1 IN THE SUPREME COURT OF THE UNITED STATES 2 - - - - - - - - - - - - - - - X 3 NEIL RANDALL, ET AL., : 4 Petitioners : 5 : No. 04-1528 v. 6 WILLIAM H. SORRELL, ET AL.; : 7 VERMONT REPUBLICAN STATE : 8 COMMITTEE, ET AL., : 9 Petitioners : 10 : No. 04-1530 v. 11 WILLIAM H. SORRELL, ET AL.; : 12 and : 13 WILLIAM H. SORRELL, ET AL.; : 14 Petitioners : 15 : No. 04-1697 v. 16 NEIL RANDALL, ET AL. : 17 - - - - - - - - - - - - - - - - X 18 Washington, D.C. 19 Tuesday, February 28, 2006 20 The above-entitled matter came on for oral 21 argument before the Supreme Court of the United States 22 at 10:11 a.m. 23 **APPEARANCES:** 24 JAMES BOPP, JR., ESQ., Terre Haute, Indiana; on behalf 25 of the Petitioners in Nos. 04-1528 and 04-1530.

1	WILLIAM H. SORRELL, ESQ., Attorney General; Montpelier,
2	Vermont; on behalf of Respondents Sorrell, et al.
3	BRENDA WRIGHT, ESQ., Boston, Massachusetts; on behalf
4	of Respondent Vermont Public Interest Research Group.
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1	PROCEEDINGS
2	(10:11 a.m.)
3	CHIEF JUSTICE ROBERTS: We'll hear argument
4	first this morning in 04-1528, Randall v. Sorrell, and
5	the consolidated cases.
6	Mr. Bopp.
7	ORAL ARGUMENT OF JAMES BOPP, JR.
8	ON BEHALF OF THE PETITIONERS
9	IN NOS. 04-1528 AND 04-1530
10	MR. BOPP: Thank you. Mr. Chief Justice, and
11	may it please the Court:
12	As this Court made clear recently in
13	Republican Party of Minnesota v. White, since political
14	candidates are the ones who take office, it is
15	imperative that they be allowed freely to express
16	themselves on matters of current public importance. As
17	a result, this Court has never allowed the government
18	to prohibit candidates from communicating relevant
19	information to voters during an election.
20	Vermont, however, has adopted low expenditure
21	and contribution limits for the opposite purpose,
22	reducing overall candidate campaign spending, and these
23	limits would have that effect. This is fundamentally
24	incompatible with any reasonable interpretation of the
25	First Amendment and is not justified by any truly
	4

compelling governmental interest. As a result, they
 are unconstitutional.

3 Now, Vermont's expenditure limits are an 4 unprecedented, direct restraint on candidate speech. 5 Once these low expenditure limits are exhausted, a 6 candidate may not drive to the village green to address 7 a rally, may not return the phone call from a reporter 8 at the local newspaper, and may not call a neighbor to 9 urge her to get out to vote. This Court has never 10 allowed the government to prohibit candidates from 11 communicating this sort of relevant information during 12 a campaign.

Further, this Court has long held that more speech is better than less speech. As long as contribution limits are available to address any realistic concerns about corruption, the public will benefit from candidates' being allowed to spend all that they can lawfully raise in their campaign.

Now, the record is clear in this case that the expenditure limits will deprive candidates of substantial resources. The district court erroneously looked at average spending over the last three elections and found that in all but one category, that is, Senate candidates running in single-member districts, that the average spending for all candidates

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1 in those campaigns were below the limits set by the 2 expenditure limits in Vermont.

3 However, in Buckley, the last case for --4 where this Court considered candidate expenditure 5 limits, the Court looked at the number of races 6 affected, not the average spending in all races. And 7 in Buckley, the Court looked at the expenditures in 8 U.S. Senate races and found that in previous election, 9 that 26 percent were over the mandatory expenditure 10 limits considered in Buckley, and in the House, 3 11 percent of the races had spending greater than the --12 these limits. 13 JUSTICE GINSBURG: Mr. Bopp, would you 14 clarify a procedural point? As I understand it, on the 15 expenditure issue, there is no final decision that has 16 gone back to the district court for further 17 proceedings. 18 MR. BOPP: Well, there were -- that is 19 correct, that there is a remand. 20 JUSTICE GINSBURG: And it may -- the district 21 court might -- may well find that nothing passes 22 constitutional muster in the end. 23 MR. BOPP: Well, they could potentially, yes. 24 However, the -- the Second Circuit did -- did make 25

