

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 _____
4 August Term, 2000

5 (Argued: May 7, 2001

Decided: August 7, 2002)

6
7 Docket Nos. 00-9159(L), 00-9180(Con), 00-9231(xap), 00-9139(xap), and 00-9240(xap)

8
9 _____
10 MARCELLA LANDELL,

11
12 *Plaintiff-Appellee,*

13
14 DONALD R. BRUNELLE, VERMONT RIGHT TO LIFE COMMITTEE, INC., POLITICAL COMMITTEE,
15 NEIL RANDALL, GEORGE KUUSELA, STEVE HOWARD, JEFFREY A. NELSON, JOHN PATCH,
16 VERMONT LIBERTARIAN PARTY, VERMONT REPUBLICAN STATE COMMITTEE and VERMONT
17 RIGHT TO LIFE COMMITTEE-FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

18
19 *Plaintiffs-Appellees-Cross-Appellants,*

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21
22 —v.—

23
24 VERMONT PUBLIC INTEREST RESEARCH GROUP, LEAGUE OF WOMEN VOTERS OF VERMONT,
25 RURAL VERMONT, VERMONT OLDER WOMEN'S LEAGUE, VERMONT ALLIANCE OF
26 CONSERVATION VOTERS, MIKE FIORILLO, MARION GREY, PHIL HOFF, FRANK HUARD, KAREN
27 KITZMILLER, MARION MILNE, DARYL PILLSBURY, ELIZABETH READY, NANCY RICE, CHERYL
28 RIVERS and MARIA THOMPSON,

29
30 *Intervenors-Defendants-Appellants-Cross-Appellees,*

31
32 WILLIAM H. SORRELL, JOHN T. QUINN, WILLIAM WRIGHT, DALE O. GRAY, LAUREN BOWERMAN,
33 VINCENT ILLUZZI, JAMES HUGHES, GEORGE E. RICE, JOEL W. PAGE, JAMES D. MCNIGHT, KEITH
34 W. FLYNN, JAMES P. MONGEON, TERRY TRONO, DAN DAVIS, ROBERT L. SAND and DEBORAH L.

1 MARKOWITZ,
2

3 *Defendants-Appellants-Cross-Appellees.*
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6 B e f o r e : _____
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8 WINTER, STRAUB, and POOLER, *Circuit Judges.*
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11 Appeal from the entry of a judgment by the United States District Court for the District of
12 Vermont (William K. Sessions, III, *Judge*), reviewing the constitutionality of Vermont's Act 64,
13 which imposes expenditure and contribution limitations on campaigns for state office. We hold
14 that Vermont's expenditure and contribution limits are constitutional, but that Vermont's attempt
15 to limit contributions from out-of-state sources is unconstitutional. We also remand for further
16 proceedings on Act 64's effects on political action committees that do not contribute to
17 candidates and its effects on money transfers between a political party's national and local
18 affiliates.

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

21 Judge Winter dissents in part in a separate opinion.

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5 Cross-Appellees Vermont Public Interest Research Group, the League of
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7 League, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion
8 Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl
9 Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers, and Maria
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18 Steve Howard, Jeffrey A. Nelson, John Patch, and Vermont Libertarian
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20

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1 STRAUB, *Circuit Judge*:

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

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

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

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

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

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

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

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

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

9
10 **BACKGROUND**

11 In 1997, Vermont passed a comprehensive campaign reform act known as Act 64. 1997
12 Vermont Campaign Finance Reform Act, codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 (“Act
13 64" or “the Act”). Among other things, the Act controls the flow of money into and out of
14 political campaigns and regulates the receipt of money by political organizations and candidates.
15 A number of Act 64’s most significant provisions have been challenged in this appeal. Act 64
16 establishes contribution and expenditure limits for those running for state offices. It also caps the
17 size of contributions which political parties and political action committees may accept.
18 Additionally, the Act requires that all state candidates, political parties, and political action
19 committees (“PACs”) receive no more than 25 percent of their funds from non-Vermont sources.

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

1 expenditures that a candidate for office may make during a two-year election cycle. Candidates
2 for statewide office are restricted to varying amounts depending on the position sought, with a
3 candidate for governor limited to \$300,000, for lieutenant governor to \$100,000, and other
4 statewide offices to \$45,000. *See id.* at §§ 2805a(a)(1)–(3). Candidates for state senator and
5 county office are limited to \$4000, with state senators permitted an additional \$2500 per seat in
6 multi-seat districts. *See id.* at § 2805a(a)(4). Candidates for state representative in single
7 member districts can spend no more than \$2000, and those in two member districts no more than
8 \$3000. *See id.* at § 2805a(a)(5). Incumbent candidates may spend only 85 percent of the
9 permitted amounts, except for incumbents of the General Assembly who may spend 90 percent.
10 *See id.* at § 2805a(c).

11 The Act also limits the size of contributions which candidates, political committees, and
12 political parties may receive from a single source during a two-year election cycle. Candidates
13 for state representative or local office may accept no more than \$200 from a single source,
14 political party, or political action committee. *See id.* at § 2805(a). Slightly higher limits apply to
15 candidates for state senate or county office (\$300) and to candidates for statewide office (\$400).
16 *See id.* Political action committees and political parties may accept no contribution greater than
17 \$2000. *See id.* For the purpose of all of these contributions limits, a political party's state,
18 county, and local affiliates count as a single unit. *See id.* at § 2801(5).

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

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

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

17 The plaintiffs in this case have challenged these provisions of Act 64.² They argue that

1 ¹ The defendants include a large number of individuals, including the Vermont Attorney General, the Vermont
2 State’s Attorneys, and the Vermont Secretary of State (collectively “Vermont”). A number of interested parties,
3 including the Vermont Public Interest Research Group and the League of Women Voters of Vermont, successfully
4 intervened.

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

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

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

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

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

1 to Life Committee, the Vermont Republican State Committee, and various additional individuals.
2

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

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

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

19 The General Assembly finds that:

20 (1) Election campaigns for statewide and state legislative offices are becoming too
21 expensive. As a result many Vermonters are financially unable to seek election to
22 public office and candidates for statewide offices are spending inordinate amounts
23 of time raising campaign funds.

24 (2) Some candidates and elected officials, particularly when time is limited,
25 respond and give access to contributors who make large contributions in

1 preference to those who make small or no contributions.

2 (3) In the context of Vermont, contributions larger than the amounts specified in
3 this act are considered by the legislature, candidates and elected officials to be
4 large contributions.

5 (4) Robust debate of issues, candidate interaction with the electorate, and public
6 involvement and confidence in the electoral process have decreased as campaign
7 expenditures have increased.

8 (5) Increasing campaign expenditures require candidates to seek and rely on a
9 smaller number of larger contributors, often outside the state, rather than a large
10 number of small contributors.

11 (6) In the context of Vermont, contributions scaled in proportion to the size of the
12 electoral district of the office and up to the amounts specified in this act
13 adequately allow contributors to express their opinions, level of support and their
14 affiliations.

15 (7) In the context of Vermont, candidates can raise sufficient monies to fund
16 effective campaigns from contributions no larger than the amounts specified in
17 this act.

18 (8) Limiting large contributions, particularly from out-of-state political
19 committees or corporations, and limiting campaign expenditures will encourage
20 direct and small group contact between candidates and the electorate and will
21 encourage the personal involvement of a large number of citizens in campaigns,
22 both of which are crucial to public confidence and the robust debate of issues.

23 (9) Large contributions and large expenditures by persons or committees, other
24 than the candidate and particularly from out-of-state political committees or
25 corporations, reduce public confidence in the electoral process and increase the
26 appearance that candidates and elected officials will not act in the best interests of
27 Vermont citizens.

28 (10) Citizen interest, participation and confidence in the electoral process is
29 lessened by excessively long and expensive campaigns.

30 (11) Public financing of campaigns, conditioned on an appropriate number of
31 qualifying contributions, will increase citizen participation and will limit the time
32 spent soliciting contributions, and will reduce the need of elected officials to
33 respond to, and provide access to, contributors. As a result candidates will be
34 freed to devote more time and energy to debate of the issues and elected officials
35 will be able to spend more time responding to constituents and to performing their
36 official duties.

