SUPREME COURT OF THE UNITED STATES

Nos. 04–1528, 04–1530 and 04–1697

NEIL RANDALL, ET AL., PETITIONERS
04–1528 *v.*
WILLIAM H. SORRELL ET AL.

VERMONT REPUBLICAN STATE COMMITTEE, ET AL., PETITIONERS
04–1530 *v.*
WILLIAM H. SORRELL ET AL.

WILLIAM H. SORRELL, ET AL., PETITIONERS
04–1697 *v.*
NEIL RANDALL ET AL.

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

[June 26, 2006]

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, and with whom JUSTICE STEVENS joins as to Parts II and III, dissenting.

In 1997, the Legislature of Vermont passed Act 64 after a series of public hearings persuaded legislators that rehabilitating the State's political process required campaign finance reform. A majority of the Court today decides that the expenditure and contribution limits enacted are irreconcilable with the Constitution's guarantee of free speech. I would adhere to the Court of Appeals's decision to remand for further enquiry bearing on the limitations on candidates' expenditures, and I think the contribution limits satisfy controlling precedent. I respectfully dissent.

I

Rejecting Act 64's expenditure limits as directly contravening *Buckley* v. *Valeo,* 424 U. S. 1 (1976) *(per curiam)*, *ante*, at 8–11 (opinion of BREYER, J.), is at least premature.

We said in *Buckley* that "expenditure limitations impose far greater restraints on the freedom of speech and association than do . . . contribution limitations," 424 U. S., at 44, but the *Buckley* Court did not categorically foreclose the possibility that some spending limit might comport with the First Amendment. Instead, *Buckley* held that the constitutionality of an expenditure limitation "turns on whether the governmental interests advanced in its support satisfy the [applicable] exacting scrutiny." *Ibid.* In applying that standard in *Buckley* itself, the Court gave no indication that it had given serious consideration to an aim that Vermont's statute now pursues: to alleviate the drain on candidates' and officials' time caused by the endless fundraising necessary to aggregate many small contributions to meet the opportunities for ever more expensive campaigning. Instead, we dwelt on rejecting the sufficiency of interests in reducing corruption, equalizing the financial resources of candidates, and capping the overall cost of political campaigns, see *id.,* at 55–57. Although Justice White went a step further in dissenting from the Court on expenditures, and made something of the interest in getting officials off the "treadmill" driven by the "obsession with fundraising," see *id.,* at 265 (opinion concurring in part and dissenting in part), this lurking issue was not treated as significant on the expenditure question in the *per curiam* opinion. Whatever the observations made to the *Buckley* Court about the effect of fundraising on candidates' time, the Court did not squarely address a time-protection interest as support for the expenditure limits, much less one buttressed by as

thorough a record as we have here.*

Vermont's argument therefore does not ask us to overrule *Buckley;* it asks us to apply *Buckley*'s framework to determine whether its evidence here on a need to slow the fundraising treadmill suffices to support the enacted limitations. Vermont's claim is serious. Three decades of experience since *Buckley* have taught us much, and the findings made by the Vermont Legislature on the pernicious effect of the nonstop pursuit of money are significant. See, *e.g.,* Act 64, H. 28, Legislative Findings and Intent, at App. 20 (finding that "candidates for statewide offices are spending inordinate amounts of time raising campaign funds"); *ibid.* (finding that "[r]obust debate of issues, candidate interaction with the electorate, and public involvement and confidence in the electoral process have decreased as campaign expenditures have increased"); see also *Landell* v. *Sorrell*, 118 F. Supp. 2d 459, 467 (Vt. 2000) (noting testimony of Senator Shumlin before the legislature that raising funds "was one of the most distasteful things that I've had to do in public service" (internal quotation marks omitted)); *Landell* v. *Sorrell*, 382 F. 3d 91, 123 (CA2 2004) (public officials testified at trial that "elected officials spend time with donors rather than on their official duties").

