No.

In The Supreme Court of the United States

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM SORRELL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Vermont's mandatory candidate expenditure limits violate the freedom of political speech guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2. Whether Vermont's $200-$400 limits per election cycle on campaign contributions to state candidates violate the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution because they are unconstitutionally low.

3. Whether Vermont's presumption of coordination, which provides that an expenditure made by a political party or political committee that primarily benefits six or fewer candidates is presumed to be a related expenditure subject to contribution limits, violates the freedoms of political speech and association guaranteed by the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, Vermont Right to Life Committee–Fund for Independent Political Expenditures, Marcella Landell, Donald R. Brunelle, Neil Randall, George Kuusela, Steve Howard, Jeffrey A. Nelson, John Patch and Vermont Libertarian Party, *Plaintiffs-Appellants*;

William H. Sorrell, John T. Quinn, William Wright, Dale O. Gray, Lauren Bowerman, Vincent Illuzzi, James Hughes, George E. Rice, Joel W. Page, James D. McNight, Keith W. Flynn, James P. Mongeon, Terry Trono, Dan Davis, Robert L. Sand and Deborah Markowitz; *Defendants-Appellees*;

Vermont Public Interest Research Group, League of Women Voters of Vermont, Rural Vermont, Vermont Older Women's league, Vermont Alliance of Conservation Voters, Mike Fiorillo, Marion Grey, Phil Hoff, Frank Huard, Karen Kitzmiller, Marion Milne, Daryl Pillsbury, Elizabeth Ready, Nancy Rice, Cheryl Rivers and Maria Thompson; *Intervenors-Defendants.*

CORPORATE DISCLOSURE STATEMENT

In accord with Supreme Court Rule 29.6, Petitioners state that the Vermont Republican State Committee, Vermont Right to Life Committee, Inc., Political Committee, and Vermont Right to Life Committee–Fund for Independent Political Expenditures are not corporations, but are associations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 382 F.3d 91 (2nd Cir. 2004). The opinion of the district court is reported at 118 F. Supp. 2d 459 (D. Vt. 2000).

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was filed on August 18, 2004. Plaintiffs' Petition for Rehearing en banc was denied on February 11, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Vt. Stat. Ann. tit. 17, § § 2805(a), 2805a(a) and (c), 2809(d)

STATEMENT OF THE CASE

In 1997, Vermont adopted Act 64, which regulates contributions, expenditures, and disclosures related to

candidates for state office and political organizations participating in Vermont elections. App. at 98a. It is codified at Vt. Stat. Ann. tit. 17, §§ 2801-2883 (hereafter "the Act" or "Act 64"). The Act imposes severe mandatory limits on how much a candidate for state office may spend in a two-year election cycle: candidates for governor are limited to $300,000, lieutenant governor to $100,000, and other statewide offices to $45,000. Candidates for the state senate and for county office are restricted to $4000, with candidates for state senate in multi-seat districts entitled to an additional $2500. State representative candidates in single-member districts are limited to $2000, and two-member district candidates are limited to $3000. Incumbent candidates for the General Assembly may spend 90% of the above amounts, while other candidates may spend 85%. App. at 98a-99a.

The Act also includes extremely low contribution limits to candidates and discourages spending on independent expenditures by presuming that expenditures are coordinated with a candidate if they benefit six or fewer candidates. App. at 99a. These "related campaign expenditures" are subject to the contribution limits.

Before Act 64 went into effect on November 4, 1998, contributors were permitted to give up to $2,000 in contributions per election cycle ($1,000 each for the primary and general election). Former Vt. Stat. Ann. tit. 17, § 2805. Act 64 reduced candidate contribution limits from individuals, political committees and political parties to $400 per election cycle for statewide offices, $300 per election cycle for state senate, and $200 per election cycle for state house. App. at 99a.

After a ten day bench trial, the District Court ruled that Vermont's mandatory candidate expenditure limits, candidate contribution limits from political parties, and limits on out-of-state contributions were unconstitutional. App. at 24a-26a. The District Court upheld the other provisions. App. at 24a-26a.

Four years later, after withdrawing its 2002 opinion, a Second Circuit panel unanimously upheld the District Court's holding that the limits on out-of-state contributions were unconstitutional and unanimously reversed the decision that political parties' contributions to candidates could not be limited. App. at 91a. The panel was divided as to whether the mandatory candidate expenditure limits were constitutional. App. at 96a, 190a. The majority held that two interests, preventing the reality and appearance of corruption and preserving candidates' time, taken together, were sufficient to uphold the expenditure limits. App. at 96a. The majority remanded the case to the District Court to determine whether the limits were narrowly tailored to further those interests. App. at 96a-97a. Judge Winter disagreed that the interests were compelling, explaining that each of the interests "has already been considered and rejected by the Supreme Court. *Buckley* rejected in the most explicit terms the notion that government may, under a Constitution containing the First Amendment, limit the amount of political speech by candidates and ordinary citizens." App. at 258a (Winter, J., dissenting) (citing *Buckley v. Valeo*, 424 U.S. 1, 44-45 (1976)). The panel unanimously upheld the limits on contributions to candidates, holding that the "governmental interest in eliminating actual and apparent corruption is sufficient" to support them. App. at 169a. The Court upheld the mandatory presumption of coordination because it is rebuttable. App. at 183a-184a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision upholding mandatory expenditure limits, contribution limits, and the coordination presumption conflicts with the decisions of other circuit courts of appeals and this Court.

The Second Circuit held that Vermont had established two compelling interests sufficient to supports its mandatory candidate expenditure limits. This extraordinary decision conflicts with the Sixth and Tenth Circuits, both of which have struck down mandatory

candidate expenditure limits, finding no interest sufficient to support them, and with the longstanding precedent of this Court. In addition, the Second Circuit's decision upholding inordinately low contribution limits conflicts with the circuits that have struck down comparable limits as unconstitutionally low, and conflicts with this Court's warning that contribution limits that are too low are unconstitutional. Finally, the Second Circuit's decision upholding the presumption of coordination, that an expenditure by a political party or committee that benefits six or fewer candidates is a related expenditure subject to contribution limits, conflicts with the decisions of other circuits and with this Court.