37 (12) Public financing of campaigns, coupled with generally applicable
38 contribution and expenditure limitations, will level the financial playing field
39 among candidates and provide resources to independent candidates, both of which
40 will increase the debate of issues and ideas.

41 (13) In Vermont, campaign expenditures by persons who are not candidates have
42 been increasing and public confidence is eroded when substantial amounts of soft
43 money are expended, particularly during the final days of a campaign.

1 (14) Identification of persons who publish political advertisements assists in
2 enforcement of the contribution and expenditure limitations established by this act.
3 (15) Because it is essential for all candidates to have their names and positions on
4 issues known to the electorate and because incumbents have a substantial
5 advantage in these areas, public grants and campaign expenditures must be
6 reduced for incumbents.
7

8 1997 Vt. Laws P.A. 64 (H. 28). On June 26, 1997, Vermont's Governor signed Act 64 into law.

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

25 The District Court upheld the provisions imposing limitations on amounts that

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

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

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

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

6 The District Court held, however, that political parties deserve greater freedom in their
7 ability to make contributions to political candidates. Although the District Court upheld the
8 \$2000 limitation on contributions to political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(a),
9 it struck down the provision limiting contributions to candidates insofar as it applies to those
10 candidate’s own political parties pursuant to Vt. Stat. Ann. tit. 17, § 2805(b). Regarding
11 contributions to political parties, the court relied on Vermont’s anti-corruption interest, noting
12 that unrestrained contributions to parties provided a loophole to individuals wishing to evade
13 restrictions on direct contributions. Quoting *Nixon v. Shrink Mo. Gov’t PAC* (“*Shrink*”), the
14 District Court found that the limit imposed by the statute is not “so radical in effect as to render
15 political association ineffective, drive the sound of [a political party’s] voice below the level of
16 notice, and render contributions pointless.” 528 U.S. 377, 397 (2000). Moreover, the District
17 Court found that, given Vermont’s electoral situation, the \$2000 limit did not inhibit the strength
18 of political parties. The court relied on the evidence specifically concerning Vermont campaigns
19 and politics, a comparison of limits on contributions to candidates in other jurisdictions, and the
20 ability of the Republican Party to raise substantial sums while subject to Act 64’s limitations.
21 The District Court, however, did not address the constitutionality of transfers of money to state
22 and local parties from the national affiliated party which are apparently subject to the \$2000

1 limitation.

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

10 The District Court also upheld the treatment of state and local parties as a single entity for
11 the purpose of calculating the contribution limitations pursuant to Vt. Stat. Ann. tit. 17, §§
12 2801(5) & 2301–20. The court relied on a number of factors, including the fact that
13 notwithstanding its adamant assertions, the defendant Vermont Republican State Committee had
14 never acted as a loose confederation of entities in the conduct of the litigation.

15 The District Court upheld the provision of Act 64 that treats third party expenditures
16 “intentionally facilitated by, solicited by or approved by the candidate or the candidate’s political
17 committee” as contributions to the candidate pursuant to the Act. *See* Vt. Stat. Ann. tit. 17, §
18 2809(a) & (c). The purpose of the provision is to close a loophole which would otherwise permit
19 evasion of the legitimate contribution limitations by engaging in coordinated expenditures. The
20 District Court further upheld the provision establishing a rebuttable presumption that any third
21 party expenditure benefitting six or fewer candidates is a related expenditure. *See id.* at 2809(d).
22 The court explained that the presumption is a guideline to assist in compliance, and that since

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

5 The District Court struck down the provision that caps out-of-state funds at 25 percent of
6 total contributions received by a candidate, political party, or PAC pursuant to Vt. Stat. Ann. tit.
7 17, § 2805(c). The court found that the factual record did not establish any legitimate
8 government interest in limiting such contributions. Instead, the record only supported an
9 inference that such contributions raise the risk of corruption when they are large—a problem
10 solved by the contribution limits. The fact that a donor is a resident of another state is not an
11 important factor in either increasing the risk of corruption or the public’s perception of
12 corruption. Moreover, the mechanics of the ban indicated a lack of narrow tailoring because it
13 acts as a complete bar to contributions for some would-be contributors and candidates.

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

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

1 Connecticut, Maryland, New York, and Oklahoma. The plaintiffs have cross-appealed,
2 contending that the District Court should have also enjoined the enforcement of the other
3 disputed provisions of the Act.
4

5 DISCUSSION

6 Although we review the District Court’s factual findings for clear error pursuant to
7 Federal Rule of Civil Procedure 52(a), *see Bose Corp. v. Consumers Union of U.S., Inc.*, 466
8 U.S. 485, 498 (1984), the breadth of review is greater in cases raising First Amendment issues:
9 “an appellate court has an obligation to ‘make an independent examination of the whole record’
10 in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of
11 free expression.’” *Id.* at 499 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284–286
12 (1964)). The appellate court must also be vigilant for errors of law that “may infect a so-called
13 mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the
14 governing rule of law.” *Bose*, 466 U.S. at 501.

15 As a threshold matter, the defendants have challenged the plaintiffs’ standing to assert
16 this facial challenge to Act 64’s expenditure and contribution limitations. In order to present a
17 “case or controversy” within the meaning of Article III of the Constitution, the plaintiffs seeking
18 relief must have a sufficient “personal stake in the outcome of the controversy.” *Buckley v.*
19 *Valeo*, 424 U.S. 1, 11 (1976) (internal quotation omitted). The District Court provided careful
20 analysis demonstrating that each of the challenged provisions arguably affects the First
21 Amendment rights of one or more of the plaintiffs. *See Landell v. Sorrell*, 118 F. Supp. 2d 459,
22 474–76 (D. Vt. 2000). For the reasons set forth by the District Court, we uphold its

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

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

14 The First Amendment fully protects the activity restricted by the challenged provisions of
15 Act 64. Restrictions on contributions and expenditures implicate both the First Amendment
16 rights of political expression and political association. *Buckley*, 424 U.S. at 14–15. In the case
17 of political expression, an expenditure cap “necessarily reduces the quantity of expression by
18 restricting the number of issues discussed, the depth of their exploration, and the size of the
19 audience reached.” *Id.* at 19. Contribution limits are less harmful to First Amendment political
20 expression values than expenditure limits, but they still fall within the ambit of full protection.
21 They are less harmful because they involve “little direct restraint” on the contributor’s political
22 communication. *Id.* at 21. “The quantity of communication by the contributor does not increase

1 perceptibly with the size of his contribution” *Id.*

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

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

13 **I. Act 64’s Expenditure Limitations**

14 **A. The Rule of *Buckley***

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

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

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

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

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

3 **B. Post-*Buckley* Interpretations**

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

1 *Buckley.*” *Id.* at 405.

2 Indeed, Justice Kennedy argued that the post-*Buckley* experience requires a wholesale
3 abandonment of the approach adopted in *Buckley*, leaving open the possibility that “Congress, or
4 a state legislature, might devise a system in which there are some limits on both expenditures and
5 contributions thus permitting officeholders to concentrate their time and effort on official duties
6 rather than on fundraising” *Shrink*, 528 U.S. at 409 (Kennedy, J., dissenting). Justice Stevens,
7 articulating the need for “a fresh reexamination” of *Buckley*, concluded that “Money is property;
8 it is not speech.” *Id.* at 398 (Stevens, J., concurring). He advocated the replacement of the
9 Court’s First Amendment review of campaign finance laws with an analysis based on
10 prohibitions against deprivations of liberty or property. *Id.* at 398–99.³

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

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

1 ³ Unease with *Buckley* is not limited to those who argue that campaign finance regulations have a proper place in our
2 constitutional system. In *Shrink*, Justices Thomas and Scalia both advocate overruling *Buckley* not to give
3 legislatures greater leeway to pass needed campaign finance reform, but to heighten the constitutional review given
4 to contribution limits. *See Shrink* at 528 U.S. at 410–12. Justice Kennedy expressed sympathy for their view. *Id.* at
5 409–10 (Kennedy, J., dissenting).