The legislature's findings are surely significant enough to justify the Court of Appeals's remand to the District

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*In approving the public funding provisions of the subject campaign finance law, Subtitle H of the Internal Revenue Code, the *Buckley* Court appreciated that in enacting the provision Congress was legislating in part "to free candidates from the rigors of fundraising," 424 U. S., at 91; see also *id.,* at 96 ("Congress properly regarded public financing as an appropriate means of relieving major-party Presidential candidates from the rigors of soliciting private contributions"). Recognition of the interest as to Subtitle H, a question of congressional power involving a different evidentiary burden, see *South Dakota* v. *Dole,* 483 U. S. 203, 207 (1987); see also *Buckley*, *supra*, at 90, does not imply a conclusive rejection of it as to the separate issue of expenditure limits.

Court to decide whether Vermont's spending limits are the least restrictive means of accomplishing what the court unexceptionably found to be worthy objectives. See *id.,* at 124–125, 135–137. The District Court was instructed to examine a variety of outstanding issues, including alternatives considered by Vermont's Legislature and the reasons for rejecting them. See *id.,* at 136. Thus, the constitutionality of the expenditure limits was not conclusively decided by the Second Circuit, and I believe the evidentiary work that remained to be done would have raised the prospect for a sound answer to that question, whatever the answer might have been. Instead, we are left with an unresolved question of narrow tailoring and with consequent doubt about the justifiability of the spending limits as necessary and appropriate correctives. This is not the record on which to foreclose the ability of a State to remedy the impact of the money chase on the democratic process. I would not, therefore, disturb the Court of Appeals's stated intention to remand.

II

Although I would defer judgment on the merits of the expenditure limitations, I believe the Court of Appeals correctly rejected the challenge to the contribution limits. Low though they are, one cannot say that "the contribution limitation[s are] so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Nixon* v. *Shrink Missouri Government PAC,* 528 U. S. 377, 397 (2000).

The limits set by Vermont are not remarkable departures either from those previously upheld by this Court or from those lately adopted by other States. The plurality concedes that on a per-citizen measurement Vermont's limit for statewide elections "is slightly more generous," *ante*, at 18, than the one set by the Missouri statute ap-

proved by this Court in *Shrink*, *supra*. Not only do those dollar amounts get more generous the smaller the district, they are consistent with limits set by the legislatures of many other States, all of them with populations larger than Vermont's, some significantly so. See, *e.g., Montana Right to Life Assn.* v. *Eddleman,* 343 F. 3d 1085, 1088 (CA9 2003) (approving $400 limit for candidates filed jointly for Governor and Lieutenant Governor, since increased to $500, see Mont. Code Ann. §13–37–216(1)(a)(i) (2005)); *Daggett* v. *Commission on Governmental Ethics and Election Practices,* 205 F. 3d 445, 452 (CA1 2000) ($500 limit for gubernatorial candidates in Maine); *Minnesota Citizens Concerned for Life, Inc.* v. *Kelley,* 427 F. 3d 1106, 1113 (CA8 2005) ($500 limit on contributions to legislative candidates in election years, $100 in other years); *Florida Right to Life, Inc.* v. *Mortham,* No. 6:98–770–CV, 2000 WL 33733256, *3 (MD Fla., Mar. 20, 2000) ($500 limit on contributions to any state candidate). The point is not that this Court is bound by judicial sanctions of those numbers; it is that the consistency in legislative judgment tells us that Vermont is not an eccentric party of one, and that this is a case for the judicial deference that our own precedents say we owe here. See *Shrink, supra,* at 402 (BREYER, J., concurring) ("Where a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments"); see also *ante*, at 14 (plurality opinion) ("[O]rdinarily we have deferred to the legislature's determination of [matters related to the costs and nature of running for office]").