decisions of law. They found that these two interests

1 that the State is alleging, that is, in preventing 2 corruption and in conserving incumbent time, were together a compelling governmental interest, and we --3 4 we allege that they are not and that on this record, 5 this Court can determine that they are not -- they are 6 not together a compelling governmental interest. 7 JUSTICE GINSBURG: Are you arguing now then 8 that there may be no limits on expenditures? 9 MR. BOPP: Well, the -- this Court has now 10 considered, including this case, a dozen times in which 11 the government has sought to limit expenditures, either 12 of candidates or PAC's or political parties, and 13 despite the work of the most brilliant lawyers in the 14 United States, they have not come up with any 15 compelling governmental interest that this Court has 16 accepted. And we believe that this record demonstrates 17 that these claimed interests either are not compelling 18 or are not proven.

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19 Now --
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JUSTICE SOUTER: Do you -- when -- when you make that point, that on this record the -- the claimed interests are not compelling or not proven, would you have us leave the door open for a greater degree of proof? For example, take the -- the problem of candidate time. The lower the donation limits are, the

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1 -- the more donations there have got to be, and -- and 2 there's -- there's plenty of comment, particularly in some of the amicus briefs, on the amount of time that 3 4 political candidates generally spend scrounging around 5 for money. If we decided the case your way, would the 6 door be left open for a more impressive and compelling 7 record on this issue?

8 MR. BOPP: Well, we -- we are asserting that 9 that is not a compelling interest in and of itself, and 10 this Court should reject it. I -- I just don't see --11 JUSTICE SOUTER: But you also say, on this 12

record.

13 MR. BOPP: Yes. And in addition -- well, the 14 -- the point about it not being a compelling interest I 15 think is an analytical point that doesn't have to be --16 that doesn't rest on this -- strictly on this record.

17 JUSTICE SOUTER: So I -- I take it your point 18 then on the combined corruption/competition for money 19 problem is that there isn't any record that would 20 support it.

21 MR. BOPP: If it were a compelling interest, 22 there's no record here that is a problem in Vermont. 23 JUSTICE SOUTER: Right, but you're saying 24 this combination cannot be a compelling interest as a 25 matter of law, consistent with the First Amendment. Is

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1 that correct?

2 MR. BOPP: Yes, it is. I don't see how it is 3 a compelling governmental interest to limit challengers 4 to only fund-raise to the extent that an incumbent 5 finds comfortable or convenient. 6 JUSTICE SOUTER: Yes. 7 JUSTICE KENNEDY: Well, just --8 JUSTICE SCALIA: Or at least where -- where 9 the limitation -- you make a big point of this in your 10 brief as -- as I -- as I recall. At least where the 11 reason the candidate would have to spend so much time 12 is the very small contribution limit established by the same statute. It's -- it's rather like the -- the 13 14 murderer asking for mercy because he's an orphan, 15 having killed his parents. 16 MR. BOPP: It is a self-justifying statute by 17 imposing the lowest contribution limits in -- in the 18 Nation, adjusted for inflation for 1974 dollars, when 19 the \$1,000 limit was approved. This is a contribution 20 limit of \$50 for an --21 JUSTICE KENNEDY: Well, to get back to 22 Justice Souter's questions, could you answer it this 23 way? Let's assume that some members of the Court 24 simply accepted the proposition that money buys access. 25 And -- and I don't think maybe we can take judicial of

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1 that, but I -- I think that's a common sense conclusion 2 that we can reach. And you tend to fight this in your brief to say that this doesn't happen. I tend to doubt 3 4 that. I tend to think money does buy access. What --5 if -- if we or I were to conclude that, what would 6 follow? 7 MR. BOPP: Well, I think it's not a matter of 8 just access. It has to be a matter of privileged 9 access that this Court found in the --10 JUSTICE KENNEDY: All right. Let's say it's 11 privileged access. 12 MR. BOPP: Well, if it -- if it's privileged 13 _ _ 14 JUSTICE KENNEDY: I mean, isn't the answer 15 that the -- that this is up to the voters. The voters 16 can see what's going on and throw the legislator out if 17 they choose. 18 MR. BOPP: Indeed, and in fact, the -- there 19 are other less restrictive ways of -- of dealing with 20 this. For -- for instance, Vermont prohibits 21 contributions from lobbyists during the session. Other 22 legislatures have imposed a prohibition on incumbents 23 from raising any money during the time the legislative 24 session -- the legislature is in session. So there are 25 ways of dealing with the question of access that are

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1 not the blunderbuss approach here.

