual spending patterns, a district court should also look to the likely costs and needs that a candidates will encounter in running an effective campaign. The court should consider such factors as the size of election districts, the cost of mass media, and the feasibility of alternative communication techniques. This narrow tailoring analysis does not require that we fine-tune the expenditure amounts elected by the legislature as long as those amounts are within a range reasonably related to the needs of a candidate who is

running for office. Finally, the court should test whether the limits unduly benefit incumbents or otherwise create dangerous distortions of the electoral system. It should be recognized, however, that a legislature's inaction may maintain such barriers more easily than reforms create them, and review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the reforms they are enacting. *See* Frank Michelman, *Law and the Political Process*, 24 Harv. J.L. & Pub. Pol'y 17, 22 (2000).

The District Court found that Vermont's expenditure limitations reflect the actual cost of running for office in Vermont and would leave candidates fully capable of conducting effective campaigns. In fact, Act 64's expenditure limits would not cause a revolutionary shift in campaign spending, and would have very little effect on House, Senate and statewide races. The average spending in House districts during the three election cycles preceding the District Court's opinion was found to be almost uniformly below the limits set pursuant to Act 64. The lone exception—spending in single member districts in 1994—saw average expenditures of only ten dollars over the Act 64 limits. Similarly, multi-member Senate districts all involved average spending below that permitted pursuant to Act 64, with average spending exceeding the Act's expenditure limits only in single-member Senate districts.

In addition to reflecting the actual expenditures in Vermont elections, Act 64's expenditure limits are also appropriate given the costs of running for office in Vermont. Put simply, candidates can spend the money needed to conduct effective campaigns. The District Court credited the testimony of a number of fact witnesses who testified to the details of previous campaigns they had run, including a Senate challenger in Chittenden County and a former Senate candidate in Rutland County. Vermont candidates for legislative offices are able to run such

campaigns because of the standard use of low-cost campaigning methods, such as community debates, door-to-door campaigning, town barbecues and suppers, advertising placards and the issuance of press releases. Legislative candidates rarely purchase expensive mass media or hire campaign staff.

Although candidates for statewide office utilize these more expensive media and techniques, they are permitted to spend larger amounts and can thus engage in effective campaigning. In part, this reflects the particular qualities of Vermont, especially the relatively inexpensive cost of television advertising. In reaching this conclusion, the District Court rejected testimony of witnesses for the plaintiffs that much larger amounts of money—amounts so large that no Vermont candidate has ever spent them—are required to wage an effective campaign for governor or other statewide offices.

Finally, Act 64 permits challengers to outspend incumbents, partially neutralizing the advantages that incumbents often enjoy from free media exposure. Specifically, incumbent candidates for statewide office may only spend 85 percent of the amount permitted challengers. *See* Vt. Stat. Ann. tit. 17, § 2805a(c). Incumbents in the General Assembly may spend 90 percent. *See id.*

We note the apparent tension between requiring, on the one hand, that expenditure limits reform the political process and also, on the other hand, that the limits approximate the spending needs of candidates as demonstrated by current spending patterns. We believe that tension is more apparent than real. First, even with expenditure limits that are higher than the amounts spent in the vast majority of campaigns, the limits will still affect the minority of campaigns where significantly larger funds are raised and expended. Moreover, the record in Vermont

demonstrates that often it is the potential of being vastly outspent—the arms race mentality—that creates powerful and deleterious pressures to raise funds. Expenditure limits make such dangers more easily calculable, and, the evidence indicates, will encourage a more rational response to the dangers of facing a better financed opponent. In addition, although consistent with current spending, the expenditure limitations will also forestall the continued escalation of campaign spending into the future. Finally, we recognize that the reality of campaign spending may require even lower limits if the evidence were to demonstrate that Act 64's limits are inadequate and lower caps would still permit effective campaigning.

Act 64 establishes campaign expenditure limits which are grounded in the reality of running for office in Vermont. We uphold the District Court's findings that the limits permit fully effective campaigns and are narrowly tailored. Since we do not agree with the District Court's conclusion that *Buckley* prohibits all expenditure limits, we vacate the District Court's injunction against enforcement of the expenditure limitations. We have reviewed them with the level of exacting scrutiny required by *Buckley* and its progeny for expenditure limits, and we hold these provisions of Act 64 to be constitutional.

II. Act 64's Contribution Limitations

Act 64 also imposes four basic types of contribution limitations. First, contributions by individuals to candidates are limited to $200 for state representative and other local offices, $300 for state senator and other county offices, and $400 for state-wide office. *See* Vt. Stat. Ann. tit. 17, § 2805(a). Second, PACs and political parties may not accept contributions from a single source in excess of $2000, and are subject to the individual contribution limits when contributing to candidates. *See id.* Third, individuals, PACs or political parties that make "related

expenditures" with candidates must count those expenditures toward the relevant expenditure and contribution limits. *See id.* at 2809(a)–(c). Finally, candidates, PACs, and political parties may not accept more than 25 percent of their total resources from out-of-state sources. *See id.* at 2805(c).

A. Limits on Contributions by Individuals to Candidates

The contribution limits of $200 (state representative), $300 (state senator), and $400 (state-wide office) are subject to "'the exacting scrutiny required by the First Amendment. . . .'" *Shrink*, 528 U.S. at 386 (quoting *Buckley*, 424 U.S. at 16). Contribution limits "involving significant interference with associational rights could survive if the Government demonstrated that contribution regulation was closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tun[ed]." *Id.* at 387–88 (internal quotation omitted) (alteration in original).

The government interest in eliminating actual and apparent corruption is sufficient to support Vermont's limits on contributions to candidates. The *Buckley* Court upheld limitations of $1000 on contributions to candidates for federal office on the strength of this interest alone. "It is unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions in order to find a constitutionally sufficient justification . . . ." 424 U.S. at 26. In *Shrink*, the Supreme Court upheld contribution limits ranging from $250 to $1000 for various state offices, rejecting the argument that corruption is limited to quid pro quo arrangements. 528 U.S. at 382–89. Instead, the government interest in battling corruption extends "to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 389.

The Vermont limits are narrowly tailored to this anti-corruption interest. The District Court's findings in this respect are reasonable and based on evidence adduced at trial. The legislature relied heavily on testimony of those who have run for office in Vermont. For example, during 1998, fewer than 2 percent of the donors were responsible for over 40 percent of the Vermont Republican Party's funding. The law has had the effect of causing the party to broaden its donor base, and reduce its reliance on a small number of donors. Based on testimony by both plaintiffs' and defendants' witnesses, the District Court also concluded that the limitations approximated amounts "considered suspiciously large by the Vermont public." The District Court also relied on citizen polls, comments by public officials and media coverage to demonstrate the real and perceived threat of corruption. As the District Court noted, "The threat of corruption in Vermont is far from illusory."

The contribution ceilings are also sufficiently high to permit effective campaigning. Overly restrictive contribution limits might "have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21. Contribution limits, however, need not be perfectly set: the failure of the legislators to "engage in such fine tuning does not invalidate the legislation." *Id.* at 30. "[D]istinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* We agree with the District Court's conclusion that the limits do not "amount to differences in kind."

As the District Court found, the limits imposed by Vermont hardly overwhelm the ability of candidates to engage in active and effective campaigning. The District Court marshaled evidence to support its findings, and conducted a fact intensive analysis of what constitutes

effective campaigning. Over the last three election cycles, less than 10 percent of contributions exceeded the limits set by the Vermont legislature. Moreover, Vermont has actually conducted an election since the imposition of these contribution limits (for Mayor of Burlington), and that election involved effective campaigns despite the contribution limitations. Subject to the applicable limits imposed by the statute, the candidates for mayor raised funds comparable in amount to that spent in State Senate races in the past. The District Court also reviewed testimony concerning the availability of low cost, highly effective methods of campaigning that reach large numbers of voters in Vermont, including county-wide televised and live debates, tables distributing literature, and town barbecues. The District Court further concluded that the limits may actually improve the ability of candidates to campaign, by freeing candidates from the time-consuming task of "wooing big donors." Finally, the court compared the Vermont law to similar limits upheld in Maine and Missouri. In Maine, a limit of $250 for House and Senate candidates was upheld. *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445, 459 (1st Cir. 2000). In Missouri, limits of $1075, $525, and $275, depending on the size of the electoral district, were upheld. *Shrink Mo. Gov't PAC v. Adams*, 204 F.3d 838, 840 (8th Cir. 2000).[5]

B. Limitations on Contributions to and by PACs and Political Parties

Act 64 regulates the ability of PACs and political parties to give and receive contributions. The Act prohibits such organizations from accepting contributions of more than $2000 from a single source during any two-year general election cycle. *See* Vt. Stat. Ann. tit 17,

---

[5] The District Court noted that by way of comparison, the Vermont law has a limit-constituency ratio (i.e., the maximum contribution allowed divided by the number of constituents) of .00068, compared to .00040 under the Missouri statute.

§ 2805(a). The Act further prohibits those organizations from making contributions to political candidates in excess of the general contribution limits—$200 for state representatives or local office, $300 for state senator or county office, and $400 for statewide office. *See id.* at §§ 2805(a)–(b).

The District Court upheld these limitations, except as applied to contributions by political parties to their own candidates. Upon review, we hold that all of these limitations are constitutional. We thus affirm the judgment of the District Court as to the constitutionality of most of the limitations, but reject the District Court's conclusion that political parties cannot be prohibited from contributing to candidates in excess of generally applicable limitations. We discuss three narrow issues that require further attention and, in two of those, further proceedings before the District Court.

As a general matter, we find little merit in the plaintiffs' contention that the $2000 limit on contributions to political parties and PACs is unconstitutionally overbroad. We first consider the issue of the $2000 limitation on contributions to political committees or political action committees and political parties. Act 64 defines "political committees" or "political action committees" as "any formal or informal committee of two or more individuals, not including a political party, which receives contributions or makes expenditures of more than $500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an election or advocating a position on a public question, in any election or affecting the outcome of an election." *Id.* at § 2801(4). A political party is defined separately by Vermont Elections Law, *id.* at § 2311–13, and includes both the party apparatus and "any committee established, financed, maintained or controlled by the party." *Id.* at § 2801(5).

Perhaps the most typical application of these rules would involve contributions to a political committee or political party that participates in the political process either by making contributions to or coordinated expenditures with candidates for office. As applied to these organizations, the $2000 limitation is unquestionably constitutional. Political action committees "derive rights from their members" and are accordingly due First Amendment protection. *Colo. Republican II*, 533 U.S. 431, 477 n.10. It is well established, however, that the state interest in fighting corruption, real and apparent, justifies limitations on contributions by individuals to particular candidate committees. Such a state interest is equally capable of justifying limits on contributions made to political parties or committees.

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

Cal. Med. Ass'n v. Fed. Election Comm'n, 453 U.S. 182, 197 (1981) ("*CMA*").

The plaintiffs do not dispute that, in principle, such limitations may be constitutional. Instead, they argue that Vermont's chosen limitations are overbroad, both because the statute applies to too many organizations and because it sets the contribution ceiling too low.

Regarding the first point, the plaintiffs assert that the restriction is an "overbroad, blunderbuss approach that punishes" even those organizations that are unlikely to corrupt the political process. They imply that certain types of PACs, "particularly legislative leadership PACs or ideological PACs," pose a weaker danger of corruption and should be permitted greater latitude in determining how to allocate their contributions. The plaintiffs argue that the limits are unconstitutional because Vermont has not shown any independent evidence that political parties

and PACs have a negative or deleterious effect on Vermont's politics. Further, the plaintiffs contend, these organizations are even less likely to corrupt in light of Act 64's other limitations. Private individuals cannot, for example, effectively funnel large gifts through political parties because parties can themselves only make contributions to candidates of between $200 and $400 dollars.

An argument identical to the plaintiffs' overbreadth argument was addressed and rejected in *Buckley*. There, the appellants argued that many large contributors have no interest in corrupting the political process, and the law was overbroad for restricting the rights of these unthreatening contributors. The Supreme Court upheld the constitutional validity of generally applicable contribution limits of $1000, even though "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29. The Court reasoned that the very corruption rationale which provides a foundation for the constitutional validity of contribution limitations supports their general applicability: "Not only is it difficult to isolate suspect contributions, but, more importantly, Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the process of raising large monetary contributions be eliminated." *Id.* at 30.

These arguments were also rejected by the Supreme Court in *CMA*. 453 U.S. at 197. In that case, a California political action committee challenged a $5000 federal limit on annual contributions by individuals and associations to multicandidate political committees. *See id.* at 186. Like the plaintiffs here, the parties in *CMA* asserted that such limitations do not serve the government's strong interest in preventing actual or apparent corruption in the political process.

See id at 197. The Supreme Court concluded that "*Buckley* precludes any argument" that the government may not limit the size of contributions made to multicandidate committees, and rejected the assertion that such limitations do not further the government's interest in battling political corruption. *Id.* Without such limitations, individuals could evade the contribution limitation "by channeling funds through a multicandidate political committee." *Id.* at 198.

In light of these prior holdings, we are unpersuaded by the plaintiffs' contention that Vermont had an obligation to divine which PACs and political parties pose the most serious risk of corruption, and develop a record that donations to each type of organization, narrowly defined, pose a strong threat of corruption. It is clear that, in principle, such limitations are an "appropriate means . . . to protect the integrity of the contribution restrictions upheld . . . in *Buckley*." *CMA*, 453 U.S. at 199. Accordingly, the Vermont provision is constitutional so long as the danger of corruption of the political system exists. Just as individuals may be limited from directly contributing to campaign organizations, individuals may be limited from doing so indirectly—that is, contributing large sums to PACs or political parties that funnel money to candidates. *See Buckley*, 424 U.S. at 38. Vermont does not have the burden to show on a contributor-by-contributor basis that contributions have led to corruption.

The plaintiffs' second overbreadth argument is that the $200, $300, and $400 limits on contributions to candidates for office are unnecessarily low, and that political parties and PACs should be exempt. The plaintiffs in *Buckley* also raised this argument, contending that the $1000 limitation regulated more contributions then necessary to accomplish its anti-corruption goals. Specifically, the appellants argued that even contributions of a larger amount did not carry a risk of corruption because no politician would throw away a career and reputation for a $1000

donation. As with the earlier overbreadth argument, the Supreme Court rejected the contention. *See Buckley*, 424 U.S. at 30. "[I]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2000 ceiling might not serve as well as $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." *Id.* (quotations and citations omitted). The Court reaffirmed the validity of this approach in *Shrink*, stating that a contribution limit survives scrutiny only if the regulation is "closely drawn to match a sufficiently important interest, though the dollar amount of the limit need not be fine tun[ed]." 528 U.S. at 387-88 (internal quotations and citations omitted) (alteration in original).

In order to succeed, then, this overbreadth argument must establish that when the limitations are applied to political parties and political action committees, they impose such a severe burden that it results in a "difference[] of kind" from alternative limits. *Buckley*, 424 U.S. a 30. In other words, a party seeking a special exemption from such laws carries a large burden. Illustrative of the political parties' and political action committees' burden in this regard is *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). In that case, the Supreme Court considered the constitutionality of a federal law which bans corporations from making any political expenditures from general corporate funds. The statute's purpose was to regulate "the corrosive influence of concentrated corporate wealth." *Id.* at 257. The F.E.C. had sought enforcement of the provision against an incorporated, non-profit pro-life advocacy organization that had "features more akin to voluntary political associations than business firms." *Id.* at 263. The Court held that, as applied, the provision was unconstitutional because the stated interest does not apply to an incorporated association like

MCFL. *Id.* at 263-64. The court set forth specific and demanding criteria for determining when other corporations fall into this constitutionally mandated exclusion. *Id.* These advocacy organizations met this high standard.

We should expect that the plaintiffs here bear a similar burden of establishing their exceptionalism, even if the particular facts of *MCFL* do not apply. Unlike the situation in *MCFL*, the PACs here have offered no evidence that PACs and political parties have overriding features exempting them from the general findings about actual and apparent corruption in Vermont. Nor have they provided evidence that the limitations, when applied to these organizations, impose such a severe burden on speech as to constitute a difference in kind. As mentioned, the District Court concluded, after considering a large body of evidence, that the contribution limits are high enough so that they do not constitute a severe infringement—a difference in kind—of the ability to associate politically. We thus agree with the judgment of the District Court and find that Act 64's contributions limits on political action committees and parties are constitutional.