I. Mandatory Candidate Expenditure Limits Violate The Freedom Of Speech.

A. The Second Circuit's Decision Conflicts With The Decisions of the Sixth And Tenth Circuits.

The Second Circuit held that Vermont's mandatory candidate expenditure limits were constitutional because Vermont had established two compelling interests sufficient to support the spending limits. App. at 144a. The decision conflicts with decisions of the Sixth and Tenth Circuits. *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) (striking down mandatory candidate expenditure limits); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1998) (same); *Homans v. City of Albuquerque*, 366 F.3d 900 (10th Cir. 2004) (same). The Court should grant certiorari to rectify this conflict among the circuits.

The Second Circuit conceded that its decision directly conflicts with the Tenth Circuit's *Homans* decision and the Sixth Circuit's decision in *Kruse*. "The District Court in this case (and it is by no means alone) apparently felt that *Buckley* categorically prohibits expenditure limitations. We disagree." App. at 113a (citing *Homans* and *Kruse* as courts reading *Buckley* to prohibit spending limits, as well as Judge

Winter's dissent). The Second Circuit asserted that *Buckley* left open the possibility "that a legislature could identify a sufficiently strong interest, and develop a supporting record, such that some expenditure limits could survive constitutional review." App. at 114a. But the Tenth Circuit held that mandatory candidate expenditure limits cannot be supported as a matter of law. *Homans*, 366 F.3d at 914 (Tymkovich, J., concurring, writing for panel).

The Second Circuit admitted that *Buckley* rejected the anti-corruption interest as justification for expenditure limits, but it held that "considerable evidence" could show that unlimited spending contributes to corruption and limits on expenditures are a "necessary and plausible solution." App. at 128a. The Court found that Vermont had proven the strength of the anti-corruption interest and its relationship to candidate spending, holding that the record was sufficient to distinguish *Buckley*. App. at 135a. But, the Tenth Circuit held that the only interest that could ever support expenditure limits is the interest in preventing corruption. "One can safely conclude that *Buckley* forecloses a finding that spending limitations can be narrowly tailored to further governmental justifications other than the anti-corruption interest sustained by the Supreme Court, no matter what evidence may be presented." *Homans,* 366 F.3d at 916 (Tymkovich, J., concurring, writing for panel). While the Tenth Circuit stated that *Buckley* did not adopt a per se rule against campaign spending limits, *id.* at 915, it held that "there is no basis to retreat from *Buckley's* essential teaching that campaign spending restrictions are not narrowly tailored to further the governmental interest in reducing corruption." *Id.* at 917.

The Sixth Circuit in *Kruse* also held that mandatory candidate expenditure limits are not supported by the anti-corruption interest. It explained that this Court distinguishes between contribution limits, which can be justified by the anti-corruption interest, and campaign expenditure limits, "which are unconstitutional because

they cannot be similarly justified." 142 F.3d at 911-12 (citations omitted). The Court held that the anti-corruption interest asserted as justification for expenditure limits is "*clearly foreclose[d] . . . as a matter of law*" by this Court's decisions. *Id.* at 915. "The spending of money legally raised by candidates themselves poses no risk of *quid pro quo* corruption and campaign spending limits cannot be justified by the anti-corruption rationale." *Id.* The Sixth Circuit rejected the argument, approved by the Second Circuit, that time has shown that contribution limits are insufficient to prevent corruption, requiring a reevaluation of *Buckley's* holding that such limits are unconstitutional. *Id.*

The Tenth Circuit also rejected the interest in decreasing the burden of fundraising on candidates as a justification for expenditure limits. *Homans*, 366 F.3d at 918-19 (Tymkovich, J., concurring, writing for panel). It held that interest to be part of the "broader interest in controlling the costs of campaigns, an issue the *Buckley* Court did consider and firmly reject." *Id.* at 918. The Tenth Circuit did not consider the evidence advancing this interest, instead holding that the interest does not support expenditure limits as a matter of law. *Id.* at 914-19 ("Since *Buckley* is directly controlling, I would again agree with the Sixth Circuit and reject this proposed [burden of fundraising] justification without reaching the details . . . ." *Id.* at 918.). The Court reasoned "that they choose to do [fundraising] (allegedly at the expense of their other duties) seems to be a rather weak reason to override core First Amendment concerns. Freeing politicians from having to make that choice is not a compelling governmental interest." *Id.* at 919. Likewise, the Sixth Circuit considered the argument that candidates must spend an "inordinate amount of time" fundraising. *Kruse*, 142 F.3d at 916, holding that this is simply a reformulation of the interest in controlling costs of campaigns, which *Buckley* rejected. *Id.* at 916-17. "The need to spend a large amount of time fundraising is a direct outgrowth of the high costs of campaigns," and the "need to spend time raising

money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending." *Id.* at 916-17. The Second Circuit recognized the circuit conflict it created with its approval of the time-protection interest.[1]

As a result, the Second Circuit's holding that two compelling interests justified mandatory candidate expenditure limits, App. at 144, directly contradicts the Sixth and Tenth Circuits' holdings that neither interest supports limits on expenditure limits. This Court should grant certiorari to correct this conflict.

B. The Second Circuit's Decision Conflicts With This Court's Decisions.

The Second Circuit decision disregards this Court's precedent. This Court has consistently regarded mandatory campaign expenditure limits as unconstitutional restraints on free speech, and has "routinely struck down limitations on independent expenditures by candidates, other individuals, and groups . . . ." *FEC v. Colorado Republican*

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[1] The Second Circuit noted:

> "The Sixth Circuit agreed in *Kruse* [with the Plaintiffs' argument that the time-protection argument is no different than the goal of reducing the cost of campaigns], reasoning that '[t]he need to spend a large amount of time fundraising is a direct outgrowth of high costs of campaigns. However, because the government cannot constitutionally limit the cost of campaigns, the need to spend time raising money, which admittedly detracts an officeholder from doing her job, cannot serve as a basis for limiting campaign spending.' *We are unpersuaded by this reasoning.*" App. at 138a (citation omitted) (emphasis added).