To place Vermont's contribution limits beyond the constitutional pale, therefore, is to forget not only the facts of *Shrink*, but also our self-admonition against second-guessing legislative judgments about the risk of corruption to which contribution limits have to be fitted. See *Shrink, supra*, at 391, and n. 5. And deference here would surely not be overly complaisant. Vermont's legislators them-

selves testified at length about the money that gets their special attention, see Act 64, H. 28, Legislative Findings and Intent, at App. 20 (finding that "[s]ome candidates and elected officials, particularly when time is limited, respond and give access to contributors who make large contributions in preference to those who make small or no contributions"); 382 F. 3d, at 122 (testimony of Elizabeth Ready: "If I have only got an hour at night when I get home to return calls, I am much more likely to return [a donor's] call than I would [a non-donor's] . . . . [W]hen you only have a few minutes to talk, there are certain people that get access" (alterations in original)). The record revealed the amount of money the public sees as suspiciously large, see 118 F. Supp. 2d, at 479–480 ("The limits set by the legislature . . . accurately reflect the level of contribution considered suspiciously large by the Vermont public. Testimony suggested that amounts greater than the contribution limits are considered large by the Vermont public"). And testimony identified the amounts high enough to pay for effective campaigning in a State where the cost of running tends to be on the low side, see *id.,* at 471 ("In the context of Vermont politics, $200, $300, and $400 donations are clearly large, as the legislature determined. Small donations are considered to be strong acts of political support in this state. William Meub testified that a contribution of $1 is meaningful because it represents a commitment by the contributor that is likely to become a vote for the candidate. Gubernatorial candidate Ruth Dwyer values the small contributions of $5 so much that she personally sends thank you notes to those donors"); *id.,* at 470–471 ("In Vermont, many politicians have run effective and winning campaigns with very little money, and some with no money at all. . . . Several candidates, campaign managers, and past and present government officials testified that they will be able to raise enough money to mount effective campaigns in the system of

contribution limits established by Act 64"); *id.,* at 472 ("Spending in Vermont statewide elections is very low . . . . Vermont ranks 49th out of the 50 states in campaign spending. The majority of major party candidates for statewide office in the last three election cycles spent less than what the spending limits of Act 64 would allow. . . . In Vermont legislative races, low-cost methods such as door-to-door campaigning are standard and even expected by the voters").

Still, our cases do not say deference should be absolute. We can all imagine dollar limits that would be laughable, and per capita comparisons that would be meaningless because aggregated donations simply could not sustain effective campaigns. The plurality thinks that point has been reached in Vermont, and in particular that the low contribution limits threaten the ability of challengers to run effective races against incumbents. Thus, the plurality's limit of deference is substantially a function of suspicion that political incumbents in the legislature set low contribution limits because their public recognition and easy access to free publicity will effectively augment their own spending power beyond anything a challenger can muster. The suspicion is, in other words, that incumbents cannot be trusted to set fair limits, because facially neutral limits do not in fact give challengers an even break. But this received suspicion is itself a proper subject of suspicion. The petitioners offered, and the plurality invokes, no evidence that the risk of a pro-incumbent advantage has been realized; in fact, the record evidence runs the other way, as the plurality concedes. See *ante*, at 22 ("the record does contain some anecdotal evidence supporting the respondents' position, namely, testimony about a post-Act-64 competitive mayoral campaign in Burlington, which suggests that a challenger can 'amas[s] the resources necessary for effective advocacy,' *Buckley,* 424 U. S., at 21"). I would not discount such evidence that

these low limits are fair to challengers, for the experience of the Burlington race is confirmed by recent empirical studies addressing this issue of incumbent's advantage. See, *e.g.,* Eom & Gross, Contribution Limits and Disparity in Contributions Between Gubernatorial Candidates, 59 Pol. Research Q. 99, 99 (2006) ("Analyses of both the number of contributors and the dollar amount of contributions [to gubernatorial candidates] suggest no support for an increased bias in favor of incumbents resulting from the presence of campaign contribution limits. If anything, contribution limits can work to reduce the bias that traditionally works in favor of incumbents. Also, contribution limits do not seem to increase disparities between gubernatorial candidates in general" (emphasis deleted)); Bardwell, Money and Challenger Emergence in Gubernatorial Primaries, 55 Pol. Research Q. 653 (2002) (finding that contribution limits favor neither incumbents nor challengers); Hogan, The Costs of Representation in State Legislatures: Explaining Variations in Campaign Spending, 81 Soc. Sci. Q. 941, 952 (2000) (finding that contribution limits reduce incumbent spending but have no effect on challenger or open-seat candidate spending). The Legislature of Vermont evidently tried to account for the realities of campaigning in Vermont, and I see no evidence of constitutional miscalculation sufficient to dispense with respect for its judgments.