The District Court did find support for one exception to the candidate contribution limits: those made by political parties. In this regard, we reject the District Court's conclusion that on account of their "unique role in the mechanics of our democracy," political parties must have greater freedom to provide their candidates with financial support. Relying on the central place of political parties in elections, the District Court held that the generally applicable limits were too severe when applied to parties. "Such limits would reduce the voice of political parties to an undesirable, and constitutionally impermissible, whisper."

We see no other way to understand the District Court's position than as being founded on

the belief that political parties operate as specially protected institutions under our Constitution. The District Court had already concluded that candidates can receive sufficient funds to effectively exercise their First Amendment rights even when restricted by Act 64's contribution limits. Thus, the District Court's conclusions concerning political parties are at odds with its findings that contributions within the limit are constitutionally adequate. Therefore, the District Court must have relied upon an implicit finding that political parties merit special treatment.

Whatever the validity of this principle in other legal contexts, the Supreme Court has recently left no doubt that parties do not deserve a special exemption from generally applicable contribution limits. *See Colo. Republican II*, 533 U.S. at 480–82. In that case, the Colorado Republican Party challenged the constitutionality of restrictions on expenditures it made in coordination with candidates for office, arguing that "coordinated spending is essential to parties because a party and its candidate are joined at the hip, owing to the very conception of the party as an organization formed to elect candidates." *Id.* at 477 (citations and quotation marks omitted). The Court held that such limitations are a constitutional mechanism for ensuring that contributors do not circumvent the federal contribution limit and rejected the claim that political parties occupy some special place in our constitutional system. Above all, the argument fails because, just as with other political organizations, political parties "are necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors." *Id.* at 479. Thus, as it does with any other contributor to political campaigns, the government has an interest in restricting the flow of money from parties to candidates in order to

reduce actual and apparent corruption. "The Party's arguments for being treated differently from other political actors subject to limitation on political spending under the Act do not pan out." *Id.* at 481. "We accordingly apply to a party's coordinated spending limitation the same scrutiny we have applied to the other political actors, that is, scrutiny appropriate for a contribution limit." *Id.* at 482.

Since we agree with the District Court's conclusion that Vermont's limits are "vital to deter avoidance of the individual contribution limits," we hold that their application to political parties is supported by this strong government interest.

Having concluded that the restriction of contributions from political parties is supported by a constitutionally sufficient government interest, we turn to the question of whether the statute is narrowly tailored to this interest. As discussed above, the District Court reviewed the limits based upon data reflecting the costs of elections and the views of citizens regarding what constitutes suspiciously large gifts. Based on this body of evidence, the District Court concluded that gifts in excess of the limits create the appearance of, and increase the likelihood of, corruption. Moreover, contributions in the amounts permitted by the Act provide citizens an adequate tool for "speaking their mind" by giving a donation in order to affiliate with a candidate.

There are three narrower issues that require more individual attention. The first concerns the Act's definition of local and state party affiliates as a single entity. For the purposes of determining whether a political party has exceeded its various contribution limitations, Act 64 defines a political party as "any committee established, financed, maintained or controlled by the party, including any subsidiary, branch or local unit thereof and including national or regional

affiliates of the party." Vt. Stat. Ann. tit. 17, § 2801(5). Vermont's Secretary of State has interpreted this provision, in conjunction with Vt. Stat. Ann. tit. 17, §§ 2301–2320, to require that state and local branches of political parties be considered a single unit for the purposes of applying contribution limits, and determining whether those limits have been reached or violated.

Plaintiff Vermont Republican State Committee argues that this definition requires the party to treat itself as a single monolithic unit, and requires the party to abandon its current, decentralized structure. However, the plaintiff has not cited any actual changes that will need to be made, except that the local and state affiliates will now have to record and coordinate their contributions. In other words, the provision does not impose any organizational burden on the party outside of the campaign finance realm, and requires no broader organizational reform. Moreover, the District Court indicated doubt as to whether the Republican Party actually demonstrated that it operates in the decentralized form that it claims. For example, the state committee brought suit on behalf of all of the town and county committees without ever consulting them or asking them to approve the lawsuit. The District Court also noted that federal election law treats state, county, and town committees as a single unit for the purposes of campaign finance. We agree with the District Court that, insofar as Vermont's campaign finance law treats state and local affiliates as a single entity, it suffers from no constitutional defect.

Second, the plaintiffs have argued that Act 64 applies to even those political action committees that make wholly independent expenditures. Plaintiff Vermont Right to Life Committee-Fund for Independent Political Expenditures ("VRLC-FIPE"), which is affiliated with the Vermont Right to Life Committee ("VRLC"), is a political committee that, by its charter, cannot make contributions to candidates. It has asserted that it makes only independent

expenditures, that is, it never coordinates its expenditures with candidates for office. Thus it argues that when applied to itself, the $2000 cap operates as a limitation on independent expenditures.

The statute does appear to lend itself such an interpretation. On the one hand, the Act explicitly states that it does not apply to independent expenditures. The law explicitly states that "[t]he limitations on contributions . . . shall not apply to contributions made for the purpose of advocating a position on a public question, including a constitutional amendment." Vt. Stat. Ann. tit. 17, § 2805(g). Nonetheless, it appears that VRLC may be correct that even political organizations that make solely independent expenditures, but nonetheless advocate the election of particular candidates, would be covered. *See id.* at § 2801(4).

Thus, we remand for findings on the following points: (1) whether plaintiff VRLC makes solely independent expenditures and thus has standing to challenge this provision; (2) whether the Vermont law regulates contributions to such organizations; and (3) whether Vermont has a sufficiently strong government interest in such limitations.

Finally, we remand for additional proceedings on the issue of how Act 64 implicates the ability of a state party affiliate to receive funds from national affiliates. Act 64 apparently limits the transfer of money from national to state and local parties, and that limit might impose a significant burden on political parties. How a party allocates money between its national, state and local affiliates constitutes an important component of party organization. It determines who in the party exercises decision making authority, who speaks for the party, and how the party arranges its internal finances. At the same time, the failure to limit such transfers might create a loophole that would allow contributors to easily circumvent the $2000 limit on gifts to state

parties. The District Court never made specific findings of fact regarding this issue, including how national and local affiliates of the political parties interact and how limitations on transfers of money might affect parties. Since we are reluctant to rule on this issue without the benefit of findings of fact on how such a provision might be expected to operate, we remand for further proceedings.

C. The Related Expenditure Provisions are Constitutional

We affirm the District Court's holding that the "related expenditure" provisions of Act 64 are constitutional because they serve to reinforce the anti-corruption goals of the contribution limitations. Pursuant to Act 64, "related expenditures" on behalf of a candidate by a third party count toward the third party's contribution limit as well as the candidate's expenditure limit. The Act defines related expenditures as those "intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee." Vt. Stat. Ann. tit. 17, § 2809(c). The plaintiffs challenge the provision on three grounds: (1) the phrase "facilitated by" is vague; (2) political parties and PACs should have greater abilities to engage in coordinated expenditures with candidates; and (3) the Act's rebuttable presumption that an expenditure benefitting six or fewer candidates is a related expenditure is a content-based speech restriction discouraging advertisements about a small number of candidates. We reject each claim.

Plaintiffs argue that the "facilitated by" standard is vague because it leaves open the possibility that *any* communication about a candidate's views with a third party that then undertakes independent expenditures will qualify as a contribution. The First Amendment permits the treatment of "coordinated expenditures" as contributions to a candidate. *Buckley*, 424 U.S. at 46–47. Independent expenditures may not be limited because "the absence of

prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985). The plaintiffs' objection to Act 64 is really one which assumes that the word "facilitated" has its broadest meaning, akin to giving any aid in support of the third-party expenditure. If that were what the statute meant, then we would agree that the provision might raise constitutional problems.

We think that, in light of the terms "solicited by or approved by" that accompany it, the term facilitated should be given a narrower reading. Such a reading would also resolve the ambiguity of the statutory language so as to guarantee the constitutionality of the statute. *See* William Eskridge, *Legislation: Statutes and the Creation of Public Policy*, 873–89 (3d Ed. 2001) (discussing canon of constitutional avoidance). Accordingly, we construe the phrase "facilitated by" as requiring some "prearrangement" or "coordination" with the candidate. *Nat'l Conservative Political Action Comm.*, 470 U.S. at 498. Under such a construction, sharing routine information about a candidate is not sufficient to meet the "facilitated by" requirement. Thus, the provision is not constitutionally invalid.

Nor is there any constitutional barrier to applying this provision to related expenditures by PACs and political parties. The plaintiffs' argument on this point substantially restates their claim discussed above—that different contribution limits ought to apply to PACs and political parties. We reject it for the same reasons.

Finally, the provision's rebuttable presumption, which presumes that expenditures by political parties or PACs that benefit six or fewer candidates are contributions to those

candidates, does not violate the constitution by chilling protected speech. The plaintiffs argue that the presumption is unconstitutional because (1) the law may never presume that an expenditure is coordinated and (2) the presumption could never be rebutted and, as a result, chills independent advocacy of particular candidates. We find neither claim persuasive.

The Constitution does not bar the use of rebuttable presumptions in this context. The plaintiffs base their argument on *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996) ("*Colo. Republican I*"). There, the Supreme Court struck down a federal provision that automatically treated all party expenditures, including those made independently, as contributions to candidates. The Court rejected the Court of Appeals's analysis that the government was entitled to a conclusive presumption that party expenditures are coordinated. *Id.* at 619. The fact that the presumption was conclusive, however, played the critical role in that decision: it eliminated the need for a finding that the expenditures were in fact coordinated and foreclosed the possibility of a defense. *Id.* at 625. Act 64 does nothing of the sort, since its presumption is rebuttable.

The plaintiffs' argument that the presumption is functionally conclusive because one "cannot prove a negative" is, at least in the legal arena, inaccurate. There are ample strategies that an accused party can employ to demonstrate that an expenditure was truly independent from the candidate it supported. The party can, for example, testify that no discussion took place with the candidate about advertising strategies, including the sharing of information about advertising plans. Candidates can testify that they never gave feedback on an independent advertising scheme or that the third parties never solicited such feedback. Adjudicative bodies can take such evidence, or other similar testimony, as proof and infer a lack of coordination.

Accordingly, we uphold Act 64's rebuttable presumption concerning related expenditures.

D. The 25 Percent Limit on Out-of-State Donations is Not Constitutional

We can find no sufficiently important government interest to support the provision of Act 64 that limits out-of-state contributions to 25 percent of all candidate contributions. Unlike all of the other Act 64 provisions at issue in this appeal, the out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents). The District Court's decision in this regard should be upheld.

The District Court concluded that Vermont's interest in eliminating excessive out-of-state contributions was confined to unusually large contributions. The District Court also noted that many non-residents have legitimate and strong interests in Vermont and have a right to participate, at least through speech, in those elections. We find no support in the record for the alternative claim that Vermont has an important interest in singling out one class of contributors for limitations as particularly worrisome. *See* 1997 Vt. Laws P.A. 64 (H.28) (1997) (finding No. 5 "Increasing campaign expenditures require candidates to seek and rely on a smaller number of larger contributors, often outside the state, rather than a large number of small contributors."). There are only vague references to the danger of out-of-state contributions, and those all refer to the danger of excessively large (not cumulatively great) contributions.

In the two reported decisions on the issue, courts have split on whether limitations of non-resident contributions may be upheld on corruption grounds. The Ninth Circuit has rejected, almost in bright-line form, limitations on non-resident restrictions. In *VanNatta v. Keisling*, the court struck down an Oregon initiative that effectively limited the use of non-resident

contributions to 10 percent of total campaign expenditures. 151 F.3d 1215, 1218–19 (9th Cir. 1998). Addressing the asserted anti-corruption justification, the court held that the provision suffered from both over- and underbreadth. Its overbreadth stemmed from the fact that it prevented all non-resident contributions once the 10 percent threshold had been reached, even those too small to have any corrupting influence. *Id.* at 1221. The provision was underbroad because it did nothing to prevent corrupting (i.e., large) resident contributions; nor did it prevent corrupting non-resident contributions until the 10 percent limit had been reached. *See id.* at 1221. In other words, the non-resident cap was "not closely drawn to advance the goal of preventing corruption." *Id.*

Because Act 64 contains contribution limits, it does not share all of the flaws of the Oregon statute considered in *VanNatta.* Act 64 does, for example, limit large resident and non-resident contributions. Nonetheless, the provision is overbroad in that it prohibits small contributions from out-of-state sources once the 25 percent threshold has been reached, even though such contributions are no more likely to corrupt than in-state contributions. Under this analysis, sustaining the provision would require an additional explanation for why exactly Vermont has an interest in eliminating such small donations only from non-residents.

The Alaska Supreme Court has attempted to craft such an explanation in *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000). The Alaska law at issue capped out-of-state contributions but at lower percentages than Vermont's law. The court upheld the limitations on the grounds that out-of-state contributions have the ability to distort the Alaskan political system: "These nonresident contributions may be individually modest, but can cumulatively overwhelm Alaskans' political contributions. Without

restraints, Alaska's elected officials can be subjected to purchased or coerced influence which is grossly disproportionate to the support nonresidents' views have among the Alaska electorate, Alaska's contributors, and those most intimately affected by the elections, Alaska residents. These restraints therefore limit the 'potential for distortion.'" *Id.* at 617. Put another way, Alaska's "[m]ore than 100 years of experience . . . have inculcated deep suspicions of the motives and wisdom of those who, from outside its borders, wish to remold Alaska and its internal policies." *Id.* The out-of-state limitation restrains their distorting influence. *Id.*

The analysis of the Alaska case is a sharp departure from the corruption analysis adopted by the Supreme Court in *Buckley* and *Shrink*. Even under the more expansive *Shrink* analysis, the fear was that candidates would become too compliant with the wishes of large contributors because they must rely on private interest groups for funding. The *Alaska* analysis permits limitations not to ensure candidate independence generally, but to limit the influence of one set of people—untrustworthy outsiders. Even assuming that the Alaska Supreme Court is correct that outsiders have bad motives and little to contribute to its political discourse, the government does not have a permissible interest in disproportionately curtailing the voices of some, while giving others free rein, because it questions the value of what they have to say.

The Alaska Court's concern could be understood another way: that when candidates are beholden to fundraisers, and not voters, then large contributions from non-residents distort the system. Again, this problem would endure even if officials were beholden to in-state contributors. Moreover, Vermont's expenditure limitations eliminate the major force behind candidates' excessive reliance on campaign contributors—their need to maximize their ability to raise funds by remaining pliant to the wishes of those who contribute to the political campaign

system.

Based on our review of these cases and the government interests asserted by the defendants, we are unpersuaded that the First Amendment permits state governments to preserve their systems from the influence, exercised only through speech activities, of non-residents. Vermont has asserted no valid interest sufficiently strong to justify the provision, and we therefore hold it unconstitutional. Pursuant to Act 64's severability provision, the unconstitutional provisions should be severed.[6]

CONCLUSION

Vermont has established a sufficiently important interest in favor of Act 64's expenditure limitations: namely, preventing the effective sale of time and access to public officials that results from the corrupting influence of excessive fundraising and campaign spending. Such limits are

---

[6] With respect to the dissent, we offer only a few observations. The arguments largely reprise those presented by Senator Buckley and like-minded commentators in the early 1970s. While some of those arguments were then successful, they failed to result in having the Supreme Court hold that expenditure limits are *per se* unconstitutional—a fact that our dissenting colleague appears not to dispute. Thus, given that *Buckley* was grounded in a factual record distinguishable from that before us today, we are confident in our conclusion that the unique circumstances of the Vermont context warrant a different outcome.

It is beyond cavil that an opponent of the Act will argue its ambiguities and statutory peculiarities. But any such ambiguities, omissions or statutory quirks will, in the normal course of litigation, legislative amendment and administrative interpretation, be resolved. But in any event, the ambiguities raised by the dissent do not, we believe, render the statute unconstitutional. Indeed, though raising the specter of a multitude of pitfalls latent in the statutory text, even our dissenting colleague would uphold the constitutionality of the majority of the Act—despite that many of those same ambiguities speak to portions of the Act unanimously upheld. And while the dissent questions the extensive record made by the State of Vermont, we are quite comfortable in having concluded, upon direct review of their efforts, that the Governor and Legislature of Vermont, as confirmed by the District Court, were correct in finding a compelling governmental interest for expenditure limitations. Finally, the cited post-event commentary could not have informed the State nor the District Court and can have no effect on our decision.