Federal Campaign Committee, 533 U.S. 431, 441 (2001) ("Colorado II").[2]

This Court has held that there are no compelling interests to support expenditure limits. In *Buckley*, the Court held that mandatory campaign expenditure limits impose constitutionally impermissible restraints on speech and are not justified by any compelling state interest. *Buckley*, 424 U.S. at 54-58. The Court did not evaluate the evidentiary support for the asserted interests, stating that "[n]o governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression." *Id.* at 55.

The Second Circuit acknowledged this Court's rejection of the anti-corruption interest: "Given *Buckley's* holding rejecting the anti-corruption interest as inadequate to support the expenditure limits at issue in that case, we are reluctant to conclude that the same general interest, standing alone, is sufficiently compelling to support Act 64's expenditure limits." App. at 135a. Nevertheless, it decided that the anti-corruption interest, when added to a second interest, is sufficient to uphold mandatory candidate expenditure limits. "Vermont has established two interests that, taken together, are sufficiently compelling to support its expenditure limits . . . ." App. at 145a. Further, the Second Circuit conceded that *Buckley's* rejection of the interest "dictates the need for considerable evidence" to establish that unlimited spending adds to the problem of corruption and that expenditure limits are a necessary solution. App. at 128a. The Second Circuit found that the factual record presented by the State in support of the anti-

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[2] *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (striking PAC expenditure limits); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("Colorado I") (striking political party expenditure limits); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (striking nonprofit corporation expenditure limits); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking corporation expenditure limits).

corruption interest could be sufficient to distinguish *Buckley*. App. at 135a.

The time-protection interest was considered and rejected in *Buckley*. *See* App. at 262a-265a (Winter, J., dissenting) (citing Landmark Briefs: 2 Buckley v. Valeo (Brief for Appellee Center for Public Financing of Elections, Common Cause, League of Voters, et al.)) (the "thirst for money has forced candidates to divert time and energy to fund-raising and away from other activities, such as addressing the substantive issues"). Judge Winter, who argued *Buckley* before the Supreme Court, observed that the time-protection rationale "was relied upon by the Court of Appeals in *Buckley* in upholding the statute, was the subject of an entire subsection of the brief filed in the Supreme Court on behalf of the Attorney General and Solicitor General, was argued as a justification in the brief filed in the Supreme Court by intervening parties defending expenditure limits, and was mentioned by the Supreme Court itself." App. at 263a-265a (Winter, J., dissenting) (footnotes omitted). This Court considered the interest, but did not spend much time discussing it – as Judge Winter remarked, "It was, understandably, given only passing attention by the Court because it is not compelling in any sense." App. at 273a. This Court did not find time-protection to be sufficiently compelling to support expenditure limits. *See Buckley*, 424 U.S. at 55 ("No governmental interest that has been suggested is sufficient . . . .").

The Second Circuit, in contrast, held that the time-protection interest is compelling. It pointed to this Court's holding that the interest is sufficient to support public financing for Presidential elections. App. at 136a (citing *Buckley*, 424 U.S. at 96). It observed that other circuits have recognized the interest as compelling in upholding public financing of campaigns. App. at 137a. And it sought to minimize *Buckley* by stating that this Court "alluded to this time-protection interest only in passing," App. at 137a (citing *Buckley*, 424 U.S. at 91, 96). The Second Circuit's

decision conflicts with this Court's precedent, so the Court should grant certiorari.

C. This Case Goes To The Heart Of The Democratic Process And The First Amendment.

Contribution and expenditure limits "operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14. They affect political expression, particularly in the areas of discussion of public issues and the qualifications of candidates. *Id*. The public must be empowered to make "informed choices" regarding the candidates because those individuals elected by the public will "shape the course that we follow as a nation." *Id.* at 14-15. "It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Id.* at 15. Speech regarding the qualifications of candidates is "at the core of our First Amendment freedoms." *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002) (applying strict scrutiny to legislation limiting judicial candidate speech).

This Court, in the almost thirty years since *Buckley*, has continuously held that mandatory campaign expenditure limitations are prohibited. The Second Circuit seeks to change this critical holding in this Court's campaign finance jurisprudence. Given the magnitude of this issue, this Court should correct the Second Circuit's error and reiterate its unambiguous protection of candidate speech.

D. Special Considerations

1. The Remand Serves No Purpose.

This Court should grant certiorari even though the Second Circuit has remanded to the District Court the issue of whether expenditure limits are narrowly tailored. The District Court has already expressed the view that the State "proved that each of these concerns exist, and that Vermont's expenditure limits address them." App. at 66a.

The District Court further noted that the State's evidentiary record set the case apart from *Buckley.* App. at 66a. The only reason the District Court did not uphold the expenditure limits was that it believed it was bound by stare decisis to follow the Supreme Court precedent that expenditure limits are unconstitutional as a matter of law. App. at 66a. The Second Circuit has removed the obstacle by declaring that expenditure limits are not unconstitutional as a matter of law. The District Court has already decided that the facts support the expenditure limits so there is nothing new for it to decide on remand and even if the District Court finds that Vermont's expenditure limits are not narrowly tailored, the Second Circuit's holding that anti-corruption and time-protection are compelling interests that support expenditure limits will remain the law of the circuit.

2. This Court Should Reclaim Its Authority.

The Second Circuit's decision, in light of Supreme Court precedent and disapproval of expenditure limits by its sister circuits, is extraordinary. It is made more so by the fact that it upholds legislation that was enacted with the purpose of challenging this Court's ruling in *Buckley*. "The express legislative goal" of the Act is to give "the Supreme Court an opportunity to reevaluate its decision in *Buckley v. Valeo*." Memorandum from Secretary of State Deborah L. Markowitz re: Review of Practical Policy and Legal Issues of Vermont's Campaign Finance Law (Jan. 9, 2001), available at http: // vermont - elections. org / elections 1 / 2001GA MemoCF.html. This Court has warned that it is not the legislature's role to determine how much candidates can spend on their campaigns. "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." *Buckley,* 424 U.S. at 57.