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

3 It is quite wrong to assume that the net effect of limits on contributions and
4 expenditures—which tend to protect equal access to the political arena, to free candidates
5 and their staffs from the interminable burden of fund-raising, and to diminish the
6 importance of repetitive 30-second commercials—will be adverse to the interest in
7 informed debate protected by the First Amendment.

8
9 *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm’n*, 518 U.S. 604, 649–50
10 (1996) (“*Colo. Republican P’*”) (Stevens, J., dissenting). In part, they reached this conclusion
11 because of the comparative competency of the different branches of government: “Congress
12 surely has both wisdom and experience in these matters that is far superior to ours.” *Id.* at 650.

13 The academic literature also contains persuasive analyses that our post-*Buckley*
14 understanding of campaign finance requires a careful evaluation of the evidence in support of
15 expenditure limits. See, e.g., Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The*
16 *Beginning of the End of the Buckley Era?*, 85 Minn. L. Rev. 1729, 1765–69 (2001) (arguing that
17 fair and competitive elections may require some form of expenditure limitations); Vincent Blasi,
18 *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not*
19 *Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1288–89 (1994) (noting that
20 changed circumstances and never before considered government interests, including the
21 protection of candidates’ time, might permit expenditure limits to survive *Buckley*’s test).

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

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

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

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

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

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

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

1 In reaching this view, we do not need to conclude that a thriving democracy requires that
2 every person have equal influence in government affairs. *See Buckley*, 424 U.S. at 48–49 (“[T]he
3 concept that government may restrict the speech of some elements of our society in order to
4 enhance the relative voice of others is wholly foreign to the First Amendment”). *But see*
5 *Shrink*, 528 U.S. at 401 (Breyer, J., concurring) (suggesting that contribution limits may be
6 justified because “such restrictions aim to democratize the influence that money itself may bring
7 to bear upon the electoral process”). In our view, the influence of campaign contributors is
8 pernicious because it is bought. Certain private citizens and organizations should not be given
9 greater access to public office holders—and thus greater influence—*on account of* those citizens’
10 ability and willingness to pay for candidates’ campaigns. Similarly, quid pro quo corruption is
11 troubling not because certain citizens are victorious in the legislative process, but because they
12 achieve the victory by paying public officials for it.

13 **C. The History of Campaign Finance Reform in Vermont**

14 Before discussing the specific evidence produced at legislative hearings on Act 64 and
15 also during the trial below, we note that Vermont’s decision to impose these expenditure
16 limitations has been the result of a century-long effort to safeguard the accessibility and
17 accountability of its elected officials. In 1916, Vermont took early steps to ensure the
18 accountability of its elected officials by passing direct primary elections and mandating the post-
19 primary disclosure of candidate expenditures. 1915 Vt. Laws 4, § 22; 1916 Vt. Laws (Sp. Sess.)
20 4, § 1. In 1961, the legislature adopted mandatory expenditure limits in primary elections, 1961
21 Vt. Laws 178, and applied those limits to general elections in 1971, 1971 Vt. Laws 259. In 1975,
22 Vermont repealed its expenditure limits but continued to limit the maximum contribution that

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

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

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

13 **D. Compelling Interests**

14 As mentioned, a number of distinct phenomena conspire to foster a situation where those
15 who pay for candidate campaigns are given privileged access while regular citizens are denied
16 such contact. First, the Vermont legislature considered powerful evidence concerning the
17 pressures which the prospect of unlimited expenditures places on candidates for office. In
18 particular, there is strong evidence that unlimited expenditures have compelled candidates to
19 engage in excessively lengthy fundraising in order to preempt the possibility that political
20 opponents might develop substantially larger campaign war chests. The Vermont General
21 Assembly found that fundraising requires an “inordinate[] amount of time.” 1997 Vt. Laws P.A.
22 64 (H.28) (finding No.1). The large and growing (and constantly record-breaking) campaign war

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

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

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

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

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

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

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

1 time talking to other people who have not provided other large contributions. . . . [S]o it
2 becomes a cycle where the large contributors get more and more access and the average
3 folks stop trying to get it.
4

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

21 Citizens in Vermont apparently share this view, and have consistently demonstrated a
22 belief that the attention of their public representatives may be available for a price. As a result,
23 public faith in the democratic system has declined. The General Assembly described the effects
24 of a need to raise ever growing amounts of funds: “Robust debate of issues, candidate interaction

1 with the electorate, and public involvement and confidence in the electoral process have
2 decreased as campaign expenditures have increased.” 1997 Vt. Laws P.A. 64 (H.28) (finding
3 No. 4); “Large contributions and large expenditures by persons or committees, other than the
4 candidate and particularly from out-of-state political committees or corporations, reduce public
5 confidence in the electoral process and increase the appearance that candidates and elected
6 officials will not act in the best interests of Vermont citizens.” *Id.* (finding No. 9). At trial, one
7 expert witness, Celinda C. Lake, concluded that “[v]oters are extremely concerned about the
8 influence of special interests in the political process.” In fact, according to polling data
9 considered below, nearly 75 percent of voters say that ordinary voters do not have enough
10 influence over Vermont politics and government, and more than two thirds believe that “large
11 corporations and wealthy individuals have too much influence.” (expert report of Celinda C.
12 Lake). Most citizens are bothered by the fact that “political fundraising took away time from
13 important government business.” (testimony of Celinda C. Lake). Newspaper articles
14 demonstrated the public perception that certain special interests dominated candidate
15 contributions. The Vermont legislature considered one article in the Burlington Free Press
16 stating that “[m]oney not only threatens to corrupt the process, it sabotages the political dialogue
17 as well. Candidates spend too much time begging for dollars and too little time talking issues . . .
18 [I]t breeds cynicism . . . For proof, look in part to the large number of folks who simply don’t
19 vote, staying home with a ‘why bother’ shrug on election day.” *See Democratic Process Relies*
20 *on Reform*, Burlington Free Press, Oct. 6, 1997 at 6A. Testimony by Vermont’s elected officials
21 exposed how the disenchantment and loss of public faith play a critical role in their belief that
22 expenditure limits are necessary. The goal of the legislation is to ensure the accessibility and

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

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

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

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

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

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

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

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

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

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

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

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

19 **E. Narrow Tailoring**

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

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

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

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

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

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

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

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

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

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

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

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

16 **II. Act 64’s Contribution Limitations**

17 Act 64 also imposes four basic types of contribution limitations. First, contributions by
18 individuals to candidates are limited to \$200 for state representative and other local offices, \$300
19 for state senator and other county offices, and \$400 for state-wide office. *See* Vt. Stat. Ann. tit.
20 17, § 2805(a). Second, PACs and political parties may not accept contributions from a single
21 source in excess of \$2000, and are subject to the individual contribution limits when contributing
22 to candidates. *See id.* Third, individuals, PACs or political parties that make “related

1 expenditures” with candidates must count those expenditures toward the relevant expenditure
2 and contribution limits. *See id.* at 2809(a)–(c). Finally, candidates, PACs, and political parties
3 may not accept more than 25 percent of their total resources from out-of-state sources. *See id.* at
4 2805(c).