In short, the dissent argues that, though acting with the best intentions, the State of Vermont has charted a misguided course destined only to silence the voices of ordinary citizens and entrench political parties. Our dissenting colleague thus characterizes the legislators of Vermont as, at best, naive, and at worst, strategically self-interested. We choose not to view Act 64 through this cynical lens and instead take solace in the words of our Supreme Court, which has cautioned that "tradition teaches that the First Amendment embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they become a straightjacket that disables government from responding to serious problems." *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741 (1996) (plurality opinion).

thus necessary to safeguard the democratic process and the public's faith in its representatives. These limits are narrowly tailored, and permit candidates for public office to engage in effective campaigns. Vermont also has a sufficiently important interest in support of Act 64's contribution limits: fighting the real and apparent corruption that accompanies unlimited campaign gifts. The contribution limits are narrowly tailored to this goal. Accordingly, those provisions of Act 64 are constitutional.

For the reasons set forth, we affirm the District Court's holdings that the following provisions of Act 64 are constitutional: (i) the limit on contributions that candidates may accept from individuals or political action committees; (ii) the limit on contributions that political action committees and political parties may accept from any source; (iii) the definition of political parties as including state, county and town entities; and (iv) the classification of related expenditures.

We vacate the District Court's injunction against enforcement of (i) the expenditure limitations and (ii) the limitation on contributions by political parties to candidates. We also vacate the judgment and remand for further proceedings with respect to the constitutionality of (i) regulating contributions by the plaintiff Vermont Republican Right to Life Committee and (ii) limiting transfers of funds from national to state political party affiliates. Finally, we affirm the District Court's injunction against enforcement of the limits on contributions from non-Vermont residents and organizations.

In vacating aspects of the District Court's injunction, we are mindful that Act 64's limitations are premised on a two-year election cycle. Because the issuance of this opinion will occur in the waning months of such a two-year period, the application of these limits to the

current cycle might be disruptive to candidates who relied on their absence while campaigning. Given that further proceedings must be held, and given our concerns with the timing of this decision, we remand to the District Court the issue of when the various limitations revived by this opinion should be given effect. We thus authorize the District Court to designate an appropriate effective date for these limitations that causes the least disruption to the current election cycle.

Each party shall bear its own costs on this appeal.

00-9159

Landell v. Vermont Public Research,

WINTER, Circuit Judge, dissenting,

I respectfully dissent as to the constitutionality of two provisions of Act 64. See 1997 Vermont Campaign Finance Reform Act (codified as Vt. Stat. Ann. tit. 17, §§ 2801-2883) ("Act 64"). Those provisions are Act 64's limits on expenditures by candidates, including related expenditures, and its restrictions on fundraising by state, county, and local committees of a political party. Id. §§ 2801(5), 2805a. Otherwise, based on Supreme Court precedent, I concur in the result reached by my colleagues. In view of the length of this dissent, I begin with a table of contents.

CONTENTS

I. INTRODUCTION

Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), held that government may not limit campaign expenditures by candidates for electoral office. Id. at 45, 54, 57. Act 64 limits such expenditures notwithstanding Buckley. Indeed, the proponents of Act 64 never doubted its unconstitutionality under Buckley and enacted it for the explicit purpose of creating a vehicle for litigation to overturn Buckley. See infra note 1 and accompanying text. Act 64's limits on expenditures by candidates violate the First Amendment because they limit political speech, including editorializing speech by the press, for no permissible purpose, and entrust those who enforce the law with unfettered, and unconstitutional, discretion to determine what acts of political advocacy are permitted and prohibited. Moreover, the treatment of a contribution to a local political party affiliate -- be it state, county, or local -- as a contribution to all affiliates violates both freedom of speech and freedom of association.

Act 64 suppresses ordinary political activity at every level of the electoral process. It may be a popular law but only because its proponents systematically divert attention from the law's actual provisions to the nobility of their goal -- here the transfer of political power from "special interests" to "regular

citizens."

As Justice Brandeis once noted, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). And Justice Black has reminded us that "[h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'" Beauharnais v. Illinois, 343 U.S. 250, 274 (1952) (Black, J., dissenting). Act 64, which has its greatest impact in silencing those ordinary citizens whose active participation in politics is through organized groups, provides us with a modern reminder of the wisdom of those two statements.

II. APPLICABLE CONSTITUTIONAL PRINCIPLES

Neither Act 64's limits on expenditures nor its restrictions on independent fundraising by state or local party committees involve new issues of constitutional law.

Political speech without an audience is not worth the effort. Political speakers must go to where voters are or speak through a medium that voters watch or hear. Without resources of communication, no speech is effective. Without money, resources are not obtainable. Cars use gas. Gas costs money. A candidate who may not under a law even drive the family car to a town green to make a speech is as effectively barred from speaking as he

would be if the law flatly prohibited the speech. As the Supreme Court has stated:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event.

Buckley, 424 U.S. at 19.

Act 64's limits on campaign expenditures directly inhibit the most ordinary activities of democratic politics. If a citizen uses his or her residence as a place at which a candidate and the candidate's supporters sometimes meet to plan campaign efforts, buys stamps for invitations to the gatherings, and provides snacks and soft drinks for those who attend, then the value of the use of the rooms and the items purchased must fit within Act 64's highly restrictive limitations. See Office of the Secretary of State, 2001 Guide to Vermont's Campaign Finance Law, available at http://vermont-elections.org/elections1/2001cfguide.html ("2001 Guide"); Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (Mar. 11, 1999),

available at http://vermont-elections.org/elections1/1999GAMemoCF.html ("1999 Memorandum"). The value of the mileage driven by the candidate and other supporters to the meetings must also be calculated and fit within Act 64's limits. See 2001 Guide, supra. If the same candidate successfully "solicits" an editorial endorsement from a newspaper, the value of that endorsement falls within the definitions of "contribution" and "related expenditure" regulated and limited by Act 64. See Vt. Stat. Ann. tit. 17, §§ 2801(2), 2809(c); 2001 Guide, supra. These restrictions on candidates and their supporters are rendered even harsher by Act 64's severe, albeit constitutional, limitations on what political parties can do in election campaigns.

The activities limited by Act 64 are the ordinary stuff of democracy that constitutes the core of the conduct protected by the First Amendment. There is "practically universal agreement that a major purpose of [the First] Amendment was to protect" such speech. Mills v. Alabama, 384 U.S. 214, 218 (1966), quoted in McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995). Indeed, the First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Buckley, 424 U.S. at 15 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

In applying these principles, the Supreme Court has held that only the prevention of "corruption or the appearance of corruption" constitutes a sufficiently compelling interest to limit contributions to candidates. See Buckley, 424 U.S. at 25-28 (holding that limiting the actuality and appearance of corruption is a "constitutionally sufficient justification" for a contribution limitation, but dismissing other proffered justifications for the limitation). It has also held, however, that neither the anti-corruption rationale, the interest in equalizing the financial resources of candidates, nor the increase in money spent on political campaigns justifies the limiting of amounts that candidates for office may spend to promote their candidacy. Id. at 45, 54, 57. Indeed, the Court has stated that

> [t]he First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government but the people -- individually as citizens and candidates and collectively as associations and political committees -- who must retain control over the quantity and range of debate on public issues in a political campaign.

Buckley, 424 U.S. at 57.

Since Buckley, the Court has adhered to the distinction between the regulation of contributions and the regulation of expenditures. See Federal Election Comm'n v. Colorado Republican

Federal Campaign Comm., 533 U.S. 431, 440-41 (2001) ("Colorado II"). In Colorado II, the Court stated that "ever since we first reviewed the 1971 Act, we have understood that limits on political expenditures deserve closer scrutiny than restrictions on political contributions," because "[r]estraints on expenditures generally curb more expressive and associational activity," and "limits on contributions are more clearly justified by a link to political corruption." Id. The Court went on to state that "[g]iven these differences, we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits." Id. at 441-42 (citations and footnotes omitted) (emphasis in original). One would think that the unqualified statements of the Supreme Court regarding the unconstitutionally of expenditure limits might be the end of the matter at this level of the court system, particularly since the sponsors of Act 64 have made no secret of their intention to enact Act 64 in order to provoke a test case to overrule Buckley with regard to expenditure limits. See Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (Jan. 9, 2001), available at http://vermont-elections.org/elections1/2001GAMemoCF.html ("2001 Memorandum"); see also Hearing on H. 28

Before the Vt. House Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Anthony Pollina); Hearing on H. 28 Before the Vt. Senate Comm. on Gov't Operations, 64th Biennial Sess. (1997) (statement of Sen. William Doyle); Vt. House Comm. of Conf., Report on Campaign Finance, H. 28, 64th Biennial Sess. (1997).[1] However, the views of my colleagues require that I describe in some detail why Act 64 is unconstitutional in the particular respects noted above and even under the new constitutional test that they adopt.

There is another body of First Amendment jurisprudence that is of relevance here: Any regulation of protected speech must embody valid criteria sufficiently precise to ensure that officials apply those criteria. See Thomas v. Chicago Park Dist., 122 S. Ct. 775, 780 (2002) (stating that the Supreme Court has "required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review"); Forsyth County v. The Nationalist Movement, 505 U.S. 123, 131 (1992) ("'[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.'" (quoting Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51 (1969))). Otherwise, the officials who administer the law will

have the discretion to fashion and apply their own criteria without restraint. See Thomas, 122 S. Ct. at 780 ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is a risk that he will favor or disfavor speech based on its content."); Forsyth, 505 U.S. at 131 ("If the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion' by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted." (citations omitted)).

In that regard, Act 64 is more a theory than a body of legal rules. What it actually means in practice has been, in a literal multitude of critical respects, simply left to future executive or judicial rulings. Act 64 bristles with interpretive issues -- the meaning of "anything of value," "candidate," "for the purpose of influencing an election," "primarily benefits six or fewer candidates," "single source," "affirmative action to become a candidate," "services by individuals volunteering their time," and so on -- and with valuation questions -- of mileage, use of a room, office, computer, phone, professional services, etc. -- and leaves all of these issues to those who must administer and enforce the statute. See Vt. Stat. Ann. tit. 17, § 2801; 2001 Guide, supra.

Moreover, the exercise of freedom of association requires that citizens be allowed freely to form political organizations at various levels of government that are related to each other as affiliates of the same political party while still retaining much local autonomy. See Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997) (stating that "political parties' government, structure, and activities enjoy constitutional protection" and noting that a political party has "'discretion in how to organize itself, conduct its affairs, and select its leaders,'" (citing Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214, 230 (1989)); see also Buckley, 424 U.S. at 15 (recognizing the right "'to associate with the political party of one's choice'" and noting that "'[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association'" (internal citations omitted)). Act 64's treatment of the state, county, and local affiliates of a political party as a single aggregated unit for purposes of fundraising and contribution limits, see Vt. Stat. Ann. tit. 17, § 2801(5), forces state-wide coordination of the funding of local, county, and state-wide party activities and thereby violates both freedom of speech and freedom of association. This lumping of groups that have sound reasons for an independent existence, albeit while being loosely related to

each other, portends to destroy local organization and citizen participation in American democracy. And it does so for no articulated reason.

III. THE CONSTITUTIONALITY OF EXPENDITURE LIMITATIONS AND RESTRICTIONS ON PARTY AFFILIATE FUNDRAISING

a) The Requisite Level of Scrutiny

As noted, it is standard First Amendment jurisprudence that governmental restraints on protected speech must be subjected to exacting scrutiny to survive a constitutional challenge. See Buckley, 424 U.S. at 16, 44-45 (referring to the "exacting scrutiny required by the First Amendment," and applying exacting scrutiny to "limitations on core First Amendment rights of political expression"); Smith v. California, 361 U.S. 147, 151 (1959) (applying "stricter standards" to a statute that has "a potentially inhibiting effect on speech," and noting that "a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser" (citing Winters v. New York, 333 U.S. 507, 509-10, 517-18 (1948))); see also McIntyre, 514 U.S. at 347 (applying exacting scrutiny to invalidate an Ohio law that prohibited the distribution of anonymous campaign literature); Meyer v. Grant, 486 U.S. 414, 420 (1988) (holding that a statute prohibiting use of paid petition circulators burdens core political speech and is therefore

subject to exacting scrutiny); Lerman v. Bd. of Elections, 232 F.3d 135, 146 (2d Cir. 2000) (applying "exacting scrutiny" to restriction of "core political speech" in overturning local residency requirement for petition witnesses).

The most exacting scrutiny must be given to legislation that expressly seeks to reallocate political power -- in view of Act 64's proponents, from "special interests" to "regular people" -- by limiting the political activity of candidates for office and their supporters. See Buckley, 424 U.S. at 14-15 (calling political campaigns the "fullest and most urgent application" of the First Amendment guarantee, and invoking the "'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open'" (quoting New York Times v. Sullivan, 376 U.S. 254, 270 (1964))).

As Justices Brandeis and Black have reminded us, the high-mindedness of a law's proponents is no guarantee that it comports with principles of freedom of expression. This is particularly true with regard to legislation that was examined in the legislative process more for the nobility of its stated purpose than for what it said. Since Act 64's passage, surprise at its actual provisions and actual effects has been expressed by the law's proponents.[2] Notably, one vigorous supporter, Anthony Pollina, who was a lobbyist seeking Act 64's passage and has even

been described as its author, see Vermont Reformer Says Law He Authored is Unconstitutional, Political Finance, The Newsletter, March, 2002, has since sought to run for office and brought a lawsuit claiming that Act 64 violates the First Amendment. See Ross Sneyd, Progressives Sue to Ensure Public Financing for Pollina, Associated Press, Mar. 12, 2002.

Moreover, high-mindedness can, for some, also be a useful facade. When campaign finance legislation is considered by those in power, there is both motive and opportunity to craft rules that will restrain the political activity of opponents. My colleagues caution that the self-interest of incumbents should not cause us to presume that such legislation is unconstitutional. I agree but also note that our experience in a similar area suggests that great caution is in order. Legislatures can directly affect the outcome of elections through two kinds of legislation: reapportionment and campaign finance regulation. Our experience with reapportionment is that, over time, the self-interest of incumbents has become the sole guiding star. Campaign finance legislation presents a similar opportunity to incumbents, and a major factual premise of Act 64 is that incumbents value reelection over their duties to constituents. Indeed, whenever Congress takes up legislation involving campaign finance, the press now openly discusses how

various proposals will affect particular political parties and candidates. See, e.g., Ruth Marcus & Dan Balz, Democrats Have Fresh Doubts on "Soft Money" Ban; Some Fear GOP Would Gain Edge in Campaign Finances, Washington Post, Mar. 5, 2001, at A1; John Mintz, McCain's "Soft Money" Pledge Alarms GOP; Republican Leaders Say Curbs Would Hurt Party's Election Chances, Give Fund-Raising Edge to Democrats, Labor Unions, Washington Post, Feb. 22, 2000, at A6. The assumption that these possible effects never enter the mind of the party members and candidates who enact such legislation might be questioned by even the least cynical observer. Presumption or no, truly searching scrutiny of campaign finance legislation is essential.

I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny. Their opinion describes the provisions of Act 64 in only cursory fashion. It accepts the theory and factual assumptions proffered by the law's supporters at face value in a show of deference exceeding even that accorded decisions of an administrative body. And it essentially ignores the holding of Buckley.

Even if Buckley was not there, First Amendment jurisprudence does not allow laws that burden and prohibit political advocacy to be justified by the proffer of a theory based on spoken and unspoken factual assumptions without the most exacting judicial

scrutiny of that theory, those factual assumptions, and the actual provisions of the law as enacted. Such scrutiny requires a critical examination of the details of the law passed, the degree of burden it imposes on protected speech, and the interests asserted as a justification. Accordingly, I turn to the details of the law.

b) Act 64's Expenditure and Contribution Limits

Beginning with an overview, Act 64 limits the amount of resources -- money and things of value -- that may be used by candidates on campaign activities and that may be obtained by candidates from individual donors or political committees. See Vt. Stat. Ann. tit. 17, §§ 2805, 2805a. It therefore contains limits on direct expenditures of money or use of things of value by candidates and direct contributions of money or things of value to campaigns. See id. These limits would not necessarily reach activities that consume resources purchased and used by others to support a candidate's campaign. To eliminate any uncertainty, Act 64 styles these activities "related expenditures" and treats them both as candidate expenditures and as contributions to a candidate subject to the statutory limits on those expenditures and contributions. See id. §§ 2809(a), (b). Act 64 also requires that the limits on contributions to, and campaign expenditures by, state, county, and local affiliates

be determined by aggregating, that is, by treating them all as a single committee. See id. §§ 2801(5), 2805(a), 2809(d).[3]

Act 64 provides a public financing option for candidates for Governor and Lieutenant Governor. See id. §§ 2851-2856. Eligibility for public financing turns in part on Act 64's definitions of contributions and expenditures, and, therefore, of related expenditures. Were a candidate to raise or expend more than $500 -- or have supporters, including a political party, make related expenditures in excess of that amount -- before February 15 of the election year, the candidate would not be eligible for public financing. See id. § 2853(a).