It is not the Circuit Court's role to goad this Court into reevaluating its decisions. "It is this Court's prerogative alone to overrule one of its precedents." *United States v.*

Hatter, 532 U.S. 557, 567 (2001) (commending the Court of Appeals' application of Supreme Court precedent that had not been expressly overruled) (citing *State Oil Co.* v. *Khan,* 522 U.S. 3, 20 (1997); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989)).

This Court has repeatedly stated that mandatory expenditure limits are prohibited. No Supreme Court Justice since *Buckley* has ever described this Court's approach to candidate expenditure limits as anything but absolute, and even those Justices who have expressed sympathy for some expenditure limits have nonetheless acknowledged that upholding such limits would require a change from the current state of the law. *See Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 405 (2000) (Breyer, J., concurring) (arguing that the Court should find a way "to reinterpret aspects of Buckley" in regard to expenditures by wealthy candidates that could be considered contributions to their own campaigns).

The Second Circuit criticized this Court for not agreeing that candidates rely on special interests for support through the bundling of small contributions – "[t]he *Buckley* Court seemed to assume that many small contributions could not raise the specter of corruption." App. at 133a. "But the reality of campaign financing in Vermont is a far cry from this idyllic vision of political fundraising, in large part because not every voter has the financial ability to participate by giving campaign contributions." App. at 133a. The Second Circuit, in essence, refused to follow this Court's reasoning because the circumstances in Vermont are "special" and this Court's view of campaign finance is "idyllic."

3. The Expenditure Limits In This Case Are Unconstitutionally Low.

Justices Breyer and Ginsburg warned that this Court will not defer to a legislature when it imposes limits that are too low. *Shrink*, 528 U.S. at 404 (Breyer, J., concurring)

(contribution limits that are too low increase the advantages of incumbency and insulate legislators from electoral challenge). This Court has also explained that restrictions can have a severe impact on political speech if they prevent candidates from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21 (discussing contribution limits). Even contribution limits, which are entitled to less protection than expenditure limits, are unconstitutional if too low. It follows that expenditure limits can also be too low to survive constitutional scrutiny.

Past average spending is an inadequate measure for expenditure limits. The Second Circuit relied on the District Court's findings that average spending during the three election cycles preceding passage of the Act was primarily below the Act's expenditure limits. App. at 42a-43a. However, past average spending is an inadequate measure of appropriate limits for campaign expenditures.

Past spending averages include uncontested and lightly-contested campaigns. They fail to account for elections that involve controversial issues, where public interest is high, and where the direction of the state will be decided. For example, more money was spent in the 2000 election than in any prior Vermont election because civil unions, same-sex marriage, and other controversial issues were at stake. App. at 238a (Winter, J., dissenting). Cutting off candidate communication when such important matters depend on the outcome of elections is detrimental to the democratic process. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15.

The level of spending after the Act surpassed the expenditure limits and demonstrates that the limits are too low. For example, the spending limits were exceeded by 57% of Vermont senate campaigns and 30% of the State's house campaigns that filed reports in 1998. Ex. at VII, E-

2351. The major party candidates in the last two gubernatorial elections in Vermont reported expenditures two or three times higher than the Act's limits. App. at 239a (Winter, J., dissenting). All three candidates in the last race for Lieutenant Governor exceeded the limits by 38% - 63%. *Id.* These amounts did not even include related expenditures.

In addition, past spending averages do not account for related expenditures. Related expenditures were not included in Vermont legislation before Act 64 and, therefore, were not included in calculating average spending. App. at 234a (Winter, J., dissenting). Exacerbating the impact of the related expenditure provision, the Act states that an expenditure made by a political party or committee that primarily benefits six or fewer candidates triggers a presumption that it is a related expenditure. App. at 9a. Past spending averages also do not include the costs of compliance with the new, complicated Act. App. at 235a (Winter, J., dissenting). Procuring the services of legal counsel or accountants will be counted as campaign expenditures and could consume the entire amount permitted (for example, House candidate limits of $2000 could easily be consumed by legal fees).

For the foregoing reasons, past average spending is an adequate measure for determining mandatory candidate expenditure limits and result in expenditure levels that are too low.

The expenditure limits protect incumbents. "[A]n incumbent usually begins the race with significant advantages." *Buckley*, 424 U.S. at 31 n.33. The legislature attempted to mitigate the effects of the expenditure limits by providing that incumbents can spend only 85%-90% of what their challengers spend. App. at 7a. However, this attempt is outweighed by the powerful advantages of incumbency, including voter recognition, the status of holding office, access to significant government resources, and staff support. *Buckley,* 424 U.S. at 31 n.33.

Justices Breyer and Ginsburg warned that limits that are too low (in that case, contribution limits) can "significantly increase[] the reputation-related or media-related advantages of incumbency and thereby insulate[] legislators from effective electoral challenge." *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). They cautioned that this Court would not defer to legislation that risks the "constitutional evils" of "permitting incumbents to insulate themselves from effective electoral challenge." *Id.* at 402.

Exacerbating the harm to challengers, the limits apply over a two-year period. This means that candidates must divide their expenditure amounts between primary and general elections. Because incumbents face primary challengers less often than non-incumbents, they will generally have more money left for the general election.

The limits are not narrowly tailored. There are less restrictive means to prevent the reality and appearance of corruption. "The interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations and disclosure provisions rather than by . . . campaign expenditure ceilings." *Buckley*, 424 U.S. at 55. Act 64 contains both contribution limits and disclosure provisions, and there is no evidence that they are insufficient in preventing the reality and appearance of corruption. There are less restrictive means of protecting candidates' time. Contribution limits could be raised so that candidates can raise more money from their existing donors. The State could provide additional staff to allow officeholder candidates to attend to their official duties more efficiently. Vermont could provide for public campaign financing where candidates agree to voluntary spending caps if they elect to receive public funds. Unlike campaign spending limits, none of these alternative remedies would harm First Amendment rights.