5 **A. Limits on Contributions by Individuals to Candidates**

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

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

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

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

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

1 effective campaigning. Over the last three election cycles, less than 10 percent of contributions
2 exceeded the limits set by the Vermont legislature. Moreover, Vermont has actually conducted
3 an election since the imposition of these contribution limits (for Mayor of Burlington), and that
4 election involved effective campaigns despite the contribution limitations. Subject to the
5 applicable limits imposed by the statute, the candidates for mayor raised funds comparable in
6 amount to that spent in State Senate races in the past. The District Court also reviewed testimony
7 concerning the availability of low cost, highly effective methods of campaigning that reach large
8 numbers of voters in Vermont, including county-wide televised and live debates, tables
9 distributing literature, and town barbecues. The District Court further concluded that the limits
10 may actually improve the ability of candidates to campaign, by freeing candidates from the time-
11 consuming task of “wooing big donors.” Finally, the court compared the Vermont law to similar
12 limits upheld in Maine and Missouri. In Maine, a limit of \$250 for House and Senate candidates
13 was upheld. *Daggett v. Comm’n on Governmental Ethics & Election Practices*, 205 F.3d 445,
14 459 (1st Cir. 2000). In Missouri, limits of \$1075, \$525, and \$275, depending on the size of the
15 electoral district, were upheld. *Shrink Mo. Gov’t PAC v. Adams*, 204 F.3d 838, 840 (8th Cir.
16 2000).⁵

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

18 Act 64 regulates the ability of PACs and political parties to give and receive
19 contributions. The Act prohibits such organizations from accepting contributions of more than
20 \$2000 from a single source during any two-year general election cycle. *See* Vt. Stat. Ann. tit 17,

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

1 § 2805(a). The Act further prohibits those organizations from making contributions to political
2 candidates in excess of the general contribution limits—\$200 for state representatives or local
3 office, \$300 for state senator or county office, and \$400 for statewide office. *See id.* at §§
4 2805(a)–(b).

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

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

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

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

15
16 *Cal. Med. Ass’n v. Fed. Election Comm’n*, 453 U.S. 182, 197 (1981) (“*CMA*”).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 C. The Related Expenditure Provisions are Constitutional

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

18 Plaintiffs argue that the “facilitated by” standard is vague because it leaves open the
19 possibility that *any* communication about a candidate’s views with a third party that then
20 undertakes independent expenditures will qualify as a contribution. The First Amendment
21 permits the treatment of “coordinated expenditures” as contributions to a candidate. *Buckley*,
22 424 U.S. at 46–47. Independent expenditures may not be limited because “the absence of

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

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

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

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

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

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

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

1 Accordingly, we uphold Act 64’s rebuttable presumption concerning related
2 expenditures.

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

4 We can find no sufficiently important government interest to support the provision of Act
5 64 that limits out-of-state contributions to 25 percent of all candidate contributions. Unlike all of
6 the other Act 64 provisions at issue in this appeal, the out-of-state contribution limit isolates one
7 group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed
8 by others (Vermont residents). The District Court’s decision in this regard should be upheld.

9 The District Court concluded that Vermont’s interest in eliminating excessive out-of-state
10 contributions was confined to unusually large contributions. The District Court also noted that
11 many non-residents have legitimate and strong interests in Vermont and have a right to
12 participate, at least through speech, in those elections. We find no support in the record for the
13 alternative claim that Vermont has an important interest in singling out one class of contributors
14 for limitations as particularly worrisome. *See* 1997 Vt. Laws P.A. 64 (H.28) (1997) (finding No.
15 5 “Increasing campaign expenditures require candidates to seek and rely on a smaller number of
16 larger contributors, often outside the state, rather than a large number of small contributors.”).
17 There are only vague references to the danger of out-of-state contributions, and those all refer to
18 the danger of excessively large (not cumulatively great) contributions.

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

1 contributions to 10 percent of total campaign expenditures. 151 F.3d 1215, 1218–19 (9th Cir.
2 1998). Addressing the asserted anti-corruption justification, the court held that the provision
3 suffered from both over- and underbreadth. Its overbreadth stemmed from the fact that it
4 prevented all non-resident contributions once the 10 percent threshold had been reached, even
5 those too small to have any corrupting influence. *Id.* at 1221. The provision was underbroad
6 because it did nothing to prevent corrupting (i.e., large) resident contributions; nor did it prevent
7 corrupting non-resident contributions until the 10 percent limit had been reached. *See id.* at
8 1221. In other words, the non-resident cap was “not closely drawn to advance the goal of
9 preventing corruption.” *Id.*

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

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

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

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

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

1 system.

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

8 CONCLUSION

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

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

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

17 In short, the dissent argues that, though acting with the best intentions, the State of Vermont has charted a
18 misguided course destined only to silence the voices of ordinary citizens and entrench political parties. Our
19 dissenting colleague thus characterizes the legislators of Vermont as, at best, naive, and at worst, strategically self-
20 interested. We choose not to view Act 64 through this cynical lens and instead take solace in the words of our
21 Supreme Court, which has cautioned that “tradition teaches that the First Amendment embodies an overarching
22 commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the
23 Constitution’s constraints, but without imposing judicial formulas so rigid that they become a straitjacket that
24 disables government from responding to serious problems.” *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*,
25 518 U.S. 727, 741 (1996) (plurality opinion).

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

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

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

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

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

7 Each party shall bear its own costs on this appeal.

1 00-9159
2 Landell v. Vermont Public Research,
3 WINTER, Circuit Judge, dissenting,
4

5 I respectfully dissent as to the constitutionality of two
6 provisions of Act 64. See 1997 Vermont Campaign Finance Reform
7 Act (codified as Vt. Stat. Ann. tit. 17, §§ 2801-2883) ("Act
8 64"). Those provisions are Act 64's limits on expenditures by
9 candidates, including related expenditures, and its restrictions
10 on fundraising by state, county, and local committees of a
11 political party. Id. §§ 2801(5), 2805a. Otherwise, based on
12 Supreme Court precedent, I concur in the result reached by my
13 colleagues. In view of the length of this dissent, I begin with
14 a table of contents.

15

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1 I. INTRODUCTION

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

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

1 citizens."

2 As Justice Brandeis once noted, "The greatest dangers to
3 liberty lurk in insidious encroachment by men of zeal, well-
4 meaning but without understanding." Olmstead v. United States,
5 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). And Justice
6 Black has reminded us that "[h]istory indicates that urges to do
7 good have led to the burning of books and even to the burning of
8 'witches.'" Beauharnais v. Illinois, 343 U.S. 250, 274 (1952)
9 (Black, J., dissenting). Act 64, which has its greatest impact
10 in silencing those ordinary citizens whose active participation
11 in politics is through organized groups, provides us with a
12 modern reminder of the wisdom of those two statements.

13 II. APPLICABLE CONSTITUTIONAL PRINCIPLES

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

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

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

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

15
16 Buckley, 424 U.S. at 19.

17 Act 64's limits on campaign expenditures directly inhibit
18 the most ordinary activities of democratic politics. If a
19 citizen uses his or her residence as a place at which a candidate
20 and the candidate's supporters sometimes meet to plan campaign
21 efforts, buys stamps for invitations to the gatherings, and
22 provides snacks and soft drinks for those who attend, then the
23 value of the use of the rooms and the items purchased must fit
24 within Act 64's highly restrictive limitations. See Office of
25 the Secretary of State, 2001 Guide to Vermont's Campaign Finance
26 Law, available at [http://vermont-elections.org/elections1/](http://vermont-elections.org/elections1/2001cfguide.html)
27 [2001cfguide.html](http://vermont-elections.org/elections1/2001cfguide.html) ("2001 Guide"); Memorandum from Secretary of
28 State Deborah L. Markowitz re: Review of Practical Policy and
29 Legal Issues of Vermont's Campaign Finance Law (Mar. 11, 1999),

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

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

1 In applying these principles, the Supreme Court has held
2 that only the prevention of "corruption or the appearance of
3 corruption" constitutes a sufficiently compelling interest to
4 limit contributions to candidates. See Buckley, 424 U.S. at 25-
5 28 (holding that limiting the actuality and appearance of
6 corruption is a "constitutionally sufficient justification" for a
7 contribution limitation, but dismissing other proffered
8 justifications for the limitation). It has also held, however,
9 that neither the anti-corruption rationale, the interest in
10 equalizing the financial resources of candidates, nor the
11 increase in money spent on political campaigns justifies the
12 limiting of amounts that candidates for office may spend to
13 promote their candidacy. Id. at 45, 54, 57. Indeed, the Court
14 has stated that

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

24
25 Buckley, 424 U.S. at 57.