Such a regulatory effort of course must provide some definition of the conduct regulated and the substance of what is prohibited and what is permitted. Where limits on expenditures and contributions are imposed by dollar value, a time frame must be selected. The statutory scheme must also include an enforcement scheme, a delicate matter when electoral speech by candidates and their supporters is regulated by government itself in minute, day-by-day detail, and a multitude of statutory ambiguities and daily problems of interpretation and valuation abound. Scrutiny of the details of such regulation is necessary to inform the constitutional inquiry regarding the degree of impact on protected speech and conduct, the requisite nexus

between the regulation and constitutionally permissible goals, and the accuracy, reliability, and likely adherence to those goals of the designated enforcement mechanisms.

As noted, establishing a basic legal framework for regulating political campaigns first requires selection of a time frame(s) for the provision of public financing and for totaling candidate expenditures, contributions, and related expenditures in order to enforce limits on their size. Act 64 is schizophrenic in that regard. For purposes of public financing, it establishes separate time periods and separate funding for primary and general elections in recognition of the fact that some candidates need funding to wage both a primary and general election campaign while others need funding only in the general election. See id. § 2855(a).

For purposes of limiting contributions and expenditures, however, Act 64 imposes a so-called two-year cycle approach. See id. §§ 2805(a), 2805a(a); see also 2001 Guide, supra. Under that approach, expenditures by candidates, contributions, and related expenditures are totaled over a two-year period for purposes of enforcing the statutory limitations. The effect of the two-year cycle is not inconsequential. Vermont, like most American states, provides both for primaries and for subsequent general elections. See Vt. Stat. Ann. tit. 17, §§ 2103(15),(25), 2351.

Because the two-year cycle lumps these elections together, contribution and expenditure limits, including related expenditures, are imposed on the total raised and spent by individual candidates in both electoral periods. In other words, Act 64 limits a candidate who must wage a serious primary fight to the same amount of financing as a general election opponent who did not face a serious primary contest.

The two-year cycle introduces another complexity -- and creates much room for anti-democratic manipulation -- because party primaries in Vermont are not restricted to voters registered in the particular party but are open to all voters, including those registered in other parties. See id. § 2363; see also Ian Urbina, Leveling Politics in the Green Mountain State, The American Prospect, Sept. 25, 2000, at 41 (discussing Vermont's cross-over voting in primaries); Vermont's Senate Race, The Common Man, The Economist, Sept. 5, 1998, at 25. The amount that a candidate must spend in a primary, therefore, may be substantially affected by voters who are seeking to disadvantage the candidate in the general election.

Turning to Act 64's definitions, candidate expenditures are defined to include "payments," "distributions," and "disbursements" "of money or anything of value" "for the purpose of influencing an election." Vt. Stat. Ann. tit. 17, § 2801(3).[4]

The breadth of this language is indisputable. Given its ordinary meaning, it includes the value of the use of phones, computers, offices, rooms in residences or elsewhere, paper, pencils, autos, etc. See 2001 Guide, supra; 1999 Memorandum, supra. For example, according to Vermont's Secretary of State, a candidate's use of an auto is an expenditure. See 2001 Memorandum, supra. Candidates therefore may not drive their personal vehicles for campaign purposes without recording every mile driven and treating the costs of that driving as a campaign expenditure. See id. Vermont's Secretary of State has suggested that 31¢ per mile is presently an accurate measure of expense for this purpose. See id. These expenditure limits also apply to candidates who use personal funds exclusively to fund their campaigns. See Vt. Stat. Ann. tit. 17, § 2805a(a).

Two terms are critical to determining what activities are "expenditures" subject to the limits: "for the purpose of influencing an election," see id. § 2801(3), and "candidate," see id. § 2801(1). The breadth of the former language clearly is such as to be in substantial part hopelessly ambiguous. At one end of an interpretive spectrum, "for the purpose of influencing an election" would probably not include, for example, a candidate's cost of driving to a town hall to register to vote and, later, of driving to vote, although even that driving fits

within Act 64's literal definition of expenditure. At the other end of the spectrum, candidate Jones's purchase of an ad stating "Vote for Jones Next Tuesday" would certainly be an expenditure. In between are literally a multitude of activities that may influence an upcoming election but lack an accompanying statement of express purpose. As to these, the statute offers no guidance.

Potentially the most significant, but hardly the only, area of ambiguity involves activities of incumbent officials. Members of the executive and legislative branches engage in relatively continuous communication with the public that involves the use of resources in a way that will help a reelection effort and would therefore fit within the definition of "expenditure," if done by a "candidate" "for the purpose of influencing an election." The statute offers no guidance on the question of how these terms are to be applied in practice to an incumbent's activities. This is a fateful question. If most of the resource-consuming activities of officeholders are not "expenditures" because they occur in the course of the officeholder's public duties, incumbents will have an enormous advantage over challengers under expenditure limits. If most of these activities are "expenditures," an incumbent officeholder might well use the bulk of permitted communications in the first year of the two-year cycle. There are also hundreds of intermediary positions, all of which are arbitrary to one

degree or another.

Some interpretive guidance, but not much, may be gleaned from the definition of "candidate."[5] A "candidate" is someone who "has taken affirmative action to become a candidate." See id. Even apart from the self-evident circularity, the phrase "affirmative action" is not unambiguous. Persons who fully intend to run for office, but have not announced, engage in all sorts of conduct to bring themselves into the public eye, to appear interested and informed on public issues, and to commend themselves as potential candidates to the media and political leaders. These efforts require the use of money or things of value, are intended to influence the outcome of an election, and therefore meet the definition of expenditure if done by a "candidate." That issue thus turns on whether such conduct constitutes an "affirmative action."

A degree of clarity is added by the next sentence of the definition, which states that affirmative action shall include three kinds of acts. However, most of the basic ambiguity is left in place because the use of language of inclusion does not suggest that what follows is an exclusive list of "affirmative act[s]." The first set of included acts involves accepting "contributions" or making "expenditures" in excess of a total of $500. See id. § 2801(1)(A). This brings into the definition of

candidate all of the ambiguities of the term "expenditure" -- and "related expenditure" -- including the pre-campaign conduct noted above that is fully intended to influence the outcome of an election. In addition, as the Secretary of State has noted, an individual not fully decided upon, but considering, a run for state-wide office will trigger the definition of candidacy by driving four round trips between Swanton and Brattleboro at 31¢ per mile. See 2001 Memorandum, supra. A person's official candidacy can also be triggered by acts of the person's political party deemed to be "related expenditures" valued in excess of $500. See Vt. Stat. Ann. tit. 17, §§ 2809, 2853(a); see also Ross Sneyd, Progressives' Poll Raises Question About Public Financing, Associated Press, Feb. 21, 2002. The two other acts included are filing a petition for nomination or announcing a candidacy. See Vt. Stat. Ann. tit. 17, §§ 2801(1)(B), (1)(C). However, these provisions clarify things that were not ambiguous.

The limits on expenditures by candidates over the two-year cycle vary with the office sought, as follows:

Governor - $300,000

Lieutenant governor - $100,000

Other state-wide offices - $45,000

State senator - $4,000 plus $2,500 for each additional seat in the district county office - $4,000

State representative, single member district - $2,000, two member district - $3,000.

See id. § 2805a(a).

Incumbents may spend only 85% -- except for legislators, who may spend 90% -- of the expenditure limits. See id. § 2805a(c).

"Contributions" are similarly broadly defined as any "payment, distribution, advance, deposit, loan or gift of money or anything of value paid or promised to be paid to a person for the purpose of influencing an election . . . ." Id. § 2801(2).[6] The limits apply to "single source" donors, defined as "an individual, partnership, corporation, association, labor organization or any other organization or group of persons which is not a political committee or political party." See id. §§ 2801(6), 2805(a). Exempted from the definition of contribution are "services provided without compensation by individuals volunteering their time on behalf of a candidate." Id. § 2801(2).

Ambiguities lurk in the word "paid to a candidate" with regard to resources put to a campaign's use by the resource's owner, for example, a campaign worker's use of a personal vehicle. Some of these ambiguities are cured in part by the definition of "related expenditures," discussed below.

Uncured are the ambiguities in the term "services provided

without compensation" by volunteers. These uncertainties are particularly great -- and very important with regard to professional services. A few of the many questions that will arise are: If an employee or partner engages in political activity during working hours and the firm does not dock the appropriate amount of compensation, is that a contribution by the firm? Can professionals who are not solo practitioners provide free professional services to candidates? If a professional is not generally free under a firm's employment arrangements to moonlight professional services to others, is the provision of such services to a candidate in non-working hours a contribution by the firm to the candidate valued according to the firm's usual billing rate? And so on.

The definition of "single source" also contains ambiguities. For example, rendering a non-obvious interpretation, the Secretary of State has stated that partnerships may make contributions as a separate entity from the partners, who are free to make identical contributions as individuals. See 2001 Guide, supra. Questions also arise about corporations with only one shareholder, e.g., are professional corporations operated by solo practitioners firms separate from their owner for purposes of the contribution limits?

As noted, the contribution limits also apply to money,

goods, or services provided to political parties, and the various affiliates of a party are treated as one unit for the purpose of these limits, i.e., a contribution to a Democratic town committee is viewed as a contribution to all Democratic town, county, and state committees and limited as noted immediately infra. See Vt. Stat. Ann. tit. 17, §§ 2801(5), 2805(a). This provision therefore necessitates some form of state-wide reporting and coordinating mechanism.

The limits on contributions also vary by office sought and political committee as follows:

Political party/political committee - $2,000

State-wide office - $400

State senate/county office - $300

State representative/local office - $200.

See id. § 2805(a).

Turning now to "related expenditures," they are defined as "expenditures" (including, therefore, things of value and importing the ambiguities described above) "intentionally facilitated by, solicited by or approved by the candidate." Id. § 2809(c).[7] Related expenditures therefore include the value of mileage driven by campaign volunteers, the use by a volunteer of a residence, house phone, or computer, or other expenditures by volunteers for items such as paper, pens, etc.

The law regulates "related expenditures" in two ways. First, it subjects them to the limits on contributions described above. Every use of an in-kind resource -- car, phone, computer, etc. -- must thus be valued and totaled, with direct cash contributions, on an ongoing basis. See id. § 2809(a). Use of the in-kind resource must cease when the contribution limit is reached.

Second, when an individual's related expenditures exceed $50, the candidate on whose behalf they were made must treat them as a campaign expenditure limited by the statute. See id. § 2809(b). This means that, over a two-year period, every supporter of a candidate who drives the family car to campaign meetings or provides paper, pens, phones, refreshments, or rooms for meetings, must keep a running total and, when the total exceeds $50 -- driving an average of seven miles per month at 31¢ per mile triggers this -- the candidate must fit it under the statutory limit on candidate expenditures.

Related expenditures also include activities of political parties, such as polls, mailings, dinners, other events, etc.[8] If such party activities fall within the definition, they must be treated as contributions to, and expenditures by, the candidate. Such activities can, therefore, trigger an official candidacy, destroy eligibility for public financing, or exhaust the total

that a candidate may spend in the two-year cycle. See 2001 Guide, supra; see also Vt. Stat. Ann. tit. 17, §§ 2805a, 2853. It will be recalled that the district court struck down the provisions of Act 64 subjecting related expenditures by parties to the Act's contribution limits, e.g., no more than $400 in cash or related expenditures to a candidate for state-wide office. Given the holding of Colorado II, 533 U.S. at 465, these provisions are now revived.

To illustrate the effect of these provisions, I have added as Appendix A a letter from the Secretary of State responding to an inquiry as to whether certain party activities should be deemed related expenditures attributable to a particular candidate. The letter makes it clear that parties and their candidates can avoid the risk of legal disaster only by eschewing normal and necessary political activities. There is danger, for example, in sharing party-funded poll results with candidates or potential candidates; candidates or potential candidates must avoid any knowledge of party mailings; candidates must avoid participation in planning or even approving a party event (a party event at which a candidate is introduced apparently must be a "surprise party"); and parties must avoid mailings that have a "primary thrust" of supporting candidates. See Appendix A, infra. The Secretary and Attorney General wisely advise, "Each

party and potential candidate should review proposed activities with their own counsel," although this will be difficult for the candidate where he or she must remain ignorant of the event. Id.

Two further points regarding the substance of Act 64 need to be made. The first is that the costs of complying with the law's various provisions are not exempted from the limits on expenditures. See 2001 Guide, supra. Raising contributions itself costs money and is an expenditure. See id. Indeed, the limits on the size of contributions increase these costs. Moreover, for a candidate to comply with the expenditure limits, he or she must, over a two-year period, either restrict the activities of supporters and the party organization, including the driving of personal vehicles, that constitute related expenditures or keep in constant contact with supporters and the organization to monitor the size of such expenditures. Failure either to restrict or monitor related expenditures will run the very real risk that, at a critical stage of the campaign, supporters will report that they have exceeded the $50 limit and have, therefore, made expenditures that must be counted as candidate expenditures and may exhaust the campaign limit. In a state-wide campaign, the monitoring and limiting of related expenditures might well require almost a full-time staff member.

Moreover, a candidate who does not have legal counsel and

other professional services runs great risks. The ambiguities detailed above and the problems of valuation will confront candidates and supporters -- or at least those who seek to comply with the law as written -- with an ongoing need for professional advice. In fact, the Secretary of State and Attorney General advise that parties and candidates retain their own separate attorneys. See Appendix A. However, the cost of these attorneys, or the value of their services if obtained as an unpaid-for related expenditure, including its provision by a political party, is an expenditure. See Vt. Stat. Ann. tit. 17, § 2801(3).

The second point is that, although this legislation was fostered by groups experienced in these matters, it does not contain the usual exemption for editorials or op-ed pieces published by the media that endorse a particular candidate. See, e.g., N.Y. Elec. Law § 14-124 (exempting "any person, association or corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business"); Conn. Gen. Stat. § 9-333w(c) (exempting "any editorial, news story, or commentary published in any newspaper, magazine or journal on its own behalf and upon its own responsibility and for which it does not charge or receive any compensation whatsoever"). When a

Vermont candidate meets with an editorial board, commentator, or columnist hoping for an endorsement, the value of any such published endorsement is, under the language of Act 64, a contribution and a related expenditure. See Vt. Stat. Ann. tit. 17, § 2809(c). Indeed, Vermont's Secretary of State has warned that if any individual or organization "requests a photograph, written presentation, or other assistance or information and informs the candidate that the requested information will be used in a publication . . . [providing such] will trigger a related expenditure." 2001 Guide, supra.

I turn now to the processes governing administration and enforcement of this law. Power is delegated to the Secretary of State to "adopt rules necessary to administer the provisions" regarding related expenditures. Vt. Stat. Ann. tit. 17, § 2809(f). Additionally, the Secretary of State has a general administrative role under Act 64, see, e.g., id. §§ 2803, 2810a, and she has actively offered her interpretations of the scope and application of the various provisions of Act 64. See, e.g., 2001 Guide, supra; 1999 Memorandum, supra; 2001 Memorandum, supra. As the discussion above indicates, interpretive and valuation questions abound and, as Appendix A indicates, answers that are not prolix or ambiguous are often not available. Moreover, there is at present every indication that the power to adopt

"necessary" rules and administer the statute will be viewed by the Secretary of State as a very broad delegation of power. For example, interpreting a provision requiring that all contributions in excess of $50 be made by check, the Secretary has said that Act 64 allows so-called "pass-the-hat" fundraisers at which persons may anonymously contribute up to $50 in cash. See 2001 Guide, supra. Because the givers are anonymous, a candidate is not expected to monitor how many times an individual may have put $50 into ever-moving "hats" at several "pass-the-hat" fundraisers. This ruling thus promotes fundraising practices that do not really control the size of cash contributions, unless, of course, an anonymous donor foolishly drops a $100 bill into a hat.