There is no relationship between corruption and expenditures. "There is nothing invidious, improper, or

unhealthy in permitting [] funds to be spent to carry the candidate's message to the electorate." *Id.* at 56.[3]

Moreover, the Second Circuit admits that the Act's remarkably low contribution limits add to the problem of exhausting candidates' time. App. at 143a. Because of the contribution limits, candidates must spend more time soliciting contributions in order to raise the funds needed to run their campaigns. It is curious that the legislature would enact expenditure limits, purportedly in the interest of protecting candidates' time, while including in the same act extremely low contribution limits that sap candidates' time. The Act creates the problem and then includes restrictive provisions in the hope of alleviating it. Rather than trample on the First Amendment rights of candidates, the State could raise the contribution limits, which would decrease the time candidates must spend fundraising.

The Second Circuit's decision is at odds with the longstanding and continuous precedent of this Court, as well as the other Circuit Courts. This Petition should therefore be granted.

II. Vermont's $200-$400 Contribution Limits Per Election Cycle Are Unconstitutionally Low.

A. The Second Circuit's Decision Conflicts With The Decisions of Other Circuit Courts Striking Down Comparable Limits.

This Court has long recognized that contribution limits "impinge on the protected freedoms of expression and association," *McConnell v. FEC*, 540 U.S. 93, 231 (2003),

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[3] The danger of the appearance or reality of corruption can present itself when large contributions are given to a candidate because elected officials may be influenced to act contrary to their obligations of office by the possibility of financial gain to themselves or their campaigns. *National Conservative Political Action Committee*, 470 U.S. at 497. "The hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Id*. This danger of "quid pro quo" does not exist in campaign expenditures.

so that they require "heightened scrutiny," which looks to "whether there is a 'sufficiently important interest' and whether the statute is 'closely drawn' to avoid unnecessary abridgment of First Amendment freedoms." *Id.* (quoting *Buckley*, 424 U.S. at 25). The Court has warned that contribution limits that are "so low as to prevent candidates . . . from amassing the resources necessary for effective advocacy" would "impose serious burdens on free speech." Id. at 135 (quoting *Buckley,* 424 U.S. at 21.)

The Second Circuit's decision upholding the extraordinarily low contribution limits of $200-$400 conflicts with the decisions of the Eighth and Ninth Circuits, many district courts, and the Oregon Supreme Court. Those courts have followed this Court's teaching, striking down comparably low limits, either because they harmed First Amendment rights or justification was implausible on the minimal evidence submitted, or a combination of the two. The Eighth Circuit has twice struck down limits of comparable size and effect, *see Carver v. Nixon*, 72 F. 3d 633 (8th Cir. 1995) (invalidating $100-$300 per cycle limits); *Russell v. Burris*, 146 F. 3d 563 (8th Cir. 1998) (enjoining $100-$300 per election limits), and the Ninth Circuit has upheld a preliminary injunction against similar limits. *California ProLife Council Political Action Committee v. Scully*, 989 F. Supp. 1282 (E.D. Calif. 1998), *aff'd*, 164 F.3d 1189 (9th Cir. 1999) (upholding a preliminary injunction enjoining contribution limits).[4]

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[4] Several district courts have also struck down limits comparable to those at issue here. *Citizens For Responsible Gov't State PAC v. Buckley*, 60 F. Supp. 2d 1066 (D. Colo. 1999), *vacated as moot* 236 F.3d 1174 at 1183 (10th Cir. 2000) (striking limits of $500 and $100); *Wilkinson v. Jones*, 876 F.Supp. 916 (W.D. Ky. 1995) (striking $100 limit); *National Black Police Association v. District of Columbia Board of Elections and Ethics,* 924 F. Supp. 270, 275 *vacated as moot* 108 F.3d 346 (D.C.Cir 1997) (striking $50 and $100 limits); *see also Vannatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) (striking $500 and $100 limits). *But see Daggett v. Webster,* 205 F.3d 445, 460 (1st Cir. 2000); *Frank v. City of Akron,* 290 F.3d 813 (6th Cir. 2002).

In particular, the Second Circuit's approval of such low contribution limits conflicts with the decisions of the Eighth Circuit, which observed that *Buckley* identified the compelling interest supporting contribution limits as the interest in preventing real and perceived corruption caused by *large* contributions. *Carver*, 72 F. 3d at 638. The *Carver* Court considered whether the contribution limits were justified by the interest in preventing corruption associated with large contributions, and noted that the constitutionality of the limits is determined by their dollar amount. *Id.* at 640. The court acknowledged that it may not fine tune limits, but pointed out that *Buckley* teaches that limits must be struck down when "distinctions in degree" become "differences in kind." *Id.* (citing *Buckley*, 424 U.S. at 30). The question was "whether Missouri must adopt the lowest contribution limits in the nation to remedy the corruption caused by large campaign contributions." *Id.* at 642. In concluding that the low contribution limits could not be justified by the anti-corruption interest, the court noted that the State had produced no evidence as to why the limit amounts were chosen. *Id.* at 642-43. The primary issue, in the court's view, was whether the limits were high enough to actually pose the threat of corruption.

In contrast, the Second Circuit, in its discussion of the anti-corruption interest, held that the "governmental interest in eliminating actual and apparent corruption is sufficient to support Vermont's limits on *contributions* to candidates." App. at 169a. (emphasis added). It failed to acknowledge that only large contributions pose the danger of corruption. By omitting the word "large," it extended the application of the anti-corruption interest to all contribution limits, regardless of the amount. The Eighth Circuit in *Carver* corrected the district court on that issue, which made the same error, nothing that "extending *Buckley* to the infinitely broader interest of limiting all, not just large, campaign contributions" was contrary to *Buckley*. 72 F. 3d at 639. The Second Circuit has extended the anti-corruption

interest identified in *Buckley*, giving itself free rein to uphold all contribution limits. This is in direct conflict with the Eighth Circuit.