2 JUSTICE KENNEDY: It -- it is true that all the polls say that there's public disaffection and 3 4 cynicism. Does that translate into action to defeat 5 incumbents who take particularly large sums of money? Is there -- is there statistical evidence to show that? 6 7 MR. BOPP: I'm not aware of that. But 8 certainly the press and opponents often, you know, 9 point to examples where they believe that their challenger is under too much of an influence of a 10 11 particular entity, and the voters, you know, in certain 12 circumstances take that into account in their voting. 13 And furthermore, it is true that there is a general cynicism about politicians and government that 14 15 has existed since the first colonists came to our 16 country and continues today. In fact, our governmental 17 system is established on the proposition that we need to limit the -- the government, and we need to have 18 19 checks and balances because we don't want free rein by 20 politicians because we are concerned about their 21 exercise of power. 22 But if this is enough --23 JUSTICE STEVENS: May ask you this question, 24 Mr. Bopp? This -- in -- following up on Justice 25 Ginsburg's inquiry, is it your view that there is no

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set of facts, no matter how scandalous and so forth and so on, Watergate and all the rest of it, could ever justify an expenditure limit?

MR. BOPP: That is not our position.
JUSTICE STEVENS: Well, if that's the case,
then why -- why would it be inappropriate to have
further hearings in this case to see whether they're -they could be justified?

9 MR. BOPP: Because there have been legal 10 findings by the Second Circuit that we believe are 11 erroneous. The -- the first, as I mentioned 12 previously, is that -- that we do not believe that the 13 -- preserving incumbents' time through expenditure 14 limits can ever be a compelling governmental interest, 15 to limit what challengers can spend -- raise and spend 16 in their own election. I mean, this interest -- the 17 expenditure limits don't apply just to incumbents who 18 -- if there is a concern about --

JUSTICE STEVENS: No, I understand. I'm just curious to know what sort of -- what sort of evidence could ever support an -- an expenditure limit in your view, if -- if any.

23 MR. BOPP: I have a -- a very difficult time 24 justifying expenditure limits.

25 I know there's a debate on this Court on

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1 whether or not there are per se situations under the 2 First Amendment. If there was ever a candidate for a per se First Amendment ban on a law, surely it would be 3 4 this type of case. In other words, we are talking 5 about speech that is at the core of the First 6 Amendment, and secondly, we are talking about candidate 7 speech. Candidates are the ones that go into office. 8 They are the ones that are going to be exercising 9 governmental power. These low expenditure and 10 contribution limits would have the effect of making 11 candidates a bit player in their own election so that 12 the voters --

13 CHIEF JUSTICE ROBERTS: Counsel, with respect 14 to the contribution limits, what -- what makes this 15 case different from the -- the Shrink PAC case from a 16 few years ago?

MR. BOPP: Well, several things. First is there was actually a paucity of evidence in the Shrink PAC case. There was only an allegation of one PAC that wanted to give one contribution to one candidate, and this Court said that, you know, you didn't need a lot of evidence to combat such a weak -- weak claim.

23 So secondly is the novelty and plausibility 24 of a -- adjusted for per election in 1974 dollars of a 25 \$50 contribution limit, that that would actually give

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rise to realistic concern about actual and perceived
 corruption. So, again, in Shrink PAC --

3 CHIEF JUSTICE ROBERTS: So you think it --4 you think it's the dollar amounts that are involved? 5 MR. BOPP: Well, one of the decisions that 6 the Court has to make under your jurisprudence is that 7 -- that contribution limits can only eliminate large 8 contributions that give rise to this realistic 9 perception or actuality of corruption. So it is --10 whether it's large or not and giving rise to that 11 concern because of the size, that is an integral part 12 of the Shrink analysis.

13 JUSTICE SOUTER: It -- it was pointed out in -- in one of the briefs -- and I -- I didn't go back 14 15 and check it myself, but I'd like your comment. It was 16 pointed out in one of the briefs that the limits in 17 Vermont were substantially close to or even -- even 18 higher than the -- than the limits in the Missouri 19 scheme, out of which the Shrink litigation grew. Do 20 you know whether that is correct?

21 MR. BOPP: Well, it depends on how you -- you 22 compute it. The --

23 JUSTICE SOUTER: It always -- it always does, 24 yes.

25 (Laughter.)