III

Four issues of detail call for some attention, the first being the requirement that a volunteer's expenses count against the person's contribution limit. The plurality certainly makes out the case that accounting for these expenses will be a colossal nuisance, but there is no case here that the nuisance will noticeably limit volunteering, or that volunteers whose expenses reach the limit cannot continue with their efforts subject to charging their candi-

dates for the excess. Granted, if the provisions for contribution limits were teetering on the edge of unconstitutionality, Act 64's treatment of volunteers' expenses might be the finger-flick that gives the fatal push, but it has no greater significance than that.

Second, the failure of the Vermont law to index its limits for inflation is even less important. This challenge is to the law as it is, not to a law that may have a different impact after future inflation if the state legislature fails to bring it up to economic date.

Third, subjecting political parties to the same contribution limits as individuals does not condemn the Vermont scheme. What we said in *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.,* 533 U. S. 431, 454–455 (2001), dealing with regulation of coordinated expenditures, goes here, too. The capacity and desire of parties to make large contributions to competitive candidates with uphill fights are shared by rich individuals, and the risk that large party contributions would be channels to evade individual limits cannot be eliminated. Nor are these reasons to support the party limits undercut by claims that the restrictions render parties impotent, for the parties are not precluded from uncoordinated spending to benefit their candidates. That said, I acknowledge the suggestions in the petitioners' briefs that such restrictions in synergy with other influences weakening party power would justify a wholesale reexamination of the situation of party organization today. But whether such a comprehensive reexamination belongs in courts or only in legislatures is not an issue presented by these cases.

Finally, there is the issue of Act 64's presumption of coordinated expenditures on the part of political parties, Vt. Stat. Ann., Tit. 17, §2809(d) (2002). The plurality has no occasion to reach it; I do reach it, but find it insignificant. The Republican Party petitioners complain that the

related expenditure provision imposes on both the candidate and the party the burden in some circumstances to prove that coordination of expenditure did not take place, thus threatening to charge against a candidate's spending limits some party expenditures that are in fact independent, with an ultimate consequence of chilling speech. See Brief for Respondent/Cross-Petitioner Vermont Republican State Committee et al. 45–46. On the contrary, however, we can safely take the presumption on the representation to this Court by the Attorney General of Vermont: the law imposes not a burden of persuasion but merely one of production, leaving the presumption easily rebuttable. See Tr. of Oral Arg. 39–41 (representation that the presumption disappears once credible evidence, such as an affidavit, is offered); see also Brief for Respondent/Cross-Petitioner William H. Sorrell et al. 48 (the presumption "contributes no evidence and disappears when facts appear. In a case covered by the presumption, a political party need only present some evidence that the presumed fact is not true and the presumption vanishes. . . . Simple testimony that the expenditure was not coordinated would suffice to defeat the presumption" (citations, internal quotation marks, and alterations omitted)). As so understood, the rebuttable presumption clearly imposes no onerous burden like the conclusive presumption in *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n,* 518 U. S. 604, 619 (1996) (principal opinion), or the nearly conclusive one in *Riley* v. *National Federation of Blind of N. C., Inc.,* 487 U. S. 781, 785–786 (1988). Requiring the party in possession of the pertinent facts to come forward with them, as easily as by executing an affidavit, does not rise to the level of a constitutionally offensive encumbrance here. Cf. *County Court of Ulster Cty.* v. *Allen,* 442 U. S. 140, 158, n. 16 (1979) ("To the extent that a presumption imposes an extremely low burden of production—*e.g.,* being satisfied by 'any' evidence—it may well be that its

impact is no greater than that of a permissive inference").

IV

Because I would not pass upon the constitutionality of Vermont's expenditure limits prior to further enquiry into their fit with the problem of fundraising demands on candidates, and because I do not see the contribution limits as depressed to the level of political inaudibility, I respectfully dissent.