Also key to the Eighth Circuit's ruling was the fact that higher contribution limits had been enacted and were set to become effective two months after voters approved by proposition the lower limits being litigated in that case. The Court held that the new lower limits were not justified because there was no evidence of any harm that needed to be addressed between the old higher limit amounts and the new lower limits. *Id*. The Second Circuit, however, ignored the fact that there were already contribution limits ($2000 per cycle) in place before Act 64 was enacted. This failure to consider whether the old limits were sufficient to further the anti-corruption interest conflicts with the Eighth Circuit.

B. Upholding Such Low Contribution Limits Conflicts With This Court's Warning That Contribution Limits That Are Too Low Are Unconstitutional.

In *Shrink*, this Court upheld Missouri's $1,075 per election limit on contributions to statewide candidates, but reaffirmed that such limits could be so low as to create "a system of suppressed political advocacy that would be unconstitutional." 528 U.S. at 396. Specifically, "the issue in later cases . . . must go to the power to mount a campaign with all the dollars likely to be forthcoming." *Id.* Justices Breyer and Ginsburg also expressed concern that the limit was "low enough to raise [the] question" of whether it "significantly increases the reputation-related or media-related advantages of incumbency and thereby insulates legislators from electoral challenge." *Id.* at 404 (Breyer, J., concurring).

Unfortunately, the Second Circuit's decision reads *Shrink* as effectively removing candidate contributions from the protections of the First Amendment. This trend extends to lower courts that have uniformly upheld limits on

candidate contributions since *Shrink*, frequently ignoring evidence that the limits reduced the size and scope of political campaigns. *See Daggett*, 205 F.3d 445; *Shrink Missouri Gov't PAC v. Adams*, 204 F.3d 838 (8th Cir. 2000); *City of Akron*, 290 F.3d 813; *Florida Right to Life, Inc. v. Mortham*, 1998 U.S. Dist. LEXIS 16694 (M.D. Fla. 1998). It is true that the Eighth Circuit in *Shrink* went too far, demanding actual proof of *quid pro quo* exchange of contributions for political favors, and treating the *Buckley* limits as an inflation-adjusted floor for permissible contribution limit levels. This Court corrected these errors in *Shrink* and reaffirmed other aspects of *Buckley*, including the admonishment that a contribution limit creating a system of suppressed advocacy would be unconstitutional. *Shrink*, 528 U.S. at 396. Lower courts since *Shrink*, including the Second Circuit, have gone too far the other way, reading the case as giving blanket approval to contribution limits, while disregarding evidence of substantial harm to political speech. This Court should grant certiorari to clarify to the lower courts that contribution limits are unconstitutional if they are too low.

The limits here are too low because they prevent effective campaigns and disparately harm challengers. This Court has upheld limits allowing relatively high contributions of $1,000 or more because they "allow associations to aggregate large sums of money to promote effective advocacy" and "merely [] require candidates . . . to raise funds from a greater number of persons." *Id.* at 136 (quoting *Buckley*, 424 U.S. at 21-22). However, a limit that was "so low as to prevent candidates . . . from amassing the resources necessary for effective advocacy" would "impose serious burdens on free speech." *Id.* at 135 (quoting *Buckley*, 424 U.S. at 21).

Although contribution limits can be upheld based upon their value in preventing corruption, this justification is not automatic. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative

judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. This Court has therefore held that a zero contribution limit on minors was unconstitutional, because "[a]bsent a more convincing case of the claimed evil, this interest is simply too attenuated . . . to withstand heightened scrutiny." *McConnell,* 540 U.S. at 232.

Further, contribution limits can be so low that they could "significantly increase[] the . . . advantages of incumbency and thereby insulate[] legislators from effective electoral challenge." *Shrink*, 528 U.S. at 404 (Breyer, J., concurring). This concern acknowledges that challengers face the harshest impact of contribution limits. As newcomers, they need more money than incumbents to achieve the same level of effectiveness–hence a limit that reduces everyone's spending will disparately impact against challengers. Moreover, such candidates also lack broad donor lists and are therefore less able than incumbents to replace the funds lost to contribution limits. Thus, a contribution limit that significantly impacts challenger campaigns poses a severe threat to the First Amendment as well as the fundamental integrity of the electoral process. While such insulation "cannot be inferred automatically," Justice Breyer noted that a $1,075 per election contribution limit was "low enough to raise such a question." *Id.* If limiting candidates in Missouri to $2,150 per election cycle raises disturbing questions, Vermont's limits, which are less than one fifth that amount, must be regarded as unconstitutional.

The Second Circuit, however, deferred to the District Court's findings and declined to engage in any real analysis of whether Vermont's limits are too low to permit effective campaigns. App. at 170a-171a. It summarily announced that a mayoral election, conducted after imposition of contribution limits, "involved effective campaigns despite the contribution limitations." App. at 171a. "Subject to the applicable limits imposed by the statute, the mayoral

candidates raised funds comparable to the amounts spent in State Senate races in the past." App. at 171a.

However, the $200 contribution limit, in place during the 1999 Burlington mayoral race, harmed to unsuccessful challenger Kurt Wright. His campaign "worked very hard" and "did well to raise" the $19,158 that he ultimately received. Ex. at VIII, E-3053-54 (Wright deposition). These receipts were $8,000-$10,000 lower than they would have been had the contribution limits not been reduced. Ex. at VIII, E-3052-54. This loss of funds is also shown by the fact that 44 of Wright's 46 itemized contributors gave him the absolute maximum allowed by these limits. Many of these would have given substantially larger sums had they been allowed to do so, as several of them had done in Mr. Wright's previous campaigns. Ex. at VIII, E-3054; Ex. at VIII, E-2789.

This loss of funds severely restricted Wright's communications to voters, preventing him from engaging in a direct mail campaign and reducing his communications on radio and television. Ex. at VIII, E-3052. Wright's lack of funds also limited his paid staff to a single campaign coordinator costing $2,900. Ex. at VIII, E-3058. In contrast, his incumbent opponent was able to spend $8,100 to hire a volunteer coordinator, database manager and campaign coordinator. Ex. at VIII, E-3058-60.