Finally, candidates who want to seek a determination that an expenditure is a related expenditure made on behalf of their opponents may bring an expedited action in the Vermont Superior Court. See Vt. Stat. Ann. tit. 17, § 2809(e). Candidates wanting clarification of their own expenditures, or persons wishing to make expenditures on behalf of candidates, may request an advisory opinion from the Secretary of State. See 2001 Guide, supra. The costs of bringing or defending such actions, or making such inquiries, are not exempted from the definition of expenditure.

c) Act 64's Burden on Protected Speech

1) The Burden on Grassroots Political Activity

I begin with Act 64's burden on grassroots political activities, not only because such activities are core-protected speech under the First Amendment -- as well as indispensable to our democracy -- but also because proponents of Act 64 purport to justify its ubiquitously restrictive provisions in the name of increasing and enhancing such activities. See 1997 Vt. Laws P.A. 64 (H. 28) (findings nos. 6 and 8). In fact, Act 64 relentlessly makes such activities very difficult and often impossible. Indeed, the Act's most intrusive impact is not on the rich and powerful, who if necessary can engage in constitutionally protected independent political activity, but on the ordinary citizen who needs to participate in organized activity to have a political voice.

As the Supreme Court noted in Buckley, even the humblest kind of political activity requires the expenditure of resources. Buckley, 424 U.S. at 19. If the law as drafted is upheld, the quality and quantity of grassroots activities will be severely diminished.

Many grassroots political activities are sponsored and subsidized by local political party affiliates. Act 64 severely diminishes financial support for local party activity by treating

all state, county, and local party committees as a single unit for purposes of contributions, expenditures, and related expenditures. The effect is, first, to reduce severely the amount of funding for such activities -- under the limits on related expenditures and contributions -- and, second, to leave political parties the choice between some form of top-down control or chaos -- under the single unit rule for contributions to parties. See Secretary of State Being Criticized for Fund Raising Ruling, Associated Press, May 28, 1999 (reporting that both Republican and Democratic party leaders were shocked by the single unit rule). Indeed, it is now known that party committees have, even without the now-revived limits on party contributions and related expenditures, concentrated more on mass media activities than grassroots activities. See 2001 Memorandum, supra; Campaigns Meant Cash for Vermont Media, Associated Press, Nov. 10, 2000 ("'That was one of the unintended consequences of the campaign finance law, that we saw much more spending on the media,' [Secretary of State Markowitz] said.").

Many other grassroots activities are related to the campaigns of particular candidates and are expressly inhibited by Act 64's treatment of related expenditures. As noted, Act 64 treats all related expenditures as contributions and, when they exceed $50, as expenditures by the candidate whose candidacy the

activity was intended to support. See Vt. Stat. Ann. tit. 17, § 2809(b). They must therefore be counted in determining whether the candidate has complied with Act 64's spending limits. Because in-kind expenditures are included within related expenditures, any supporter engaging in the most common kind of political activities must keep detailed records over a two-year period of their value -- every mile driven, every stamp used, every use of a residence for campaign events, refreshments, pads, pencils, use of phones, etc. -- so that the total amount of such in-kind expenditures can be determined. If the related expenditures added to a person's monetary contributions to a candidate reach the contribution limit, the supporter must stop all support, even driving to a meeting, or violate the law.

For example, if a supporter holds a "meet the candidate" event in his or her house, the value of the space used, possibly the costs of refreshments,[9] and the purchase of stamps for a mailing to local citizens to invite them to the event (or invitations by phone) are all related expenditures. See 1999 Memorandum, supra. Vermont's Secretary of State has stated that it usually takes one hundred invitations to attract twenty persons to a "meet the candidate" event. See id. Thirty-seven dollars would thus be used for postage alone for one event for twenty people. See United States Postal Service, First-Class

Mail Rate Highlights, available at http://www.usps.com/ratecase/first.htm. As the Secretary of State of Vermont has noted, such "meet the candidate" events are therefore severely limited by Act 64. See 1999 Memorandum, supra.

Adding to Act 64's intrusiveness on grassroots activities is the treatment of such related expenditures as expenditures by the candidate. Driving to meetings is among the most garden variety of grassroots political activities, but, under the law, a supporter who averages seven miles per month over the two-year cycle will have exceeded $50 in mileage expenses, and the candidate in question must treat that and all other resource-consuming activities by the individual as an expenditure by the candidate.

The effect is that a candidate's supporters cannot exercise free choice as to what activities to undertake. Because the candidate's expenditures are limited, the activities of all supporters must be coordinated and controlled top-down by the candidate so that the candidate can budget a campaign and not have to end it prematurely because of belatedly discovered related expenditures in excess of $50 that exhaust the expenditure limits. Were that to happen, a candidate, or any supporter over the $50 limit, would not even be able to drive the family car to the local town green to make a speech.

Another common form of grassroots activity is the contribution of time and expert services by local professionals to candidates. Here Act 64 is ambiguous, but the provision of such services may well be deemed to be a contribution and related expenditure of some considerable size, particularly if the professional is in a firm that normally restricts the moonlighting of professional services. Indeed, to exempt professionals would be precisely counter to the purpose of reducing the influence of special interests -- e.g., clients of lawyers or the lawyers themselves -- and the well-to-do.

2) The Burden on Candidate's Speech

My colleagues and the district court conclude that the limits on campaign expenditures are based on past experience and, with limited exceptions, are substantially the same as average expenditures by candidates in the past. See Maj. Op. at 44; see also Landell v. Sorrell, 118 F. Supp. 2d 459, 471-72 (D. Vt. 2000). We have, however, no reliable evidence of past spending using Act 64's definitions.

The best, albeit highly flawed, evidence of spending in past elections would have been the candidate disclosure reports filed under Vermont law. It is not altogether clear what evidence the district court specifically considered in reaching its conclusions. However, on the face of the district court's

decision, it appears that the district court relied heavily on testimony, some of which was conflicting, see id. at 470-72, and did not scrutinize in detail documentary evidence of past practices.[10]

More significantly, whatever the basis for the district court's conclusion, no one can have any idea as to the level of spending in prior years using Act 64's new and much broader definitions of expenditures and related expenditures. Under the prior law, candidates generally deemed only a campaign's out-of-pocket expenditures as reportable. See, e.g., Campaign Finance Report of Peter Brownell, December 14, 1998 (omitting mileage, value from use of computer, value from use of office, and expenses of supporters or aides); Campaign Finance Report of David Brown, October 26, 1998 (same); Campaign Finance Report of John Bloomer, Jr., December 14, 1998 (same). For example, there is only one candidate in the entire record whose reports include any mileage expenditures although it is inconceivable that candidates ran their campaigns entirely from home. See Campaign Finance Report of Patricia Welch, October 26, 1998 (listing costs and dates for mileage expenses). Also, under the prior law, there was no reason to collect information on, much less to calculate, related expenditures by supporters, and in particular the value of in-kind related expenditures. Finally, there was

also no need under prior law to segregate and calculate expenditures by party committees, likely a huge amount, see infra note 11 and accompanying text, that would now be attributable under Act 64 to candidates. See Vt. Stat. Ann. tit. 17, § 2809(d).

The only thing we know for certain is that what candidates regarded as expenditures in the past -- generally direct cash expenditures out of the campaign's checking account -- is far less than what must be so regarded under Act 64's definitions of expenditures and related expenditures.

Moreover, prior spending is not a reliable guide for the needs of campaigns operating under Act 64, which imposes substantial costs of compliance with its terms that were not encountered under the prior law. As noted, most candidates will be unable to proceed safely without legal advice, and candidates running for state-wide office may need the services of an accountant as well. In the case of legislative candidates, such assistance could literally exhaust all the expenditures allowable under Act 64. (Retention of counsel by a party organization to help candidates would be a related expenditure.)

Much time and possibly much support staff will also be consumed by the need to monitor, coordinate, and control related expenditures that must be charged to the campaign. Finally, some

candidates will encounter costs in bringing and defending lawsuits concerning the myriad of interpretive questions that will arise as a result of Act 64's ambiguous provisions.

There is, therefore, no reliable support for the claim that, based on past experience, Act 64's limits will have little effect on the quantity or quality of political speech. In the 2000 gubernatorial race, each major party candidate spent approximately $1 million, over three times Act 64's limit on combined primary and general election gubernatorial campaigns. See Office of the Secretary of State, Campaign Finance, Total Expenditures to Date - 2000 Election Cycle, available at http://vermont-elections.org/elections1/campaignfinance.html. And this was spent without counting related expenditures. A candidate for United States Senator in the same election also spent over $1 million on the general election. See Mary Ann Lickteig, Tuttle Asks Leahy to Use Campaign Funds to Preserve Land, Associated Press, Oct. 8, 1998 (detailing how Senator Leahy spent about $1 million in his campaign).

In fact, Act 64's limits are exceedingly low and will severely restrict activities of candidates for office. As noted, the Secretary of State has stated that exploratory efforts by persons trying to decide whether to run for state-wide office will use up $500 through four round trip drives between

Brattleboro and Swanton. See 2001 Memorandum, supra. She has also stated that the $45,000 limit for lesser state-wide offices will be virtually exhausted by necessary advertising in the media. See David Gram, Dems Needle Each Other on Spending in Treasurer's Race, Associated Press, May 29, 2002.

The harshness of the limits on candidate expenditures is greatly exacerbated by the fact that a candidate's campaign cannot expect the candidate's party to provide the usual supplemental support of polls, offices, computers, phones, advertisements, mailings, and events, if the conduct "primarily benefits" fewer than seven candidates. See supra notes 8-9. Parties may make contributions and related expenditures benefitting candidates that total, over a two-year period, no more than $400 for each candidate for state-wide office, $300 for each candidate for the Senate, and $200 for each candidate for the House. There are six state-wide offices, thirty State Senators, and 150 State Representatives. A political party can, over a two-year period, make only a total of $41,400 in contributions to, or related expenditures on behalf of, all its candidates for state office.

Although Colorado II allows such restrictions, 533 U.S. at 465, their effect must be considered in gauging the impact of candidate expenditure limits. A state-wide poll regarding

candidates for the six state-wide offices would cost over $6,000. Letter from Mark F. Michaud, Vermont Democratic Party, to Vermont Attorney General General William Sorrell 1 (Feb. 28, 2002). If the poll data is shared with the six candidates, the poll would exceed Act 64's limits ($400 by 6) by over 100%. See Appendix A. The full effect of Act 64's limits has, of course, not been experienced yet,[11] because the district court invalidated candidate expenditure limits and the contribution/related expenditure limits on political parties. With these limits now revived, the effect of limits on expenditures by candidates will be to dramatically lessen political debate in Vermont.

Expenditure limits will, therefore, greatly hamper candidates in getting their message to the public. The Secretary of State has noted that the expenditure limit for State Treasurer -- $45,000 -- leaves, after advertising, "no money to hire a campaign manager, do direct mail, lawn signs or bumper stickers." David Gram, Dems Needle Each Other On Spending in Treasurer's Race, Associated Press, May 29, 2002. She has also noted that the "tight contribution limits" of Act 64 were part of the cause for an "unprecedented amount" of independent expenditures in the 2000 Vermont election. See 2001 Memorandum, supra. As a result, candidates complained that "mailings or advertisements made on their behalf attributed to them opinions they did not hold, or

sent negative messages about their opponent, in violation of their stated intent to run a positive campaign." Id. Expenditure limits will encourage even more extra-campaign spending and leave candidates without the means to set the record straight. Even "meet the candidate" events are severely limited, see 1999 Memorandum, supra, as noted above, and, although my colleagues propose, among other things, town barbecues and dinners as cheap but effective campaign methods, the nature and usefulness of these events, much less their financing, is hardly clear.

In any event, Buckley specifically rejected as unconstitutional restrictions on modes of campaign advocacy prompted by a governmental view that some modes are "wasteful" or "excessive." Buckley, 424 U.S. at 57. Even under the new constitutional test devised by my colleagues -- whether expenditures limits match the likely costs of running an "effective" campaign -- Act 64 does not pass muster. There is simply no data in the record suggesting that anything other than a drastic reduction of political speech will result from Act 64's limits.

Low limits of course also exacerbate the highly discriminatory and arbitrary effect of Act 64's selection of a two-year cycle. Under these limits, a candidate who has to run

in a contested primary election may well be unable to communicate with the public at all -- literally stuck in his or her driveway -- in a general election.

Moreover, there is no provision in Act 64's limits that adjusts for increased costs of campaigns. Although Act 64 is premised on the view that elections are "too expensive" -- a view expressly rejected as a valid reason for expenditure limits in Buckley, id. -- the "costs" of campaigning are not determined by candidates. Rather, they are determined by a competitive market for resources that are used in campaigns but are also used, and far more extensively, for non-political communication. The price of those resources is therefore set in a market that is independent of political campaigns and in which candidates for office must compete with other consumers.

An inability to pay the market price for communication resources will stifle political speech. Nevertheless, there is no provision for future inflation in Act 64's limits although even slight annual increases in the consumer price index will in a few short years substantially reduce further the ability of candidates to communicate with voters. For example, the cost of postage stamps is now higher than when Act 64 was passed. See It Now Costs 3 Cents More to Mail a First-Class Letter, N.Y. Times, June 30, 2002, at 18. A Middle East crisis may lead to a large

increase in the price of gasoline and, accordingly, a mileage valuation that, if it occurred during a campaign, might leave candidates unable to make even door-to-door visits. As noted above, the effect of rising costs has already been observed by Vermont's Secretary of State. With regard to a campaign for State Treasurer -- with an expenditure limit of $45,000 -- she noted that, "The cost of paid media has changed quite a bit in the last four or five years. With prices for television ads, and even radio ads, running a campaign on $45,000 will leave you no money to hire a campaign manager, do direct mail, lawn signs or bumper stickers." David Gram, Dems Needle Each Other on Spending in Treasurer's Race, Associated Press, May 29, 2002. It goes without saying there also would be no room under the spending cap for grassroots activities that would have to be included as related expenditures.

Act 64 also does not take into account the fact that new but costly methods of communication may come into being. Campaigns may communicate with voters only by going to where the voters are or using a medium watched or listened to by voters. For example, because the development of cable television broadened viewership opportunities for the public, it also required candidates who wished to communicate through television to buy ads on many, instead of a few, channels. For another example, the development

of the Internet has made it possible for candidates to offer websites to provide information to potential voters, a fantasy fifteen years ago. Act 64 takes a Luddite view of political communication and prevents candidates from adjusting to new needs and costs, even though the Supreme Court has expressly declared that government is not to make that choice. See Meyer, 486 U.S. at 424; Buckley, 424 U.S. at 57.

3) The Burden on Challengers

The fact that limits on candidate expenditures tend to disadvantage challengers in campaigns against incumbents is recognized both in the provisions of Act 64 -- which has slightly lower limits for incumbents -- and in its legislative history. See, e.g., Hearing on H. 28 Before the Vt. House Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Rep. Terry Bouricius); Hearing on H. 28 Before the Senate Comm. on Gov't Operations, 64th Biennial Sess. (1997) (statements of Sens. Seth Bongartz and Jean Ankeney). The Supreme Court has also noted that limits on candidate expenditures may "handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." Buckley, 424 U.S. at 57. Incumbents, moreover, have other advantages, such as an existing organization and tested donor lists.

The degree of the adverse effect of Act 64 on challengers to

incumbents will depend in large part on discretionary and arbitrary rulings as to what kinds of activities and speech by incumbents will be deemed official communication by officeholders to the public and what kinds will be deemed to be campaign expenditures. Of course, virtually every activity by an incumbent officeholder intending to seek reelection will have a political effect, and such officeholders will to one degree or another take that effect into account in determining their behavior. The law provides marginally lower limits on expenditures by incumbents, but this largely inconsequential difference will be rendered wholly irrelevant if any substantial communications by incumbents are deemed not to be campaign expenditures. Conversely, the advantage of incumbents under limits will also depend on what activities by non-announced challengers are deemed to be by a "candidate" and "for the purpose of influencing an election." See generally Vt. Stat. Ann. tit. 17, §§ 2801(1), (3).

These issues, of course, will likely be addressed in the first instance by an incumbent official, the Secretary of State. See 2001 Guide, supra. Should these rulings be adverse to incumbents -- a not very likely scenario -- the incumbents can overturn them by legislation. If the rulings favor incumbents, challengers have no such option.

Moreover, selection of the two-year cycle as the governing time period collapses primary and general elections under one expenditure limit and will in the main favor incumbents who will face serious primary challengers less frequently than those seeking a party nomination to challenge an incumbent. Indeed, there appears to be little other reason justifying the choice of the two-year cycle.