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

1 Federal Campaign Comm., 533 U.S. 431, 440-41 (2001) ("Colorado
2 II"). In Colorado II, the Court stated that "ever since we first
3 reviewed the 1971 Act, we have understood that limits on
4 political expenditures deserve closer scrutiny than restrictions
5 on political contributions," because "[r]estraints on
6 expenditures generally curb more expressive and associational
7 activity," and "limits on contributions are more clearly
8 justified by a link to political corruption." Id. The Court
9 went on to state that "[g]iven these differences, we have
10 routinely struck down limitations on independent expenditures by
11 candidates, other individuals, and groups, while repeatedly
12 upholding contribution limits." Id. at 441-42 (citations and
13 footnotes omitted) (emphasis in original). One would think that
14 the unqualified statements of the Supreme Court regarding the
15 unconstitutionality of expenditure limits might be the end of the
16 matter at this level of the court system, particularly since the
17 sponsors of Act 64 have made no secret of their intention to
18 enact Act 64 in order to provoke a test case to overrule Buckley
19 with regard to expenditure limits. See Memorandum from Secretary
20 of State Deborah L. Markowitz re: Review of Practical Policy and
21 Legal Issues of Vermont's Campaign Finance Law (Jan. 9, 2001),
22 available at [http://vermont-elections.org/elections1/](http://vermont-elections.org/elections1/2001GAMemoCF.html)
23 [2001GAMemoCF.html](http://vermont-elections.org/elections1/2001GAMemoCF.html) ("2001 Memorandum"); see also Hearing on H. 28

1 Before the Vt. House Comm. on Local Gov't, 64th Biennial Sess.
2 (1997) (statement of Anthony Pollina); Hearing on H. 28 Before
3 the Vt. Senate Comm. on Gov't Operations, 64th Biennial Sess.
4 (1997) (statement of Sen. William Doyle); Vt. House Comm. of
5 Conf., Report on Campaign Finance, H. 28, 64th Biennial Sess.
6 (1997).¹ However, the views of my colleagues require that I
7 describe in some detail why Act 64 is unconstitutional in the
8 particular respects noted above and even under the new
9 constitutional test that they adopt.

10 There is another body of First Amendment jurisprudence that
11 is of relevance here: Any regulation of protected speech must
12 embody valid criteria sufficiently precise to ensure that
13 officials apply those criteria. See Thomas v. Chicago Park
14 Dist., 122 S. Ct. 775, 780 (2002) (stating that the Supreme Court
15 has "required that a time, place, and manner regulation contain
16 adequate standards to guide the official's decision and render it
17 subject to effective judicial review"); Forsyth County v. The
18 Nationalist Movement, 505 U.S. 123, 131 (1992) ("'[A] law
19 subjecting the exercise of First Amendment freedoms to the prior
20 restraint of a license' must contain 'narrow, objective, and
21 definite standards to guide the licensing authority.'" (quoting
22 Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-51
23 (1969))). Otherwise, the officials who administer the law will

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

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

1 Moreover, the exercise of freedom of association requires
2 that citizens be allowed freely to form political organizations
3 at various levels of government that are related to each other as
4 affiliates of the same political party while still retaining much
5 local autonomy. See Timmons v. Twin Cities Area New Party, 520
6 U.S. 351, 358 (1997) (stating that "political parties'
7 government, structure, and activities enjoy constitutional
8 protection" and noting that a political party has "'discretion in
9 how to organize itself, conduct its affairs, and select its
10 leaders,'" (citing Eu v. San Francisco County Democratic Cent.
11 Comm., 489 U.S. 214, 230 (1989)); see also Buckley, 424 U.S. at
12 15 (recognizing the right "'to associate with the political party
13 of one's choice'" and noting that "'[e]ffective advocacy of both
14 public and private points of view, particularly controversial
15 ones, is undeniably enhanced by group association'" (internal
16 citations omitted)). Act 64's treatment of the state, county,
17 and local affiliates of a political party as a single aggregated
18 unit for purposes of fundraising and contribution limits, see Vt.
19 Stat. Ann. tit. 17, § 2801(5), forces state-wide coordination of
20 the funding of local, county, and state-wide party activities and
21 thereby violates both freedom of speech and freedom of
22 association. This lumping of groups that have sound reasons for
23 an independent existence, albeit while being loosely related to

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

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

6 a) The Requisite Level of Scrutiny

7 As noted, it is standard First Amendment jurisprudence that
8 governmental restraints on protected speech must be subjected to
9 exacting scrutiny to survive a constitutional challenge. See
10 Buckley, 424 U.S. at 16, 44-45 (referring to the "exacting
11 scrutiny required by the First Amendment," and applying exacting
12 scrutiny to "limitations on core First Amendment rights of
13 political expression"); Smith v. California, 361 U.S. 147, 151
14 (1959) (applying "stricter standards" to a statute that has "a
15 potentially inhibiting effect on speech," and noting that "a man
16 may the less be required to act at his peril here, because the
17 free dissemination of ideas may be the loser" (citing Winters v.
18 New York, 333 U.S. 507, 509-10, 517-18 (1948))); see also
19 McIntyre, 514 U.S. at 347 (applying exacting scrutiny to
20 invalidate an Ohio law that prohibited the distribution of
21 anonymous campaign literature); Meyer v. Grant, 486 U.S. 414, 420
22 (1988) (holding that a statute prohibiting use of paid petition
23 circulators burdens core political speech and is therefore

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

5 The most exacting scrutiny must be given to legislation that
6 expressly seeks to reallocate political power -- in view of Act
7 64's proponents, from "special interests" to "regular people" --
8 by limiting the political activity of candidates for office and
9 their supporters. See Buckley, 424 U.S. at 14-15 (calling
10 political campaigns the "fullest and most urgent application" of
11 the First Amendment guarantee, and invoking the "'profound
12 national commitment to the principle that debate on public issues
13 should be uninhibited, robust, and wide-open'" (quoting New York
14 Times v. Sullivan, 376 U.S. 254, 270 (1964))).

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

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

7 Moreover, high-mindedness can, for some, also be a useful
8 facade. When campaign finance legislation is considered by those
9 in power, there is both motive and opportunity to craft rules
10 that will restrain the political activity of opponents. My
11 colleagues caution that the self-interest of incumbents should
12 not cause us to presume that such legislation is
13 unconstitutional. I agree but also note that our experience in a
14 similar area suggests that great caution is in order.

15 Legislatures can directly affect the outcome of elections through
16 two kinds of legislation: reapportionment and campaign finance
17 regulation. Our experience with reapportionment is that, over
18 time, the self-interest of incumbents has become the sole guiding
19 star. Campaign finance legislation presents a similar
20 opportunity to incumbents, and a major factual premise of Act 64
21 is that incumbents value reelection over their duties to
22 constituents. Indeed, whenever Congress takes up legislation
23 involving campaign finance, the press now openly discusses how

1 various proposals will affect particular political parties and
2 candidates. See, e.g., Ruth Marcus & Dan Balz, Democrats Have
3 Fresh Doubts on "Soft Money" Ban; Some Fear GOP Would Gain Edge
4 in Campaign Finances, Washington Post, Mar. 5, 2001, at A1; John
5 Mintz, McCain's "Soft Money" Pledge Alarms GOP; Republican
6 Leaders Say Curbs Would Hurt Party's Election Chances, Give Fund-
7 Raising Edge to Democrats, Labor Unions, Washington Post, Feb.
8 22, 2000, at A6. The assumption that these possible effects
9 never enter the mind of the party members and candidates who
10 enact such legislation might be questioned by even the least
11 cynical observer. Presumption or no, truly searching scrutiny of
12 campaign finance legislation is essential.

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

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

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

7 b) Act 64's Expenditure and Contribution Limits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 degree or another.