1 MR. BOPP: The -- well, certainly what the --2 what the evidence was in Shrink was it was a \$1,075 limit, again adjusted for inflation, was about \$375 3 4 adjusted for inflation compared to the Buckley limits, 5 and because of the paucity of evidence and the fact 6 that it wasn't really novel to say that a \$1,000 limit 7 could give rise to corruption because --8 JUSTICE GINSBURG: But there were lower 9 limits, Mr. Bopp, and I think that's what Justice 10 Souter was asking about. 11 JUSTICE SOUTER: Yes. 12 JUSTICE GINSBURG: There were the thousand 13 dollars, but I think it went down as low as \$250 in --14 JUSTICE SOUTER: Yes, take the whole schedule 15 in Missouri. 16 MR. BOPP: Yes. Well, the -- the 17 contribution limits that this Court considered was the 18 \$1,075 --19 JUSTICE GINSBURG: There -- there was a court 20 that subsequently considered the rest and upheld the 21 contribution --22 MR. BOPP: Yes, there was. The Eighth 23 Circuit did so and the -- the lowest limit there was 24 \$275 per election, which would be \$500 for -- for the 25 -- the entire election cycle. And the -- and -- but

really that -- that was on a -- a record that this Court found to be, frankly, inadequate to -- to raise any serious questions about the -- whether the amounts concerned gave rise to a realistic threat of corruption.

And the record here demonstrates that -- that the -- that the only time really there is a actuality or perception of corruption in Vermont is when they -is when we're talking about amounts in excess of \$1,000. That was the prior limit.

JUSTICE SCALIA: And we -- we didn't send it back so that more of a record could be made, did we? MR. BOPP: No. No.

And, you know, we had a 10-day trial. We had numerous witnesses here. The -- Shrink had been decided. I mean, there was -- everything was before the court to consider the -- the matter.

18 And so, you know, they had their chance at --19 at proof. And -- and in the numerous witnesses, they 20 made their best case. They could not identify one 21 single politician in Vermont that was -- that anyone 22 would -- would claim was corrupted in any way by a 23 contribution -- by contributions under \$1,000. They 24 could not name one single incumbent politician in 25 Vermont that neglected any specific duty that he or she

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1 had.

2 JUSTICE SCALIA: Well, but you know. You 3 expect them to name names? I mean, here --4 (Laughter.) MR. BOPP: Well, if --5 6 JUSTICE SCALIA: Really, that -- that's --7 that's a lot to ask. 8 MR. BOPP: Well -- well, they at least have 9 to give, you know, realistic circumstances. They gave 10 a few circumstances --11 JUSTICE KENNEDY: Well, suppose three 12 legislators had been corrupted, venal, criminal 13 corruption, actually taking no wink-wink, nod-nod, a 14 specific agreement to vote for money. So what? Does 15 that change your case? 16 MR. BOPP: Well, the -- the responsibility 17 that Shrink imposes is to -- to demonstrate both actual 18 and perceived corruption at that the --19 JUSTICE KENNEDY: Suppose -- suppose that had 20 been demonstrated in -- in a particular State. Does 21 that mean, in your view, that a State can have strict 22 contribution limits and support? 23 MR. BOPP: If it's just anecdotal, no. It 24 has to be --25 JUSTICE KENNEDY: No. It's true. It's --

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1 it's done. There have been criminal convictions. 2 MR. BOPP: Well, the -- if it's isolated examples that are unconnected to any perception of 3 corruption at that level, then it would not be adequate 4 5 on -- on its -- on its -- by itself. 6 Now, of course, in Shrink, the Court cited to 7 both actual and perceived evidence of corruption at the 8 level that the -- you were considering that limit. 9 JUSTICE KENNEDY: Well -- well, if -- if you -- if you concede and -- and you tend, at least, to 10 11 back away from the proposition that the case I put 12 would be an inadequate ground or an adequate ground for 13 legislative limits, then I suppose you can say the 14 State has the power to prevent this from happening to 15 begin with. 16 MR. BOPP: Well, this Court has never 17 approved restrictions on fundamental First Amendment 18 values based purely upon speculation or concern about 19 something that's happening some other place. In other 20 words, these are real limits on people in Vermont, and 21 it seems to me that to approve the lowest contribution 22 limits in the Nation and these very low expenditure 23 limits, the State would have to demonstrate that 24 Vermont is the most corrupt State in the Nation. And 25 they're far from it. In fact, the opposite --

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JUSTICE SCALIA: Only -- only the most
 corruptible.