Although the District Court relied on a superficial description of the overall spending in this race compared with that of Chittenden County Senate races as "the most significant" evidence of "[t]he possibility of effective campaigning," App. at 58a, this ignores the evidence that these contribution limits prevented effective advocacy by the challenger. In comparing these races, the District Court failed to note that it was comparing the spending by two competitive candidates to the average spending in six senate races, which included many candidates whose election was either a foregone conclusion or an impossibility. In fact, in 1996 and 1998 Chittenden Senate races, there were five

challengers – including Wright himself – who spent more than Wright was able to raise for his mayoral race. Ex. at IV, E-1305-6. Also, as Wright explained, there are "extreme differences in the races" for Burlington mayor and Chittenden Senate which negate the assumption that funds raised by a candidate for mayor could also be raised for the senate. Ex. at VIII, E-3074. As a result, Act 64 dramatically adversely affected the electoral system by having a debilitating impact on the ability of challengers to engage in effective advocacy.

The contribution limits are not closely drawn because the anti-corruption rationale is not supported by such low limits. In upholding the limits in *Shrink*, this Court relied upon evidence that contributions in Missouri actually appeared to corrupt politicians. Cited evidence included a legislator's claim that large contributions had "the real potential to buy votes," published sources alleging that various public officials had taken improper actions in response to sizable campaign contributions, and the public's perception of the problem as evidenced by an overwhelming initiative vote enacting still lower contribution limits. *Shrink,* 528 U.S. at 393. Such evidence supported Missouri's justification only because the record contained no evidence to dispute it. The Court noted that "[t]here might, of course, be need for a more extensive evidentiary documentation if petitioners had made *any* showing of their own to cast doubt" on the legitimacy of the state's corruption interest. *Id.* (emphasis added). A stronger evidentiary showing of the government's interest is required here because Vermont's limits are so low as to render the anti-corruption interest implausible. As this Court explained, the "quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Id.* at 391.

The Second Circuit concluded that the contribution limits are closely drawn to the interest in preventing corruption, deferring to the District Court's findings that the contribution limits are closely drawn because less than 10 percent of contributions over the last three election cycles exceeded the Act's limits, the limits "approximated amounts considered suspiciously large by the Vermont public," and the First Circuit upheld limits of $250 and the Eighth Circuit upheld limits of $1075, $525, and $275. App. at 170a.

First, according to the statistics compiled by the State's expert, campaigns would be significantly harmed. Applying the new contribution limits to 1998 campaigns would have prohibited over 28% of the funds contributed to state senate candidates and over 22% of funds contributed to state house candidates[5]. Ex. at VIII, E-976-78. The projected impact on statewide candidates since 1994 shows several candidates losing more than 50% of their funding, with impacts of 30% or more being quite common. For example, in 1998, these limits would have outlawed approximately 50% of the funds raised by the successful candidates for both Governor and Lieutenant Governor, as well as 40% of the funds raised by their chief opponents. Ex. at III, E-970-74. These statistics were compiled for races conducted under Vermont's prior contribution limits which may have had some effect of their own on candidate fundraising. The percentages, therefore, ignore the loss of contributions due to the old limits, thereby underestimating the impact of the new contribution limits.

Such statistics are well within the range of comparable data from which courts have concluded that particular contribution limits would have an

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[5] These percentages are actually significant understatements due to the expert's assumption that all non-filing candidates raised $500, and that none of those candidates received contributions over the applicable $200 or $300 limit. Ex. at III, E-946-47. This faulty assumption underestimates the percentage of that spending that would have been prohibited.

unconstitutional impact. *See e.g. Citizens for Responsible Gov't State PAC*, 236 F.3d at 1084 (between 6.4 and 18.6 percent of contributions in certain races affected); *National Black Police Association,* 924 F. Supp. at 276-77 (between 16 and 74% of contributions to select candidates affected). The numbers here dwarf the 5.1% of funds affected by the contribution limits in *Buckley*, which provided the basis for that Court's finding that "[t]here is no indication . . . that the contribution limitations imposed by the [law] would have any dramatic[ally] adverse effect on the funding of campaigns and political associations." *Buckley*, 424 U.S. at 21.

It must also be noted that these contribution limits are not indexed to inflation and will therefore continue to impose an ever increasing burden on speech with each passing election, in contrast to the limits in *Shrink*, upheld in part because of "the fact that the statute indexes the amount for inflation." 528 U.S. at 404 (Breyer, J., concurring).

Second, the District Court's finding that the limits "approximated amounts considered suspiciously large by the Vermont public" is based upon evidence of doubtful relevance and little magnitude, most of it pertaining to a supposed erosion of public confidence. App. at 28a-31a. However, such a showing of general distrust of political actors "is not sufficient" and is "irrelevant to the critical elements to be proved: corruption of candidates or public perception of candidates." *National Conservative Political Action Committee*, 470 U.S. at 499; Tr. VIII-134-38.

The only specific evidence which the District Court cited as "actual and perceived influence of large contributions on legislators" was the testimony of a state senator and the claims of two academic experts. App. at 37a-38a. Both of these experts based their findings on evidence from outside of Vermont. Ex. at IV, E-1533; Ex. at VI, E-2202. Moreover, the Court's findings ignore comprehensive research proving that legislative voting patterns correlate to donor interests, because donors contribute to candidates whom they want to see elected.

This evidence was countered by considerable evidence that corruption or undue influence from large campaign contributions is not reasonably perceived in Vermont politics, and that any such perception could not be affected by Act 64's reduction in contribution limits. Several witnesses with extensive experience in Vermont government testified that they were not aware of any Vermont politician ever making substantive policy decisions in the pursuit of campaign contributions. *See, e.g.*, Tr. IV-180. Defense witnesses also conceded that they could not point to any such incident in their own extensive experience in politics. Tr. V-115; Tr. X-180; Tr. VIII-79; Tr. VII-28; Ex. IV, E-1362-64.