Because the hands-off approach of my colleagues accords expansive deference to legislative judgments as to expenditure limits, incumbents are given a weapon that can be manipulated virtually at will in the future. A low level of judicial scrutiny necessarily leaves legislators with discretion to alter campaign finance regulations to affect upcoming elections. We have seen an example of this in New Jersey where a campaign finance law was deliberately changed in an (unsuccessful) attempt to bolster the candidacy of a new entrant into the race for Governor. See David M. Halbfinger, Substitute Candidate, on Short Notice, Stakes Claim in Race for New Jersey Governor, N.Y. Times, Apr. 27, 2001, at B5; David M. Halbfinger, New Jersey Legislature Votes To Delay Primaries 3 Weeks, N.Y. Times, Apr. 24, 2001, at B5. In Vermont itself, Governor Dean sought to use money reserved for the public financing of campaigns -- a key part of Act 64 -- to pay general state expenditures. See State

May Tap Campaign Finance Fund to Ease Budget Crunch, Associated Press, Dec. 5, 2001.

My colleagues exhibit no concern regarding the influence of political self-interest on the setting of expenditure limits, notwithstanding that Act 64's major premise is that Vermont incumbents so crave reelection that they ignore official duties and personal honor to that end. However, incumbent legislators can exercise a direct influence on the outcome of elections in two ways: campaign finance regulation and reapportionment. My colleagues reassure us that the exercise of such influence in campaign finance regulation is not likely. I would suggest that the likelihood of self-interest prevailing in the long run would be informed by a study of the effect of legislative reapportionment on election districts for the United States House of Representatives, an area in which courts have deferred to legislative judgment. See White v. Weiser, 412 U.S. 783, 794-95 (1973) ("From the beginning, we have recognized that 'reapportionment is primarily a matter for legislative consideration and determination.'" (internal quotation marks omitted)); see also Miller v. Johnson, 515 U.S. 900, 915-16 (1995).

Reapportionment of House districts now has one and only one guiding star: incumbent protection. See John Harwood, No

Contests: House Incumbents Tap Census, Software to Get a Lock on Seats, Wall St. J., June 19, 2002, at A1 ("Thanks to the play-it-safe strategies of Republicans and Democrats alike, and to the sophisticated technology now used in redistricting, competition is being squeezed out of the House -- with huge consequences."); Richard Perez-Pena, With 2 Congressional Seats Lost, Albany Begins Battling over Who Must Go, N.Y. Times, Jan. 22, 2002, at B1. Indeed, reapportionment is now widely regarded as little but the "rigging" of elections in the name of the special interest, namely incumbent protection, that dominates legislative decisions. See No Contests: House Incumbents Tap Census, Software to Get a Lock on Seats, Wall St. J., June 19, 2002, at A1 (describing the practice of "sweetheart" gerrymandering by incumbents of both parties). I know of no reason why the guiding star in reapportionment decisions will not over time become the guiding star in campaign finance regulation.

4) The Burden on the Press

As noted, the law does not exempt editorial or op-ed endorsements of candidates by the media from the definitions of contribution, expenditure, or related expenditure. Such support is a "thing of value" that, if "facilitated" or "solicited" by a candidate, would be a related expenditure. See Vt. Stat. Ann. tit. 17, §§ 2801(3), 2809(c); see also 2001 Guide, supra.

Indeed, as noted above, Vermont's Secretary of State has warned candidates that providing a photo or written information to anyone who might use it in a publication advocating their election will trigger a related expenditure. See id.

The theory underlying Act 64 would easily include the media as a powerful interest having a stake in government action just like any other profit-making business or organized economic special interest -- e.g., the newspaper quoted by my colleagues is part of a huge multi-national organization, undoubtedly one of the larger companies doing business in Vermont. See Gannett Co. Inc. Operations, available at http://www.gannett.com/map/units.pdf. However, many proposals to regulate campaign finance exempt the media, see, e.g., N.Y. Elec. Law § 14-124; Conn. Gen. Stat. § 9-333w(c), often including a definition of what organs of communication constitute exempted media, see e.g., Bipartisan Campaign Reform Act of 2002, § 201(f)(3)(B), Pub. L. No. 107-155, 116 Stat. 81.[12] Nevertheless, Act 64 does not contain such an exception. Given the plain language of Act 64 and the consistency of its theory with that language, Act 64 can fairly be said to burden the press, and any candidate who seeks its support, quite as much as it burdens other candidates and their supporters.

5) The Burden on Party Affiliates

As noted, Act 64 treats a contribution to a state, county or local affiliate as a contribution to all affiliates. See Vt. Stat. Ann. tit. 17, §§ 2801(5), 2805(a).

My colleagues note that "the local and state affiliates will now have to record and coordinate their contributions," but reassure us that "the provision does not impose any organizational burden on the party outside of the campaign finance realm, and requires no broader organizational reform." However, that is like saying "I'm not going to let you cross this bridge, but I'm not going to say whether you must swim and probably drown or hire a boat to cross the river." Any such recording and coordination of financing has to be done through a state-wide party organization that parcels out funds. This centralizing of party funding will of course make grassroots political activities sponsored by local party affiliates -- the indispensable stuff of American politics -- extremely difficult. In fact, when the Secretary of State ruled that a contribution to one party organization constituted a contribution to all affiliates, both Republican and Democratic state leaders registered shock -- another example of the lack of scrutiny given the actual provisions of Act 64 -- and opined that grassroots activities would be severely inhibited. See Secretary of State Being Criticized for Fund Raising Ruling, Associated Press, May

28, 1999 (noting one political operative's stunned response as being "Someone's totally taken leave of their senses").

d) The Sufficiency of the Governmental Interests

Several governmental interests are asserted as justifications for Act 64.[13] These include eliminating special access or the appearance of special access of donors to officeholders, reducing the influential effect of bundling contributions, and increasing citizen and voter participation in the electoral process. See Maj. Op. at 30-42; see also 1997 Vt. Laws P.A. 64 (H. 28). All of these interests were rejected by the Supreme Court in Buckley, 424 U.S. at 25-26, and have not been demonstrated in the present case as having sufficient nexus to the limits on candidate expenditures and related expenditures.[14]

Before turning to expenditure limits, however, I note that, as to some of the restrictions on political activity imposed by Act 64, no governmental interest whatsoever has been proffered as a justification. Consider, for example, adoption of the arbitrary and highly discriminatory two-year cycle. See Vt. Stat. Ann. tit. 17, §§ 2801(9), 2805(a), 2805a(a). A two-year cycle does not reduce the influence of special interests, much less increase citizen or voter participation. Act 64's public financing provisions recognize the need for greater financing on

the part of those who must run two campaigns rather than one. See id. §§ 2855(a), (b). Collapsing primary and general elections under a single expenditure limit is thus a flat-out suppression of speech for no asserted reason, save perhaps for the unspoken reason of incumbent protection.

Similarly, the treatment of a contribution to any party affiliate as a contribution to all affiliates, see id. § 2801(5), serves none of the purposes asserted. Because Act 64 limits expenditures by political parties on behalf of candidates on an aggregated basis, contributions to separate affiliates cannot serve as a conduit allowing individuals to evade the limits on single source contributions. See Colorado II, 533 U.S. at 464-65 (permitting restriction of coordinated party expenditures to minimize circumvention of contribution limits).

While serving none of Act 64's asserted goals, the aggregated treatment of contributions to affiliates impairs the activities of local party committees by forcing centralized coordination of financing, eliminating the power of local committees to raise funds for local activities. One of the most vital and fertile areas of democratic political activity in America is the local party committee, which, while loosely related to larger party organizations, is the source of grassroots activities that permit citizens to participate and

seek change. Local party activities are a primary method by which a changing public opinion is absorbed gradually into the system, rather than being unheard until it reaches explosive force. These activities require funding. By impairing that funding, Act 64 impairs those activities. See Secretary of State Being Criticized for Fund Raising Ruling, Associated Press, May 28, 1999 (noting that leaders of both parties warn that "the ruling would have the effect of undermining the goal of Vermont's new campaign finance law to encourage more grassroots political activity").

Freedom of association includes the right not only to engage in group activities but to affiliate one group with another, on a horizontal, vertical, or hierarchical basis, loosely or with centralized control. The choice is to be made by the citizens involved, not by government. See Timmons, 520 U.S. at 358, Meyer, 486 U.S. at 424; Buckley, 424 U.S. at 57.

Finally, no reason is given for applying expenditure limits to candidates who desire to fund their own campaigns. See generally Vt. Stat. Ann. tit. 17, § 2805a(a). Such candidates already have "access" to themselves. Again, speech is suppressed for no reason. See Buckley, 424 U.S. at 44-45.

Turning to the reasons asserted as constitutional justifications for expenditure limits, these have already been

considered and rejected by the Supreme Court. Buckley rejected in the most explicit terms the notion that government may under a Constitution containing the First Amendment limit the amount of political speech by candidates and regular citizens. See id. It is no surprise that many of the arguments made in favor of Act 64 rehash those considered by Buckley because Act 64 was intended by its proponents as a vehicle to overturn Buckley's ruling. See 2001 Memorandum, supra; Hearing on H. 28 Before the Vt. House Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of Anthony Pollina); Hearing on H. 28 Before the Vt. Senate Comm. on Gov't Operations, 64th Biennial Sess. (1997) (statement of Sen. William Doyle); Vt. House Comm. of Conf., Report on Campaign Finance, H. 28, 64th Biennial Sess. (1997).

For example, the question of special donor access or the appearance thereof was highlighted both by the Congress that enacted the expenditure limitations struck down in Buckley, see Minority Views on Report of the Comm. on House Admin. to Accompany H.R. 16090 (July 30, 1974), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974, at 749 (1977), and by the Court of Appeals for the District of Columbia, which upheld those limitations and was reversed in Buckley. Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975), aff'd in part and rev'd in part, 424 U.S. 1 (1976). That court

expressly noted that "[l]arge contributions are intended to, and do, gain access to the elected official," id., an observation interchangeable with language in my colleagues' opinion. To be sure, the Supreme Court did not use the word "access" in Buckley, although it did use the analogous term, "improper influence." Buckley, 424 U.S. at 27, 45-46. Having held that corruption itself or the appearance thereof -- bribes -- was not a sufficiently compelling governmental interest to justify limits on expenditures by candidates, id. at 55, the Court hardly had to go on to say that access or the appearance of access -- returning or taking a phone call from a donor -- was also not compelling. Reducing bribes is generally regarded as a far more compelling interest than reducing phone calls.

It is also suggested that the practice of bundling contributions by those with common interests justifies expenditure limits. My colleagues assert that the practice of bundling was unknown at the time of Buckley. However, the concept of pooling contributions by persons with common interests is hardly new. Indeed, at the time of Buckley, proponents of the 1974 Act relied heavily on pooled contributions by various firms in particular industries as evidence of improper influence. See Senate Floor Debates on S. 3044 (Mar. 28, 1974, Apr. 3, 1974) (statements of Sens. Griffin, Baker), reprinted in Legislative

History of Federl Election Campaign Act Amendments of 1974, at 259, 365-66 (1977); House Floor Debates on H.R. 16090, (Aug. 8, 1974) (statement of Rep. Dickinson), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974, at 917 (1977). An amendment in the House that would have prohibited pooling was introduced, voted on, and rejected. See Minority Views on Report of the Comm. on House Admin. to Accompany H.R. 16090 (July 30, 1974), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974, at 752-53 (1977); House Floor Debates on H.R. 16090 (Aug. 7, 1974), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1974, at 858-59 (1977). Even the findings of the Buckley district court as to large contributions catalogued them by industry as well as by individual donor. See Joint Appendix of District Court Findings at 86-143, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Nos. 75-436 and 75-437).

In particular, much attention was given at the time of Buckley to the 1972 campaign contributions by the dairy industry, in which milk producers pooled a large sum and then broke it down into small committees to avoid disclosure. See Senate Floor Debates on S. 3044 (Mar. 26, 1974, Mar. 27, 1974, Mar. 28, 1974, Apr. 3, 1974, Apr. 4, 1974) (statements of Sens. Hathaway, Griffin, Hollings, Baker, Kennedy), reprinted in Legislative

History of Federal Election Campaign Act Amendments of 1974, at 205, 225, 257, 365, 376-77 (1977). This incident was in fact featured in the Court of Appeals decision that upheld expenditure limits, Buckley, 519 F.2d at 839 n.36, and was reversed by the Supreme Court, Buckley, 424 U.S. at 55. The term "bundling" may be new, but the concept is long in the tooth.

Moreover, with respect to bundling, my colleagues note the Vermont practice of special interests holding fundraisers in which representatives of different firms gather to make contributions. Of course, the ruling of the Secretary of State regarding the acceptance of anonymous contributions up to $50 in "pass-the-hat" fundraisers indicates that Act 64, as interpreted administratively, in fact allows the practice my colleagues condemn. See 2001 Guide, supra.

The record in this case adds nothing to what was considered and rejected in Buckley. In fact, there is much that is implausible in the portrait of the Vermont legislature drawn by the proponents of Act 64 in attempting to demonstrate a compelling governmental interest. The persons quoted in my colleagues' opinion portray members of the Vermont legislature as susceptible to corruption and so obsessed with soliciting or conferring with cash donors that they have very little time to confer with ordinary citizens. See Maj. Op. at 30-42 (describing

candidates as being "locked away" in fundraising activities instead of "out with the public" because "contributors effectively buy candidates' time and attention").

We are told essentially the following. The money spent on campaigns has been spiraling over the forty or more years in which Vermont has toyed with expenditure limits. See 1997 Vt. Laws P.A. 64 (H. 28) (finding no. 1); Maj. Op. at 10, 28-29. The urge to raise campaign money has increased accordingly. See id. at 31, 37. The average candidate for office has historically spent less in his or her campaign than the limits set by Act 64. See id. at 43-44. In concrete terms, this means that the average campaign cost for single-member Vermont House or Senate races has spiraled to $2,000 and $4,000 respectively. See generally Vt. Stat. Ann. tit. 17, §§ 2805a(a)(4), (a)(5). Raising these sums creates a dependence among legislators on large contributors who for the next two years make so many calls to them that the legislators have little time to talk with regular citizens. See Maj. Op. at 32-34.

The record justifying Act 64's massive regulation of political speech is not strong; in fact, it is pitifully weak. Even if legislative candidates must raise cash amounts well in excess of $4,000, this task would hardly leave them obsessively dependent on large contributors who take up large amounts of the

legislators' free time. Moreover, some of the hyperbole quoted by my colleagues about official time spent with large donors comes from a person described as a "lobbyist." In fact, that person was a lobbyist for Act 64, whose success in that regard entirely belies his assertions about elected officials listening only to large contributors.

There are also, of course, the accusations of corruption with precisely the same scripted sound-bites that are used in every national talk-show discussion of these issues. Rhetoric aside, the only particularized evidence of improper influence relied upon by my colleagues consists of two anecdotes. One involved "widely reported" meetings of major dairy companies with unnamed officials when such meetings were denied to smaller dairy organizations; the other involved "alleg[ations]" about the influence of the Vermont slate industry on certain legislative committee members.

The First Amendment does not permit the suppression of speech based on such untested anecdotal evidence. See, e.g., United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 820-21 (2000) (requiring more than "anecdotal evidence" of "signal bleed" problem in support of a regulation requiring broadcasters to fully scramble sexually-oriented programming); Stanley v. Georgia, 394 U.S. 557, 567 (1969) ("Given the present state of

knowledge, the State may no more prohibit mere possession of obscene matter on the ground that it may lead to antisocial conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.").

Moreover, if the claims of widespread, improper influence are true, anecdotes should not be the only available evidence. Disclosure of contributions has been required in Vermont for years, offering documented support for the claims, if accurate, of dependence on large or bundled contributions and of the influence of those contributions. See, e.g., Vt. Stat. Ann. tit. 17, §§ 2811(a)(1)-(4) (1996) (amended 1997) (requiring campaign reports for candidates' contributions and expenditures). The lack of reference to available hard evidence of who gave what to whom suggests that the portrait of corruption painted by the proponents of Act 64 is vastly overdrawn. When the Supreme Court decided Buckley, it had before it detailed records of actual large contributions and the amount of out-of-pocket expenditures by candidates. See, e.g., Buckley, 424 U.S. at 32-34 & nn. 35-40; Joint Appendix of District Court Findings at 264, 483, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Nos. 75-436 and 75-437). Nevertheless, it struck down the expenditure limits as facially unconstitutional. See Buckley, 424 U.S. at 54-55.

Here, the opposite result is reached based on anecdotal evidence, even though better evidence, if widespread corruption exists, is available.