3 (Laughter.)

4 MR. BOPP: Nor corruptible. The -- the 5 evidence is quite clear. Even in the few examples that 6 they cite to like the tobacco industry passing out \$40 7 checks after a -- a vote defeating a bill. Of course, 8 that's still legal under this -- this act. But, you 9 know, even pointing out that they -- that the person 10 who talked about that example made it clear that he 11 didn't believe anybody was -- was influenced by post-12 contributions after a vote regarding a matter that's 13 not even prohibited by this -- by this act.

So it was -- it was a lot of testimony about how truly clean Vermont is, not the most corrupt, where people -- politicians would be tempted at these quite low limits to, you know, sell their honor and -- and personal, you know -- and their -- and affect their own, you know, personal character and reputation.

JUSTICE SOUTER: Mr. Bopp, toward the end of your brief, you -- you make the argument that if we accepted the State's position in this case, we implicitly would have accepted the position that totally -- totally publicly funded elections would be constitutional. And -- and I -- I realize your -- your

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1 concern there was with expenditure limits, obviously, 2 not contribution limits. You didn't come out and say it, but I -- I assume your position is that that would 3 4 be unconstitutional per se. A totally publicly funded 5 scheme would be unconstitutional per se. 6 MR. BOPP: The key would be if it's mandated, 7 voluntary --8 JUSTICE SOUTER: Yes. 9 MR. BOPP: If it was mandated, yes, it would be unconstitutional. 10 11 JUSTICE SOUTER: And -- and its 12 unconstitutionality would rest on the limitation on 13 expenditure, in effect? 14 MR. BOPP: Yes. Oh, yes. Well, there would 15 be a prohibition in that case if I understand your --16 JUSTICE SOUTER: Oh, yes, yes. 17 MR. BOPP: -- on -- on contributions, and 18 there would be also a -- a mandatory expenditure limit 19 because you could only spend what the government gave 20 vou. So that would have all those features. 21 Now, if it was, of course, voluntary, it 22 would solve the -- the two problems that -- that the 23 State talks about because if you have a voluntary 24 public funding system -- and this is, again, why remand 25 is -- is inappropriate. You don't need to go back and

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-- and determine whether or not the legislature
 considered providing adequate public funds. I mean,
 it's whether that alternative exists.

4 JUSTICE SOUTER: But on -- on your view, if -- if there were a -- a mandatory publicly funded 5 scheme and the -- the limits on expenditure were very 6 7 high -- it was a very generous scheme. They gave them 8 lots of money -- it would still be unconstitutional 9 because there would be -- I -- I take it on your view, 10 because there would be an elimination of any way to 11 participate by contributing. Is that correct? 12 MR. BOPP: There would be an absolute 13 prohibition, and this Court in -- in Beaumont reserved 14 that question of whether or not an absolute prohibition 15 -- and -- and then in McConnell, you struck down the absolute prohibition on minors' contributing to 16 17 campaigns. So, yes, there would be a absolute 18 prohibition on any way for any individual to associate 19 with a campaign through a contribution. 20 JUSTICE SCALIA: Well, it would also prevent 21 the candidate himself from expending his entire 22 fortune, if he wishes, in informing people of why he

23 should be elected --

24 MR. BOPP: Yes, that is true.

25 JUSTICE SCALIA: -- think that's okay.

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MR. BOPP: And -- and in the record below, plaintiff Donald Brunelle said that he was prepared to spend considerable sums in support of his State Senate election, which -- and considerable sums above the expenditure limits that were before -- that were adopted by Vermont. So the -- the question is an independent --

3 JUSTICE SCALIA: Which raises no possibility9 of corruption.

10 MR. BOPP: Well, nor -- nor on fund raising 11 using up your time because all a wealthy person has to 12 do is write a check. And -- and, of course, in 13 Vermont, they even have an exception for not only just 14 the wealthy -- wealthy candidate, but the wealthy 15 family. So, you know --

16 JUSTICE SCALIA: I don't know what you mean 17 they have an exception for the wealthy family.

18 MR. BOPP: Yes. To a third degree of 19 consanguinity, people who are related to you to that 20 degree are not subject to the contribution limit. So, 21 you know, it's hard to justify Vermont's scheme if 22 you're concerned about the influence of the wealthy 23 because they're giving the wealthy carte blanche to 24 fund their own campaigns, even under these limits. So a wealthy person who runs for Governor -- he has no 25

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fund raising costs. So -- and -- and he can get contributions from others that are related by blood, but not by marriage, interestingly, to -- to him. So the public funding or the expenditures by -- by the wealthy neither give rise to -- and both solve -either don't give rise or solve the problems that they claim.