Here, the only recognized interest that can support a candidate contribution limit is the reality or appearance of a "threat from politicians too compliant with the wishes of *large* contributors." *Shrink*, 528 U.S. at 389 (emphasis added). This description of the worrisome contributions as "large" is repeated numerous times throughout each of the Supreme Court's candidate contribution limit decisions. *See, e.g., Buckley*, 424 U.S. at 25-28. While the potential that a candidate may be unduly influenced by gifts in excess of a $2,150 per cycle limit raises a plausible concern, such plausibility disappears long before the contributions are limited to $200 to $400 per cycle as provided for in Act 64. The quantum of evidence needed to support such low limits must therefore be higher than that which justified the contribution limits in *Shrink* or *Buckley*. Indeed, several courts have found the small size of limits to be a factor which suggested they were not closely drawn to combating corruption. *See, e.g., Carver*, 72 F.3d at 644. Such lack of tailoring is shown by Vermont's prior enactment of a $2,000 per cycle limit. Since there is no evidence of corruption under the old limits, their success shows that the $200-$400 limits are unnecessary.

C. This Issue Is Of Seminal Importance.

This issue goes to heart of democratic process, and contributions will be stripped of First Amendment protection if the Court does not grant certiorari. Moreover, given the cost of establishing the necessary record and the unlikely chance of success based on the overreaction of the lower courts to *Shrink*, it is unlikely that further opportunities will arise for this Court to correct this trend and reestablish First Amendment protection against overzealous contribution limitations.

III. The Second Circuit's Decision Upholding Vermont's Presumption of Coordination, Which Provides That An Expenditure Made By A Political Party Or Committee That Benefits Six Or Fewer Candidates Is A Related Expenditure Subject To Contribution Limits, Violates The Freedoms of Political Speech and Association.

Act 64 contains a provision that institutes a mandatory presumption that any expenditure by political parties or political committees that primarily benefits six or fewer candidates is a related expenditure and is subject to contribution limits to each candidate. App. at 9a. The Second Circuit upheld the presumption, because it is rebuttable. App. at 183a-184a.

A. The Second Circuit's Decision Upholding Vermont's Presumption Of Coordination Conflicts With The Decisions Of Other Federal Circuits That Have Held That Coordinated Expenditures Require Control, Cooperation, Or Prearrangement With A Candidate.

The Second Circuit's decision conflicts with the Eighth and First Circuits and two federal district court decisions that have recognized that coordinated expenditures require control by or prearrangement or coordination with a candidate or the candidate's campaign.

See Iowa Right to Life Comm., Inc. v. Williams, 187 F.3d 963, 968 (8th Cir. 1999) ("There is a fundamental constitutional difference between independent expenditures and coordinated expenditures. The difference is that independent expenditures, by their nature, do not involve prearrangement or coordination. And without the prearranged or coordinated nature of expenditures, the danger that the expenditure is given as a quid pro quo for improper commitments is alleviated."); *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997) ("The Supreme Court has said . . . that expenditures directed by or 'coordinated' with the candidate could be treated as contributions; but 'coordination' in this context implied *some measure of collaboration* beyond a mere inquiry as to the position taken by a candidate on an issue.") (citation omitted) (emphasis added); *FEC v. Public Citizen*, 64 F. Supp. 2d 1327, 1335 (N.D. Ga. 1999) (citing *Buckley* and *Clifton* in an analysis of a challenged expenditure to determine whether it was coordinated); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 91-92 (D.D.C. 1999). The *Christian Coalition* Court held that there must be "control" or "substantial discussion or negotiation between the campaign and the spender" over a communication's contents, timing, location, mode or intended audience, or volume. *Id.* at 92. The Court illustrated "substantial discussion or negotiation" as the candidate and spender emerging as "partners or joint venturers in the expressive expenditure." *Id.*. That holding is the direct opposition of the Second Circuit's conclusory statement that there is "no constitutional barrier to applying this provision." App. at 183a.

B. The Second Circuit's Decision Upholding Vermont's Presumption of Coordination Conflicts With The Decisions of This Court Holding That Coordinated Expenditures Require Control, Cooperation, or Prearrangement With a Candidate.

The Second Circuit's decision conflicts with the decisions of this Court holding that coordinated expenditures, by definition, require control, cooperation, or prearrangement with a candidate. In *Buckley*, the Court focused on whether an expenditure was "controlled by or coordinated with the candidate and his campaign" to determine whether it was a coordinated expenditure and thus could be treated as an in-kind contribution to a candidate. *Buckley*, 424 U.S. at 46. For an expenditure to be treated as a contribution, it must be "prearranged or coordinated . . . with the candidate or his agent." *Id.* at 47. This Court recently reiterated that it is expenditures that are "controlled by or coordinated with" a candidate that may be treated as indirect contributions. *McConnell*, 540 U.S. at 219. The Court noted that it has "repeatedly . . . struck down limitations on expenditures 'made totally independently of the candidate and his campaign.'" *Id.* at 221 (quoting *Buckley*, 424 U.S. at 47).

In contrast, the Second Circuit required no evidence of control, cooperation, or prearrangement. It simply held that the presumption is constitutional because it is rebuttable rather than conclusive. App. at 184a. However, rebuttability does not make the presumption constitutional; the presumption's unconstitutionality manifests itself not in its nature, but in its existence. A presumption that expenditures are related, in the absence of coordination with a candidate, is contrary to the First Amendment prohibition on state regulation of independent expenditures.

C. This Issue Is Of Seminal Importance Because the Presumption Converts Protected Expenditures Into Contributions Subject To Contribution Limits.

This issue is of seminal importance because the presumption converts protected expenditures into contribution receiving less protection. A presumption that irrationally rewrites definitions to characterize an independent expenditure as a related expenditure directly violates the political speech and association rights guaranteed to political committees and political parties. As a result, this Court should grant certiorari to correct the error.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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