Moreover, the proponents of Act 64 never examine the details of that Act or how they impact ordinary political activities that are indispensable to democratic rule. Consequently, they never weigh the cost in suppressed activity. Indeed, there is every indication that the details of Act 64 were ignored by many of its proponents. It is certainly hard to find any other explanation for the fact that the executive director of the Vermont Democratic party questioned, as harmful to grassroots activities, the ruling by the Secretary of State that Act 64's limits on contributions to parties treat all affiliates as a single unit, see Secretary of State Being Criticized for Fund Raising Ruling, Associated Press, May 28, 1999, even though the ruling simply followed the plain language of Act 64. The lobbyist who secured passage of Act 64 and who is quoted at great length in my colleagues' opinion, has since brought an action in the district court to have the treatment of related expenditures declared unconstitutional as infringing on the right to engage in political activities. See Vermont Reformer Says Law He Authored Is Unconstitutional, Political Finance, The Newsletter, March, 2002 (describing Anthony Pollina's lawsuit to have Act 64 ruled

unconstitutional); Ross Sneyd, Progressives Sue To Ensure Public Financing for Pollina, Associated Press, March 12, 2002 (noting that Anthony Pollina calls his lawsuit "ironic"); see also Complaint at 1, Pollina v. Markowitz, No. 2:02-CV-63 (D. Vt. Mar. 11, 2002) ("Plaintiffs claim that certain provisions of Act 64 violate their First Amendment free speech and association rights, do not serve compelling state interests, and violate equal protection and due process of law, both facially and as applied.").

Other officeholders quoted by my colleagues have filed disclosure forms that indicate a continuing lack of knowledge of the requirements of Act 64, in particular the need to record and disclose mileage. See, e.g., Campaign Finance Report of William Doyle, October 25, 2000 (listing no mileage expenses for himself or any supporters, or any value derived from use of office space, computers, utilities, etc.); Campaign Finance Report of Elizabeth Ready, December 18, 2000 (listing no expenses for value of office space, computers, utilities, basic office supplies, etc.); Campaign Finance Report of Elizabeth Ready, September 25, 2000 (same).

Moreover, the constitutional analysis used by my colleagues in determining that Act 64's expenditure limits are reasonable -- that there is an average election that can serve as the

compulsory norm for all elections -- is dangerous, and antithetical, to democracy. The average election will typically not involve issues that divide large portions of the public and a clear-cut attempt to alter government policies on those issues. It is the non-average election that is often the historic election, one in which the outcome is heavily contested, the debate is most widespread, the public interest is at its highest, and the most money is spent. Such an election was the New Hampshire primary of 1968, in which Eugene McCarthy, later a plaintiff in Buckley, in one of the most heavily financed primary races in history, badly damaged a sitting President in a debate over the Vietnam war. McCarthy spent a then-unprecedented $12 per vote received in that single primary. See George F. Will, Rules to Keep the Rascals In, Newsweek, Jan. 26, 1976, at 80. Vermont had a similar election in 2000, in which civil unions and other divisive issues were at stake. See Ellen Goodman, Vermonters Are Caught up in a Civil War over Civil Unions, Boston Globe, Nov. 2, 2000, at A27; Tom Puleo, Governor's Race Tests Vermont Values; "Gay Marriage" Issue Is Monopolizing a Bitter Battle, Hartford Courant, Oct. 30, 2000, at A1. More money was spent in the 2000 election than in any prior Vermont election. See Lawmakers To Revisit Campaign Finance Law, Associated Press, Nov. 14, 2000 (noting that the 2000 gubernatorial campaigns set

the record for money spent); see also Ross Sneyd, Campaign 2000 Involved Lots of Spending, Associated Press, Dec. 18, 2000 (describing record spending levels for many elections across Vermont in 2000).

McCarthy's New Hampshire campaign of 1968 had national significance, while the 2000 Vermont gubernatorial election had unquestioned state, and possibly national, ramifications. Both involved unprecedented citizen participation. See 2000 General Election Results for Gubernatorial Race, available at http://cgi.sec.state.vt.us/cgi-shl/nhayer.exe ("2000 Election Results") (showing that voter turnout increased in Vermont by 34.5% in the 2000 election compared to previous election); Hugh Gregg, A Tall State Revisited, at app. (1993), available at http://www.politicallibrary.org/TallState/1968dem.html. And both involved, not surprisingly, unprecedented campaign spending.

This brings me to the argument of Act 64's proponents that the Act will restore public confidence in government and thereby increase citizen and voter participation in elections. Of course, every attempt to suppress speech is based on claims that the speech in question, if allowed to go on freely, will induce behavior that is undesirable. Critics of literature, theater, or television with explicitly sexual or violent themes claim that such speech may induce similar behavior. See, e.g., 1 American

Psychological Association, Report of the American Psychological Association Commission on Violence and Youth, at 6 (1992), available at http://www.apa.org/pi/pii/violenceandyouth.pdf (stating that exposure to violence in the mass media increases the risk of youth involvement in violence). Those who would censor political speech will also argue that such speech will reduce confidence in government. I have no doubt that supporters of the Alien and Sedition Acts made such arguments and that many incumbent officeholders view vigorous opponents as undermining confidence in government.

However, governmental suppression of speech must be based on a compelling demonstration that the speech will incite conduct -- here an alleged indifference to politics on the part of citizens -- that government has a right to prevent. See Boos v. Barry, 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and concurring in the judgment) ("Our traditional analysis rejects such a priori categorical judgments based on the content of speech, requiring governments to regulate based on actual congestion, visual clutter, or violence rather than based on predictions that speech with a certain content will induce those effects." (internal citations omitted)); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is

not enough to overcome the right to freedom of expression."). I do not doubt that government can and ought to take steps to enhance citizen confidence, but suppressing political activity will not encourage either more confidence or more political activity.

In fact, no little part of the public confidence argument is a quintessential self-fulfilling prophesy. The confidence of Vermont citizens is unlikely to be substantially enhanced so long as Act 64's proponents and their allies continue to make exaggerated but weakly supported claims about how corrupt government is in Vermont. Also, it is difficult to reconcile the hypothesized public preference for candidates who raise small amounts and run spartan campaigns with the judgment of professional politicians that amply-resourced campaigns are needed to attract voters.

In any event, an indifference to politics cannot be traced to excessive spending for electoral purposes. To the contrary, the New Hampshire 1968 primary and the Vermont 2000 election involved heavy citizen participation because of voter interest in the issues and the critical fact that candidates who were divided on those issues could raise and spend money debating them. Record amounts were spent on the 2000 gubernatorial election in Vermont. See Ross Sneyd, Campaign 2000 Involved Lots of

Spending, Associated Press, Dec. 18, 2000. The theory of Act 64, as stated in the legislative findings, is that public involvement decreases as spending increases. See 1997 Vt. Laws P.A. 64 (H. 28) (findings nos. 4 and 10). In fact, as noted, a full -- perhaps also record breaking -- 34.5% more people voted in the 2000 election than in the prior gubernatorial election. See 2000 Election Results, supra.

Nor is there experience elsewhere to the contrary. Before 1976, presidential general elections were privately funded with no limits on contributions and expenditures. Claims of a lack of citizen confidence were made. From 1976 through 1988 -- before the era in which so-called soft money played a growing role -- presidential general elections were fully funded by government and subject to expenditure limitations. No appreciable increase in turnout or confidence in government has been noted.

Like the concept of an average election, there is much in the public confidence argument to fear. Proponents of Act 64 rely upon evidence such as a poll showing that 75% of voters believe that large corporations have too much influence and a newspaper article stating similar conclusions. If polls suggesting that some groups have too much power demonstrate a sufficient governmental interest to silence those groups, political speech cannot be protected. The media, moreover, might

consider the full implications of the who-has-too-much-influence theory, as indeed the provisions of Act 64 indicate.

Act 64 reduces the contribution limits for state-wide races to $400, Senate races $300, and House races $200. See Vt. Stat. Ann. tit. 17, § 2805(a). There is nothing in the record of this case to suggest that these draconian limits are not sufficient to dispel any possibility of corruption or the appearance of corruption. See Buckley, 424 U.S. at 55 (holding that "[t]he interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions," and therefore does not justify campaign expenditure limitations). The proponents of Act 64 have not mentioned anything other than the hypothesized, large, cash contributions as leading to an improper influence on government. There is no evidence whatsoever that expenditures by supporters for "meet the candidate" events, or that supporters' use of a residence, computer or phone, purchase of stamps, or driving to meetings have ever caused a problem that calls for redress.

Moreover, there is nothing in the record to suggest that disclosure of amounts and sources of a candidate's campaign funds, in conjunction with low contribution limits, is not the proper democratic method of allowing voters to make their own decisions about the character of the people they elect. Nor is

there anything in the record to suggest that a reduction of campaign activity, in particular grassroots activity, will lead to persons of better character being elected, particularly under the terms of a law enacted by those of purported lesser character.

The theory of Act 64 is that less political advocacy is better for us as a polity because so much political activity is engaged in by powerful groups. Because these groups are theoretically able to use every means of communication as a conduit of influence, political activity at every level must be reduced. Act 64 is, therefore, designed to impose relative silence on everyone. However, the truly rich and powerful can still engage in constitutionally protected independent political activities or buy a media outlet, while the regular citizen, who must speak through organizational activity, is silenced.

Act 64's full effects have not been felt because the district court's decision narrowed its applicability. If expenditure limits are revived, however, candidates and their supporters will be starved for resources to use for political speech. As noted, the draconian effects of limits on expenditures and related expenditures will be aggravated by the fact that political parties will not be able to spend more than the contribution limits of $400 (state-wide office), $300

(Senate), and $200 (House), for candidates. See Vt. Stat. Ann. tit. 17, §§ 2805(a), 2809(a). This will result in a drastic reduction of party support compared to prior years, see supra note 11 and accompanying text, and expenditure limits will prevent candidates from making up the difference even through small contributions. That is truly a move to silence.

e) The Excessive Discretion Accorded Administrators

Perhaps we can rely upon the wisdom of Vermont's Secretaries of State, now and in the future, to exercise discretion and mitigate the harsh effects of Act 64. However, truly mitigating rules would involve arbitrary decisions, and the very existence of that discretion is itself a constitutional problem.

Limits on campaign expenditures are like all limits on speech. If the limits are triggered, further speech is forbidden. It is standard First Amendment jurisprudence that such a restriction on speech must be carefully crafted to avoid vesting those who administer the law with excessive discretion as to its interpretation. See Forsyth County, 505 U.S. at 131 (requiring "narrow, objective, and definite standards"). The requirement that a law regulating speech embody workable and known standards is necessary both to alert those who are regulated to its terms, see Gentile v. State Bar of Nevada, 501 U.S. 1030, 1048 (1991) (requiring regulation of speech to give

"fair notice" to those to whom it is directed), and to prevent enforcers from making decisions based on impermissible grounds, see id. at 1050-51 ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement."); Forsyth, 505 U.S. at 131 (noting "danger of censorship" where regulation allows excessive enforcement discretion).

Act 64 simply lacks discernible criteria for the many interpretive and valuation questions that it creates. If there is to be compliance with Act 64, there must be constant interpretation by the Secretary of State, the Attorney General, and the Vermont courts with regard to the vast number of questions that will arise election-by-election, campaign-by-campaign, and day-by-day. The answers to those questions are the equivalent of the granting or denying of a permit to speak. In interpreting the statute, however, the Secretary of State and the Vermont courts are afforded almost no guidance except for the proposition that the influence of special interests is to be reduced and that of regular citizens increased.

For example, the statute says nothing about the payment of debts or wind-down expenses of prior campaigns during the next two-year cycle. See 1999 Memorandum, supra. It is also unclear whether the (paltry) exception for expenses for "meet the

candidate" events applies only to party sponsored events or all such affairs. See supra notes 8-9; see generally Vt. Stat. Ann. tit. 17, §§ 2809(d)(1)-(3). If Act 64 is enforced, valuation questions regarding the donation or use "of anything of value" will themselves be a constant issue, as will be ubiquitous questions concerning whether particular activities of officeholders, "candidates," or would-be "candidates" have "the purpose of influencing an election." See generally id. § 2801. There is also little guidance as to what conduct is an "affirmative action to become a candidate," or what professional services are donations or related expenditures by a firm rather than volunteer services. See id. §§ 2801(1), 2809.

The definition of "related expenditures" can provoke thousands of questions regarding actions of individuals or political parties in which the answer turns, after a potentially intrusive inquiry into the activities and thoughts of candidates and parties, on fine details of what was done, what was said, what was the "primary thrust" of the activity, and what was thought. See Appendix A. The Secretary herself has noted in her response attached as Appendix A that the likelihood of so many different factual circumstances arising prevents the drafting of precise rules regarding whether particular efforts by a party will be related expenditures on behalf of candidates, one of the

most important questions arising under Act 64.

These issues are serious, bristling with First Amendment implications, and their resolution will ofttimes award an election to one candidate rather than another. If a party's poll is deemed a related expenditure on behalf of a candidate for the House, most or all of the expenditure limits may be exhausted. If a particular activity by an incumbent legislator is deemed an expenditure, rather than the performance of an official duty, that legislator may be barred from climbing into the family automobile and driving to the local town green to make a speech. If the activity is not an expenditure, the incumbent legislator may be allowed to engage freely in very helpful electoral activities that are denied to his or her opponent. If a candidate has a friend who is a lawyer and whose professional services are deemed not to be related expenditures, that candidate will have a great advantage over another whose friends are not lawyers, including the ability to bring litigation against the opponent that will exhaust the opponent’s campaign funds. A ruling allowing lawyers to contribute professional services without counting them as contributions or related expenditures is hardly out of the question under Act 64, even though lawyers will often offer such services in the hope for special favors for themselves or their clients.

The Secretary of State's opinions allowing partners to make double donations -- once by the partnership, once by the individual partners -- and endorsing the legality of "pass-the-hat" fundraisers in which donors are allowed to remain anonymous and on the honor system as to how much they give are only the first examples of how Act 64 will come to mean what the Secretary of State and Vermont courts say it means. See 2001 Guide, supra.

Such untrammeled discretion cannot be squared with the First Amendment's requirements that speech be regulated according to spelled out and precise criteria. Equally important, it cannot be squared with increasing confidence in government. Only an organ of government can administer and interpret these laws. However, that interpretation consumes time when time is of the essence -- Appendix A is a letter dated December 3, 1999, responding to an inquiry dated October 8 -- and is susceptible to colorable claims of partisan influence.

In the last mayoral election in New York City, a candidate claimed to be eligible for public financing in a primary race, but his application was denied in a debatable ruling. See Mirta Ojito, Badillo Campaign Denied Matching Funds, N.Y. Times, Sept. 8, 2001, at B6; Mirta Ojito, Badillo Appeals Ruling on Campaign Fund Match, N.Y. Times, July 25, 2001, at B4. A Campaign Finance Board later overturned that ruling but only after the primary

election was over. See A Bit Late for Race, Badillo Gets Funds, N.Y. Times, Apr. 12, 2002, at B3.

In Vermont, the purported author and lobbyist for Act 64 was denied public financing because his party took a poll that, if attributed to his candidacy, would be a related expenditure causing him to exceed the maximum contribution and expenditure limits for candidates eligible for public financing. See Ross Sneyd, Progressives' Poll Raises Question About Public Financing, Associated Press, Feb. 21, 2002 (describing Anthony Pollina's violation of the campaign finance law). The Democratic party then objected to his receipt of public financing. See Ross Sneyd, Democrats Ask that Pollina Be Disqualified from Public Financing, Associated Press, Feb. 28, 2002. The Secretary of State and the Attorney General, both Democrats, undertook an investigation into the activities of the candidate's party. See Ross Sneyd, Progressive Sue To Ensure Public Financing for Pollina, Associated Press, Mar. 12, 2002; see also Ross Sneyd, Pollina's Lawyer Says He Won't Cooperate with AG's Probe, Associated Press, Mar. 22, 2002. The candidate was then quoted as saying, quite understandably, "You have the Democratic Party asking the Democratic Attorney General based on an opinion of a Democratic secretary of state to investigate a Progressive Party candidate." Christopher Graff, Anthony Pollina's Campaign

Demeans Legislators, Associated Press, Mar. 17, 2002. Neither the Badillo nor the Pollina affairs strike one as confidence-builders.