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

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

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

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

19 Governor - \$300,000

20 Lieutenant governor - \$100,000

21 Other state-wide offices - \$45,000

22 State senator - \$4,000 plus \$2,500 for each additional

23 seat in the district county office - \$4,000

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

3 See id. § 2805a(a).

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

6 "Contributions" are similarly broadly defined as any
7 "payment, distribution, advance, deposit, loan or gift of money
8 or anything of value paid or promised to be paid to a person for
9 the purpose of influencing an election" Id. § 2801(2).⁶

10 The limits apply to "single source" donors, defined as "an
11 individual, partnership, corporation, association, labor
12 organization or any other organization or group of persons which
13 is not a political committee or political party." See id. §§
14 2801(6), 2805(a). Exempted from the definition of contribution
15 are "services provided without compensation by individuals
16 volunteering their time on behalf of a candidate." Id. §
17 2801(2).

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

23 Uncured are the ambiguities in the term "services provided

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

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

23 As noted, the contribution limits also apply to money,

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

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

11 Political party/political committee - \$2,000

12 State-wide office - \$400

13 State senate/county office - \$300

14 State representative/local office - \$200.

15 See id. § 2805(a).

16 Turning now to "related expenditures," they are defined as
17 "expenditures" (including, therefore, things of value and
18 importing the ambiguities described above) "intentionally
19 facilitated by, solicited by or approved by the candidate." Id.
20 § 2809(c).⁷ Related expenditures therefore include the value of
21 mileage driven by campaign volunteers, the use by a volunteer of
22 a residence, house phone, or computer, or other expenditures by
23 volunteers for items such as paper, pens, etc.

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

8 Second, when an individual's related expenditures exceed
9 \$50, the candidate on whose behalf they were made must treat them
10 as a campaign expenditure limited by the statute. See id. §
11 2809(b). This means that, over a two-year period, every
12 supporter of a candidate who drives the family car to campaign
13 meetings or provides paper, pens, phones, refreshments, or rooms
14 for meetings, must keep a running total and, when the total
15 exceeds \$50 -- driving an average of seven miles per month at 31¢
16 per mile triggers this -- the candidate must fit it under the
17 statutory limit on candidate expenditures.

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

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

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

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

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

23 Moreover, a candidate who does not have legal counsel and

1 other professional services runs great risks. The ambiguities
2 detailed above and the problems of valuation will confront
3 candidates and supporters -- or at least those who seek to comply
4 with the law as written -- with an ongoing need for professional
5 advice. In fact, the Secretary of State and Attorney General
6 advise that parties and candidates retain their own separate
7 attorneys. See Appendix A. However, the cost of these
8 attorneys, or the value of their services if obtained as an
9 unpaid-for related expenditure, including its provision by a
10 political party, is an expenditure. See Vt. Stat. Ann. tit. 17,
11 § 2801(3).

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

1 Vermont candidate meets with an editorial board, commentator, or
2 columnist hoping for an endorsement, the value of any such
3 published endorsement is, under the language of Act 64, a
4 contribution and a related expenditure. See Vt. Stat. Ann. tit.
5 17, § 2809(c). Indeed, Vermont's Secretary of State has warned
6 that if any individual or organization "requests a photograph,
7 written presentation, or other assistance or information and
8 informs the candidate that the requested information will be used
9 in a publication . . . [providing such] will trigger a related
10 expenditure." 2001 Guide, supra.

11 I turn now to the processes governing administration and
12 enforcement of this law. Power is delegated to the Secretary of
13 State to "adopt rules necessary to administer the provisions"
14 regarding related expenditures. Vt. Stat. Ann. tit. 17, §
15 2809(f). Additionally, the Secretary of State has a general
16 administrative role under Act 64, see, e.g., id. §§ 2803, 2810a,
17 and she has actively offered her interpretations of the scope and
18 application of the various provisions of Act 64. See, e.g., 2001
19 Guide, supra; 1999 Memorandum, supra; 2001 Memorandum, supra. As
20 the discussion above indicates, interpretive and valuation
21 questions abound and, as Appendix A indicates, answers that are
22 not prolix or ambiguous are often not available. Moreover, there
23 is at present every indication that the power to adopt

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

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

1 c) Act 64's Burden on Protected Speech

2 1) The Burden on Grassroots Political Activity

3 I begin with Act 64's burden on grassroots political
4 activities, not only because such activities are core-protected
5 speech under the First Amendment -- as well as indispensable to
6 our democracy -- but also because proponents of Act 64 purport to
7 justify its ubiquitously restrictive provisions in the name of
8 increasing and enhancing such activities. See 1997 Vt. Laws P.A.
9 64 (H. 28) (findings nos. 6 and 8). In fact, Act 64 relentlessly
10 makes such activities very difficult and often impossible.
11 Indeed, the Act's most intrusive impact is not on the rich and
12 powerful, who if necessary can engage in constitutionally
13 protected independent political activity, but on the ordinary
14 citizen who needs to participate in organized activity to have a
15 political voice.

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

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

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

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

1 activity was intended to support. See Vt. Stat. Ann. tit. 17, §
2 2809(b). They must therefore be counted in determining whether
3 the candidate has complied with Act 64's spending limits.
4 Because in-kind expenditures are included within related
5 expenditures, any supporter engaging in the most common kind of
6 political activities must keep detailed records over a two-year
7 period of their value -- every mile driven, every stamp used,
8 every use of a residence for campaign events, refreshments, pads,
9 pencils, use of phones, etc. -- so that the total amount of such
10 in-kind expenditures can be determined. If the related
11 expenditures added to a person's monetary contributions to a
12 candidate reach the contribution limit, the supporter must stop
13 all support, even driving to a meeting, or violate the law.

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

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

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

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

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

11 2) The Burden on Candidate's Speech

12 My colleagues and the district court conclude that the
13 limits on campaign expenditures are based on past experience and,
14 with limited exceptions, are substantially the same as average
15 expenditures by candidates in the past. See Maj. Op. at 44; see
16 also Landell v. Sorrell, 118 F. Supp. 2d 459, 471-72 (D. Vt.
17 2000). We have, however, no reliable evidence of past spending
18 using Act 64's definitions.

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

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

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

1 also no need under prior law to segregate and calculate
2 expenditures by party committees, likely a huge amount, see infra
3 note 11 and accompanying text, that would now be attributable
4 under Act 64 to candidates. See Vt. Stat. Ann. tit. 17, §
5 2809(d).

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

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

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

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

4 There is, therefore, no reliable support for the claim that,
5 based on past experience, Act 64's limits will have little effect
6 on the quantity or quality of political speech. In the 2000
7 gubernatorial race, each major party candidate spent
8 approximately \$1 million, over three times Act 64's limit on
9 combined primary and general election gubernatorial campaigns.

10 See Office of the Secretary of State, Campaign Finance, Total
11 Expenditures to Date - 2000 Election Cycle, available at
12 <http://vermont-elections.org/elections1/campaignfinance.html>.

13 And this was spent without counting related expenditures. A
14 candidate for United States Senator in the same election also
15 spent over \$1 million on the general election. See Mary Ann
16 Lickteig, Tuttle Asks Leahy to Use Campaign Funds to Preserve
17 Land, Associated Press, Oct. 8, 1998 (detailing how Senator Leahy
18 spent about \$1 million in his campaign).

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

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

6 The harshness of the limits on candidate expenditures is
7 greatly exacerbated by the fact that a candidate's campaign
8 cannot expect the candidate's party to provide the usual
9 supplemental support of polls, offices, computers, phones,
10 advertisements, mailings, and events, if the conduct "primarily
11 benefits" fewer than seven candidates. See supra notes 8-9.

12 Parties may make contributions and related expenditures
13 benefitting candidates that total, over a two-year period, no
14 more than \$400 for each candidate for state-wide office, \$300 for
15 each candidate for the Senate, and \$200 for each candidate for
16 the House. There are six state-wide offices, thirty State
17 Senators, and 150 State Representatives. A political party can,
18 over a two-year period, make only a total of \$41,400 in
19 contributions to, or related expenditures on behalf of, all its
20 candidates for state office.

21 Although Colorado II allows such restrictions, 533 U.S. at
22 465, their effect must be considered in gauging the impact of
23 candidate expenditure limits. A state-wide poll regarding

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

12 Expenditure limits will, therefore, greatly hamper
13 candidates in getting their message to the public. The Secretary
14 of State has noted that the expenditure limit for State Treasurer
15 -- \$45,000 -- leaves, after advertising, "no money to hire a
16 campaign manager, do direct mail, lawn signs or bumper stickers."
17 David Gram, Dems Needle Each Other On Spending in Treasurer's
18 Race, Associated Press, May 29, 2002. She has also noted that
19 the "tight contribution limits" of Act 64 were part of the cause
20 for an "unprecedented amount" of independent expenditures in the
21 2000 Vermont election. See 2001 Memorandum, supra. As a result,
22 candidates complained that "mailings or advertisements made on
23 their behalf attributed to them opinions they did not hold, or

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

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

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

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

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

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

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

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

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

8 3) The Burden on Challengers

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

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

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

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

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

8 Because the hands-off approach of my colleagues accords
9 expansive deference to legislative judgments as to expenditure
10 limits, incumbents are given a weapon that can be manipulated
11 virtually at will in the future. A low level of judicial
12 scrutiny necessarily leaves legislators with discretion to alter
13 campaign finance regulations to affect upcoming elections. We
14 have seen an example of this in New Jersey where a campaign
15 finance law was deliberately changed in an (unsuccessful) attempt
16 to bolster the candidacy of a new entrant into the race for
17 Governor. See David M. Halbfinger, Substitute Candidate, on
18 Short Notice, Stakes Claim in Race for New Jersey Governor, N.Y.
19 Times, Apr. 27, 2001, at B5; David M. Halbfinger, New Jersey
20 Legislature Votes To Delay Primaries 3 Weeks, N.Y. Times, Apr.
21 24, 2001, at B5. In Vermont itself, Governor Dean sought to use
22 money reserved for the public financing of campaigns -- a key
23 part of Act 64 -- to pay general state expenditures. See State

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

3 My colleagues exhibit no concern regarding the influence of
4 political self-interest on the setting of expenditure limits,
5 notwithstanding that Act 64's major premise is that Vermont
6 incumbents so crave reelection that they ignore official duties
7 and personal honor to that end. However, incumbent legislators
8 can exercise a direct influence on the outcome of elections in
9 two ways: campaign finance regulation and reapportionment. My
10 colleagues reassure us that the exercise of such influence in
11 campaign finance regulation is not likely. I would suggest that
12 the likelihood of self-interest prevailing in the long run would
13 be informed by a study of the effect of legislative
14 reapportionment on election districts for the United States House
15 of Representatives, an area in which courts have deferred to
16 legislative judgment. See White v. Weiser, 412 U.S. 783, 794-95
17 (1973) ("From the beginning, we have recognized that
18 'reapportionment is primarily a matter for legislative
19 consideration and determination.'" (internal quotation marks
20 omitted)); see also Miller v. Johnson, 515 U.S. 900, 915-16
21 (1995).

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

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

17 4) The Burden on the Press

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

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

5 The theory underlying Act 64 would easily include the media
6 as a powerful interest having a stake in government action just
7 like any other profit-making business or organized economic
8 special interest -- e.g., the newspaper quoted by my colleagues
9 is part of a huge multi-national organization, undoubtedly one of
10 the larger companies doing business in Vermont. See Gannett Co.
11 Inc. Operations, available at [http://www.gannett.com/map/](http://www.gannett.com/map/units.pdf)
12 [units.pdf](http://www.gannett.com/map/units.pdf). However, many proposals to regulate campaign finance
13 exempt the media, see, e.g., N.Y. Elec. Law § 14-124; Conn. Gen.
14 Stat. § 9-333w(c), often including a definition of what organs of
15 communication constitute exempted media, see e.g., Bipartisan
16 Campaign Reform Act of 2002, § 201(f) (3) (B), Pub. L. No. 107-155,
17 116 Stat. 81.¹² Nevertheless, Act 64 does not contain such an
18 exception. Given the plain language of Act 64 and the
19 consistency of its theory with that language, Act 64 can fairly
20 be said to burden the press, and any candidate who seeks its
21 support, quite as much as it burdens other candidates and their
22 supporters.

23 5) The Burden on Party Affiliates

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

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

1 28, 1999 (noting one political operative's stunned response as
2 being "Someone's totally taken leave of their senses").

3 d) The Sufficiency of the Governmental Interests

4 Several governmental interests are asserted as
5 justifications for Act 64.¹³ These include eliminating special
6 access or the appearance of special access of donors to
7 officeholders, reducing the influential effect of bundling
8 contributions, and increasing citizen and voter participation in
9 the electoral process. See Maj. Op. at 30-42; see also 1997 Vt.
10 Laws P.A. 64 (H. 28). All of these interests were rejected by
11 the Supreme Court in Buckley, 424 U.S. at 25-26, and have not
12 been demonstrated in the present case as having sufficient nexus
13 to the limits on candidate expenditures and related
14 expenditures.¹⁴

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

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

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

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

1 seek change. Local party activities are a primary method by
2 which a changing public opinion is absorbed gradually into the
3 system, rather than being unheard until it reaches explosive
4 force. These activities require funding. By impairing that
5 funding, Act 64 impairs those activities. See Secretary of State
6 Being Criticized for Fund Raising Ruling, Associated Press, May
7 28, 1999 (noting that leaders of both parties warn that "the
8 ruling would have the effect of undermining the goal of Vermont's
9 new campaign finance law to encourage more grassroots political
10 activity").

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

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

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

1 considered and rejected by the Supreme Court. Buckley rejected
2 in the most explicit terms the notion that government may under a
3 Constitution containing the First Amendment limit the amount of
4 political speech by candidates and regular citizens. See id. It
5 is no surprise that many of the arguments made in favor of Act 64
6 rehash those considered by Buckley because Act 64 was intended by
7 its proponents as a vehicle to overturn Buckley's ruling. See
8 2001 Memorandum, supra; Hearing on H. 28 Before the Vt. House
9 Comm. on Local Gov't, 64th Biennial Sess. (1997) (statement of
10 Anthony Pollina); Hearing on H. 28 Before the Vt. Senate Comm. on
11 Gov't Operations, 64th Biennial Sess. (1997) (statement of Sen.
12 William Doyle); Vt. House Comm. of Conf., Report on Campaign
13 Finance, H. 28, 64th Biennial Sess. (1997).

14 For example, the question of special donor access or the
15 appearance thereof was highlighted both by the Congress that
16 enacted the expenditure limitations struck down in Buckley, see
17 Minority Views on Report of the Comm. on House Admin. to
18 Accompany H.R. 16090 (July 30, 1974), reprinted in Legislative
19 History of Federal Election Campaign Act Amendments of 1974, at
20 749 (1977), and by the Court of Appeals for the District of
21 Columbia, which upheld those limitations and was reversed in
22 Buckley. Buckley v. Valeo, 519 F.2d 821, 838 (D.C. Cir. 1975),
23 aff'd in part and rev'd in part, 424 U.S. 1 (1976). That court

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

14 It is also suggested that the practice of bundling
15 contributions by those with common interests justifies
16 expenditure limits. My colleagues assert that the practice of
17 bundling was unknown at the time of Buckley. However, the
18 concept of pooling contributions by persons with common interests
19 is hardly new. Indeed, at the time of Buckley, proponents of the
20 1974 Act relied heavily on pooled contributions by various firms
21 in particular industries as evidence of improper influence. See
22 Senate Floor Debates on S. 3044 (Mar. 28, 1974, Apr. 3, 1974)
23 (statements of Sens. Griffin, Baker), reprinted in Legislative

1 History of Federal Election Campaign Act Amendments of 1974, at
2 259, 365-66 (1977); House Floor Debates on H.R. 16090, (Aug. 8,
3 1974) (statement of Rep. Dickinson), reprinted in Legislative
4 History of Federal Election Campaign Act Amendments of 1974, at
5 917 (1977). An amendment in the House that would have prohibited
6 pooling was introduced, voted on, and rejected. See Minority
7 Views on Report of the Comm. on House Admin. to Accompany H.R.
8 16090 (July 30, 1974), reprinted in Legislative History of
9 Federal Election Campaign Act Amendments of 1974, at 752-53
10 (1977); House Floor Debates on H.R. 16090 (Aug. 7, 1974),
11 reprinted in Legislative History of Federal Election Campaign Act
12 Amendments of 1974, at 858-59 (1977). Even the findings of the
13 Buckley district court as to large contributions catalogued them
14 by industry as well as by individual donor. See Joint Appendix
15 of District Court Findings at 86-143, Buckley v. Valeo, 424 U.S.
16 1 (1976) (per curiam) (Nos. 75-436 and 75-437).