IV. CONCLUSION

In holding, with only one dissenting vote, that limits on candidate expenditures are unconstitutional, Buckley simply followed mainstream First Amendment jurisprudence that is applied to communicative activity of far less constitutional significance than political speech. See, e.g., Stanley, 394 U.S. at 567 (disallowing speculative impact of possessing obscene material on an asserted governmental interest as justification for statute restricting nonpolitical speech); Smith v. California, 361 U.S. 147, 151 (1959) (applying "stricter standards" in statutory scrutiny where statute has "a potentially inhibiting effect on speech"). That jurisprudence calls for scrutiny that does not take unquestioningly and at face value the claims of a law's proponents, Buckley, 424 U.S. at 40-41 (stating that "[b]efore examining the interests advanced" in support of legislation, "[c]lose examination of the specificity of the statutory limitation is required where, as here, the legislation imposes criminal penalties in an area permeated by First Amendment interests"), without actually examining the law, see id. at 41 ("The test if whether the language of [the statute] affords the

'[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.'" (quoting NAACP v. Button, 371 U.S. 415, 438 (1963))). That jurisprudence demands that a law restricting speech, including editorializing speech by the press, spell out what it permits and what it prohibits in intelligible detail, see Forsyth, 505 U.S. at 131, and not leave vast areas of discretion to those who must implement it. See Thomas, 122 S. Ct. at 780. That jurisprudence denies to government "the power to determine that spending to promote one's political views is wasteful, excessive, or unwise," Buckley, 424 U.S. at 57, and "to control . . . the quantity and range of debate on public issues in a political campaign." Id. Under that jurisprudence, Act 64's limits on expenditures and party financing cannot be upheld. Under that jurisprudence, forcing a reorganization of political parties that reduces the autonomy of local party committees for no articulated reason is unconstitutional.

Act 64 is said to be aimed at reducing the corrupt influence of special interests while enhancing the role of regular citizens. If one looks at what Act 64 says instead of what its proponents say about it, it is quite apparent that Act 64 substantially disables citizens from meaningful participation in party organizations, particularly at the local level and in

grassroots activities on behalf of candidates, while organized economic interests retain the ability to engage in independent political advocacy, even if costly. In the beginning of this dissent, I quoted Justices Brandeis and Black on the dangers of high-minded assaults on liberty. Act 64 also exemplifies the wisdom of another, albeit less august, source, Walt Kelly: "We have met the enemy, and he is us."

1

2

FOOTNOTES

1. The desire to challenge Buckley, even at the cost of living under a bad law, is exemplified by an astonishing statement of Vermont's Secretary of State. In transmitting to the Vermont legislature a review of the operation of Act 64, she cautioned against any amendment or repeal that would render the present litigation moot, even if the legislature thought the amendment or repeal necessary, because such an amendment or repeal would "frustrat[e] the express legislative goal of giving the Supreme Court an opportunity to reevaluate its decision in Buckley v. Valeo." See 2001 Memorandum, supra.

2. Surprise at the actual provisions of campaign finance laws is as old as the laws themselves. A veteran civil-liberties lawyer tells the following story.

> In the summer of 1972, three old-time dissenters came into the offices of the New York Civil Liberties Union in Manhattan and told an extraordinary story. In May of that year they and a few like-minded others had drafted and sponsored a two-page advertisement that appeared in The New York Times. The advertisement was sharply critical of Richard M. Nixon, the President of the United States. The ad claimed that President Nixon had authorized the secret bombing of Cambodia, in

> violation of international law, and should be impeached and removed from office. The ad set forth the text of an impeachment resolution that had been introduced in the House of Representatives and contained an "Honor Roll" listing eight House members who had co-sponsored that resolution. The advertisement cost approximately $17,850, and the ad hoc group called itself the National Committee for Impeachment. Before the ink on the ad was barely dry, the group was sued by the United States Justice Department for running the advertisement.
>
> When Randolph Phillips, one of the sponsors of the ad, told this story to the lawyers at the New York Civil Liberties Union, we were incredulous. How could a group of citizens be sued by the Federal Government for publishing a criticism of the President of the United States? After all, this was 1972, and First Amendment law seemed at its most vigorous in the protections of public speech, one of the shining legacies of the Warren Court. What possible justification could the government have for suing this small group of protestors? We soon discovered the answer: campaign finance reform.

Joel M. Gora, No Law . . . Abridging, 24 Harv. J.L. & Pub. Pol'y 841, 842-43 (2001) (reviewing Bradley A. Smith, Unfree Speech (2001) (footnote omitted). The law in question was the Federal Election Campaign Act of 1971, which defined a political committee as any group that spent more than $1,000 annually "for the purpose of influencing" -- language used in Act 64 -- a federal election and imposed various requirements on a committee's purchase of advertisements relating to a federal candidate. See United States v. Nat'l Comm. for Impeachment, 469 F.2d 1135, 1139 (2d Cir. 1972).

3. Because other provisions of Act 64 strike at the heart of the democratic political system, I will note only in a footnote one egregiously overreaching provision. Act 64 requires that all political advertisements identify who paid for them, with an address, and which candidate is benefitted. The Secretary of State has sought an exemption from this requirement for buttons and lapel stickers. See 2001 Memorandum, supra. So far, she has been unsuccessful.

4. The pertinent provision reads:

> "Expenditure" means a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.

Vt. Stat. Ann. tit. 17, § 2801(3).

5. The pertinent provisions reads:

> "Candidate" means an individual who has taken affirmative action to become a candidate for state, county, local or legislative office in a primary, special, general or local election. An affirmative action shall include one or more of the following:
>
> (A) accepting contributions or making expenditures totalling $500.00 or more; or
>
> (B) filing the requisite petition for nomination under this title or being nominated by primary or caucus; or

(C) announcing that he seeks an elected position as a state, county or local officer or a position as representative or senator in the general assembly.

Vt. Stat. Ann. tit. 17, § 2801(1).

6. The pertinent provision reads:

"Contribution" means a payment, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid to a person for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates in any election, but shall not include services provided without compensation by individuals volunteering their time on behalf of a candidate, political committee or political party. For purposes of this chapter, "contribution" shall not include a personal loan from a lending institution.

Vt. Stat. Ann. tit. 17, § 2801(2).

7. The pertinent provision reads:

For the purposes of this section, a "related campaign expenditure made on the candidate's behalf" means any expenditure intended to promote the election of a specific candidate or group of candidates, or the defeat of an opposing candidate or group of candidates, if intentionally facilitated by, solicited by or approved by the candidate or the candidate's political committee.

Vt. Stat. Ann. tit. 17, § 2809(c).

8. Section 2809(d) reads in full:

An expenditure made by a political party or by a political committee that recruits or endorses candidates, that primarily benefits six or fewer

> candidates who are associated with the political party or political committee making the expenditure, is presumed to be a related expenditure made on behalf of those candidates. An expenditure made by a political party or by a political committee that recruits or endorses candidates, that substantially benefits more than six candidates and facilitates party or political committee functions, voter turnout, platform promotion or organizational capacity shall not be presumed to be a related expenditure made on a candidate's behalf. In addition, an expenditure shall not be considered a "related campaign expenditure made on the candidate's behalf" if all of the following apply:
>
> (1) The expenditures were made in connection with a campaign event whose purpose was to provide a group of voters with the opportunity to meet the candidate personally.
>
> (2) The expenditures were made only for refreshments and related supplies that were consumed at that event.
>
> (3) The amount of the expenditures for the event was less than $100.00.

Vt. Stat. Ann. tit. 17, § 2809(d).

9. There is an exemption for certain expenses relating to "meet the candidate " events in Section 2809(d). See supra note 8. Because Section 2809(d) relates generally to activities of political parties and committees and the exemption for meet the candidate events begins with the words "In addition," the exemption may well have been intended to apply only to party- or committee-sponsored events. The Secretary of State has indicated that the Attorney General believes it to apply to all such

events, however sponsored. See 1999 Memorandum, supra. The Secretary of State's position is unclear. In any event, the Secretary of State has opined that, even with the exemption, Act 64 unduly discourages such events because their costs involve non-exempted expenses. See id.

10. There are some expenditure reports in the record but they are limited to the campaign's out-of-pocket expenditures made during the three-month period preceding the general election. Act 64's limits on expenditures, however, apply, as noted, to all expenditures made over a two-year period immediately following the last general election and ending with the next general election. See Vt. Stat. Ann. tit. 17, §§ 2801(9), 2805a(a).

11. For example, in the 2000 election, the Democratic Party made cash contributions -- not including related expenditures -- in the amount of $28,000 to Elizabeth Ready for her campaign for Auditor of Accounts. See Campaign Finance Report of Elizabeth Ready, December 18, 2000.

12. Some may doubt that Act 64 was intended to apply to media editorializing because they deem such editorializing to be constitutionally protected. However, paid advertisements have

the same protection as editorials, see Sullivan, 376 U.S. at 266 (holding that "statements [that] would otherwise be constitutionally protected . . . do not forfeit that protection because they were published in the form of a paid advertisement"), and if you may constitutionally limit paid advertisements, as Act 64 does, you may limit unpaid endorsements. I, of course, believe that you cannot limit either.

The reason many campaign finance laws exempt the media is, therefore, not constitutional scruple, but the desire of proponents of regulation for media exposure and support. Such support might not be forthcoming if the media realized the extent to which the theory of such laws is a dagger easily aimed at freedom of the press.

13. My colleagues note that one purpose of Act 64's expenditure limits was to reduce the use of short commercials by candidates but, in light of their disposition of this matter, do not reach the issue of whether this concern is sufficiently compelling to justify the legislation. In that regard, I note two things. First, that interest is not compelling. Indeed, the use of law to force candidates to select one medium of advocacy rather than another is an unconstitutional purpose and an additional ground

for striking expenditure limits down. See Meyer, 486 U.S. at 424 ("The First Amendment protects [individuals'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). Second, Act 64 has increased reliance on the media. See 2001 Memorandum, supra; David Gram, Dems Needle Each Other on Spending in Treasurer's Race, Associated Press, May 29, 2002.

14. It is also suggested that expenditure limits will reduce the time spent fundraising by candidates, leaving them time to confer with ordinary voters. There is no basis for this belief. Limiting the size of individual contributions necessarily increases the amount of time that must be spent raising a particular amount of money. Moreover, compliance with Act 64 alone will consume large amounts of a candidate's time in determining -- perhaps litigating -- whether particular activities constitute expenditures or related expenditures and what value should be attributed to particular in-kind expenditures. Expenditure limits also require candidates to monitor and control activities by supporters that involve related expenditures, which, if they exceed $50 with regard to a single source, must be totaled within the permissible expenditure and contribution limits. Act 64's provisions will actually force

candidates to spend more time than ever on non-speech related activities.

APPENDIX A

State of Vermont
Office of the Secretary of State

December 3, 1999

Representative Terry Bouricius
56 Booth Street
Burlington, VT 05401

Re: Your e-mail of October 8, 1999

Dear Representative Bouricius,

Please accept my apology for the delay in responding to your questions. The review of my proposed opinion took longer than anticipated. This letter is in response to the two questions which you raised in your e-mail. I will restate the questions to make sure we understand the fact patterns which I am addressing.

1. Can a political party which has no "candidates" as defined in 17 V.S.A. §2801(1) at the time the proposed poll is conducted, pay in excess of $500 for the conducting of a professional poll to seek potential voters opinions about selected potential candidates, both Progressive and otherwise, and share the poll results with potential candidates without the polling expense and associated political party activities triggering either a person named in the poll becoming a "candidate" as defined in §2801(1), nor disqualifying a person named in the poll from seeking public financing from the Vermont Campaign Fund, if a person named in the poll later decided to become a candidate?

The conducting of a poll by a political party to "test the waters" for various potential candidates will not trigger a "candidacy" for a person named in the poll even if more than $500 per potential candidate is expended by the party for the poll so long as only the general results are used for recruiting, media releases, or other generalized activities. The conducting of the poll itself falls within the types of activities generally

pursued by a political party for its overall organization, planning, and strategy. The political party can conduct a poll and can make the general results or the poll public without triggering any candidacies. The party can use the results of the poll in a general way for recruiting candidates. (For example, telling John Jones that he was the favorite in a potential race with 3 other names, would be general information which can be used for recruiting.) However, as I will discuss below, the acceptance of detailed data and information from the poll by an individual will trigger a candidacy if the cost of the poll which is attributable on a pro rata basis to the provision of specific information and data to a particular candidate exceeds $500.

The Vermont campaign finance law does not specifically address polling activities and expenses. The definition of "candidate" in 17 V.S.A. §2801(1) states that "an affirmative action" of "(A) accepting contributions or making expenditures of over $500" will trigger a candidacy. The definition of contribution includes "a gift of money or anything of value." It is when an individual accepts the detailed data and information gained from the professional poll, that "a gift of anything of value" is accepted, and if the specific information given to an individual cost over $500 to produce on a pro rata basis, then a candidacy will be triggered.

Because it is the acceptance of the gift of detailed data from the poll, not the polling itself, which can trigger a "candidacy," the political party could conduct a professional poll at any time but wait until after February 15, 2000 to offer any detailed data or information from the poll to an individual in order to avoid the prohibitions of the Vermont campaign fund (public financing). The law states that if a person becomes a candidate before February 15 of the general election year, that person shall not be eligible for Vermont campaign finance grants, 17 V.S.A. §2853(a). Therefore, if before February 15th, a person accepts detailed data from a professional poll which is a gift of "anything of value" which cost over $500 to produce on a pro rata basis, the person has become a candidate by accepting a contribution totaling $500 or more, and will not be eligible for the Vermont campaign finance grants.

In summary, the political party can conduct polls and make the general results of the poll public without triggering any candidacies. If specific data and information is accepted by an individual which cost over $500 to produce on a pro rata basis, a

candidacy is triggered. If the candidacy is triggered before February 15, 2000, the candidate will not be eligible for campaign finance grants. A political party and any individual considering accepting the detailed results of a poll should consult their own attorney to discuss specific fact patterns and how the law would be applied to those specific facts.

2. Can a political party spend in excess of $500 to arrange and sponsor dinners, other events, or party mailings for the purpose of educating party supporters or potential contributors about Vermont campaign finance grants and the need for "qualifying contributions"? Can the party make other preparations to assist a future candidate in gathering "qualifiers" for use after February 15, 2000?

Your question leaves room for many fact patterns so we will address three possible scenarios for such preparations, including dinners, events or mailings which we do not believe will trigger a candidacy and then discuss some additional considerations that might raise issues in the mind of an opposing candidate who could raise the issue using the process in 17 V.S.A.§2809(e).

A. If the proposed events are for the sole purpose of educating voters about the need for many small contributors in order to qualify for Vermont campaign finance grants, to explain the importance of party organization, or to discuss any other topics related to general campaigning, the expenditures clearly would not trigger a candidacy.

B. If the party conducts mailings in which individuals are named or discussed as potential candidates because the party is hoping to generate interest in candidacies, but the individuals do not have knowledge of the fact that their names are mentioned, and the primary thrust of the activities are party organization and education of voters about the requirements of the campaign finance grant law, then the mailings would not trigger a candidacy.

C. If the party conducts other activities to develop a database of persons who might be willing to contribute "qualifying contributions" or solicits conditional pledges if an individual decided to run (see Secretary of State Letter of July 6, 1999), these activities would not trigger a candidacy.

D. However, if the party conducts dinners, events or

mailings or solicits pledges in which potential candidates are introduced and discussed, and the potential candidates have participated in the planning of the events or given approval to them, the potential candidates will need to evaluate when or whether they might cross the line into candidacy by either accepting contributions or making expenditures of $500 or more by way of "accountability of related expenditures" as described in 17 V.S.A. §2809. We cannot anticipate every possible fact pattern that may develop as the party and potential candidates proceed, so we merely want to raise the prospect that at some point the activities may raise questions in another candidate's mind and the opposing candidate may use §2809(e) to seek findings and a determination from a court. Each party and potential candidate should review proposed activities with their own counsel to examine the particular facts to evaluate whether they may fall into the category of activities addressed in 17 V.S.A. §2809 as "related expenditures" and possibly trigger a candidacy based upon accountability for a related expenditure of $500 or more.

This letter represents my opinion on the issues which you have raised. You may seek your own counsel to advise you in these matters. Assistant Attorney General Michael McShane has reviewed this advisory opinion on behalf of the Office of the Attorney General and that office concurs with this opinion. If you have any questions please contact me at 828-2304 or kdewolfe@sec.state.vt.us.

Sincerely,

Kathleen S. DeWolfe
Director of Elections and Campaign Finance

cc: Michael McShane, AAG
Distribution List