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

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

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

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

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

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

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

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

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

17 The First Amendment does not permit the suppression of
18 speech based on such untested anecdotal evidence. See, e.g.,
19 United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 820-21
20 (2000) (requiring more than "anecdotal evidence" of "signal
21 bleed" problem in support of a regulation requiring broadcasters
22 to fully scramble sexually-oriented programming); Stanley v.
23 Georgia, 394 U.S. 557, 567 (1969) ("Given the present state of

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

6 Moreover, if the claims of widespread, improper influence
7 are true, anecdotes should not be the only available evidence.
8 Disclosure of contributions has been required in Vermont for
9 years, offering documented support for the claims, if accurate,
10 of dependence on large or bundled contributions and of the
11 influence of those contributions. See, e.g., Vt. Stat. Ann. tit.
12 17, §§ 2811(a)(1)-(4) (1996) (amended 1997) (requiring campaign
13 reports for candidates' contributions and expenditures). The
14 lack of reference to available hard evidence of who gave what to
15 whom suggests that the portrait of corruption painted by the
16 proponents of Act 64 is vastly overdrawn. When the Supreme Court
17 decided Buckley, it had before it detailed records of actual
18 large contributions and the amount of out-of-pocket expenditures
19 by candidates. See, e.g., Buckley, 424 U.S. at 32-34 & nn. 35-
20 40; Joint Appendix of District Court Findings at 264, 483,
21 Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Nos. 75-436 and
22 75-437). Nevertheless, it struck down the expenditure limits as
23 facially unconstitutional. See Buckley, 424 U.S. at 54-55.

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

4 Moreover, the proponents of Act 64 never examine the details
5 of that Act or how they impact ordinary political activities that
6 are indispensable to democratic rule. Consequently, they never
7 weigh the cost in suppressed activity. Indeed, there is every
8 indication that the details of Act 64 were ignored by many of its
9 proponents. It is certainly hard to find any other explanation
10 for the fact that the executive director of the Vermont
11 Democratic party questioned, as harmful to grassroots activities,
12 the ruling by the Secretary of State that Act 64's limits on
13 contributions to parties treat all affiliates as a single unit,
14 see Secretary of State Being Criticized for Fund Raising Ruling,
15 Associated Press, May 28, 1999, even though the ruling simply
16 followed the plain language of Act 64. The lobbyist who secured
17 passage of Act 64 and who is quoted at great length in my
18 colleagues' opinion, has since brought an action in the district
19 court to have the treatment of related expenditures declared
20 unconstitutional as infringing on the right to engage in
21 political activities. See Vermont Reformer Says Law He Authored
22 Is Unconstitutional, Political Finance, The Newsletter, March,
23 2002 (describing Anthony Pollina's lawsuit to have Act 64 ruled

1 unconstitutional); Ross Sneyd, Progressives Sue To Ensure Public
2 Financing for Pollina, Associated Press, March 12, 2002 (noting
3 that Anthony Pollina calls his lawsuit "ironic"); see also
4 Complaint at 1, Pollina v. Markowitz, No. 2:02-CV-63 (D. Vt. Mar.
5 11, 2002) ("Plaintiffs claim that certain provisions of Act 64
6 violate their First Amendment free speech and association rights,
7 do not serve compelling state interests, and violate equal
8 protection and due process of law, both facially and as
9 applied.").

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

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

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

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

5 McCarthy's New Hampshire campaign of 1968 had national
6 significance, while the 2000 Vermont gubernatorial election had
7 unquestioned state, and possibly national, ramifications. Both
8 involved unprecedented citizen participation. See 2000 General
9 Election Results for Gubernatorial Race, available at
10 <http://cgi.sec.state.vt.us/cgi-sh1/nhayer.exe> ("2000 Election
11 Results") (showing that voter turnout increased in Vermont by
12 34.5% in the 2000 election compared to previous election); Hugh
13 Gregg, A Tall State Revisited, at app. (1993), available at
14 <http://www.politicallibrary.org/TallState/1968dem.html>. And both
15 involved, not surprisingly, unprecedented campaign spending.

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

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

11 However, governmental suppression of speech must be based on
12 a compelling demonstration that the speech will incite conduct --
13 here an alleged indifference to politics on the part of citizens
14 -- that government has a right to prevent. See Boos v. Barry,
15 485 U.S. 312, 335 (1988) (Brennan, J., concurring in part and
16 concurring in the judgment) ("Our traditional analysis rejects
17 such a priori categorical judgments based on the content of
18 speech, requiring governments to regulate based on actual
19 congestion, visual clutter, or violence rather than based on
20 predictions that speech with a certain content will induce those
21 effects." (internal citations omitted)); Tinker v. Des Moines
22 Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) ("[I]n our
23 system, undifferentiated fear or apprehension of disturbance is

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

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

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

1 Spending, Associated Press, Dec. 18, 2000. The theory of Act 64,
2 as stated in the legislative findings, is that public involvement
3 decreases as spending increases. See 1997 Vt. Laws P.A. 64 (H.
4 28) (findings nos. 4 and 10). In fact, as noted, a full --
5 perhaps also record breaking -- 34.5% more people voted in the
6 2000 election than in the prior gubernatorial election. See
7 2000 Election Results, supra.

8 Nor is there experience elsewhere to the contrary. Before
9 1976, presidential general elections were privately funded with
10 no limits on contributions and expenditures. Claims of a lack of
11 citizen confidence were made. From 1976 through 1988 -- before
12 the era in which so-called soft money played a growing role --
13 presidential general elections were fully funded by government
14 and subject to expenditure limitations. No appreciable increase
15 in turnout or confidence in government has been noted.

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

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

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

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

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

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

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

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

7 e) The Excessive Discretion Accorded Administrators

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

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

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

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

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

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

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

1 most important questions arising under Act 64.

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

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

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

17 In the last mayoral election in New York City, a candidate
18 claimed to be eligible for public financing in a primary race,
19 but his application was denied in a debatable ruling. See Mirta
20 Ojito, Badillo Campaign Denied Matching Funds, N.Y. Times, Sept.
21 8, 2001, at B6; Mirta Ojito, Badillo Appeals Ruling on Campaign
22 Fund Match, N.Y. Times, July 25, 2001, at B4. A Campaign Finance
23 Board later overturned that ruling but only after the primary

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

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

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

4 IV. CONCLUSION

5 In holding, with only one dissenting vote, that limits on
6 candidate expenditures are unconstitutional, Buckley simply
7 followed mainstream First Amendment jurisprudence that is applied
8 to communicative activity of far less constitutional significance
9 than political speech. See, e.g., Stanley, 394 U.S. at 567
10 (disallowing speculative impact of possessing obscene material on
11 an asserted governmental interest as justification for statute
12 restricting nonpolitical speech); Smith v. California, 361 U.S.
13 147, 151 (1959) (applying "stricter standards" in statutory
14 scrutiny where statute has "a potentially inhibiting effect on
15 speech"). That jurisprudence calls for scrutiny that does not
16 take unquestioningly and at face value the claims of a law's
17 proponents, Buckley, 424 U.S. at 40-41 (stating that "[b]efore
18 examining the interests advanced" in support of legislation,
19 "[c]lose examination of the specificity of the statutory
20 limitation is required where, as here, the legislation imposes
21 criminal penalties in an area permeated by First Amendment
22 interests"), without actually examining the law, see id. at 41
23 ("The test is whether the language of [the statute] affords the

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

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

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

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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