8 So there's -- there's -- you don't need a 9 remand to consider that -- that question, and that is 10 one of the questions that the Second Circuit has asked 11 that -- that the matter be remanded for.

Now, in addition, the expenditure and contribution limits here are not going to allow even effective campaigns. We have considerable evidence in the record that to run an effective campaign for Governor in Vermont, it takes \$600,000 to \$800,000; for the Senate --

JUSTICE GINSBURG: Mr. Bopp, may I ask you? You keep -- the way you're discussing this case, one would think that the trial court found there was an evidentiary insufficiency, but I thought, at least on the contributions part, the trial court found that the evidence sufficed to justify those limits. MR. BOPP: They did, but erroneously, and I

24 mk. Borr. They ald, but erioneously, and 1
 25 -- we believe that you have a responsibility to do an

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1 independent examination of the record. For instance, 2 there was a finding by the district court that these amounts were, quote, suspiciously large. Now, if you 3 4 look at the record and you look at the six individuals 5 6 JUSTICE SCALIA: Excuse me. What -- what 7 amounts were suspiciously large? 8 MR. BOPP: The contribution limits -- amounts 9 over the contribution limits for --10 JUSTICE GINSBURG: Can you -- can you point 11 to the place in the district court opinion that you're 12 referring to? 13 MR. BOPP: I am sorry. I do not have that in That the district court found that the 14 front of me. 15 amounts prohibited under the contribution limits by 16 Vermont were, quote, suspiciously large, and then they 17 cited six different witnesses. We have reviewed each 18 -- in our reply, each one of those witnesses, and it is 19 simply not true that any of them said that it was 20 suspiciously large, that is, that if there was any 21 relationship between contributions between the old 22 limits of \$1,000 per election and these new, much --23 much lower limits, if there was any -- any witness 24 related contributions of that size to any threat of 25 corruption. In fact, in the examples that are given,

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they disclaim that there was any -- that anybody was bought or influenced in any way by the contributions that were made.

4 Now, the -- in terms of an effective 5 campaign, of course, under Shrink if a expenditure --6 if a contribution limit amounts to an expenditure limit 7 -- and the Court commented on this. This Court 8 commented on this in -- in Citizens Against Rent 9 Control v. Berkeley. If a contribution limit acts as an expenditure limit, then it can -- it will be also be 10 11 struck down if the candidates cannot mount effective 12 campaigns.

13 And here we have demonstrated in the record 14 what an effective campaign amounts to, and the amounts 15 even for the House district of \$2,000 would be simply 16 used up by 1 brochure, 100 yard signs, and 1 postcard 17 mailing. All of these have been valued in the record, 18 and that would amount to \$1,500 to \$2,000, almost the 19 entire amount allowed, not allowing even one mailing to 20 all voters in -- in that House district.

I'd like to reserve the balance of my time.
CHIEF JUSTICE ROBERTS: Thank you, counsel.
General Sorrell.

24 ORAL ARGUMENT OF WILLIAM H. SORRELL

25 ON BEHALF OF RESPONDENTS SORRELL, ET AL.

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MR. SORRELL: Mr. Chief Justice, thank you,
 and may it please the Court:

Justice Kennedy, you raised the issue of whether money buys access. It clearly does. Our Governor admitted that in a State of the State address. But we also had testimony at trial from a former statewide officeholder that money, of course, buys access, but on the bad days, it buys influence. And we had the President --

10CHIEF JUSTICE ROBERTS:Counsel --11MR. SORRELL: -- of the Senate --

12 CHIEF JUSTICE ROBERTS: Counsel, you -- you 13 say in your brief -- I'm reading from page 13 -- that 14 the record convincingly shows that the ties among donor 15 groups and elected officials often determine the 16 positions officials take. Can you give me an example 17 of an official who took a position because of the ties 18 to donor groups?

MR. SORRELL: The -- there was testimony that the President of the Senate said to another Senator who was testifying at trial, we've lost the drug money. I'm not willing to lose the food manufacturer money, so I'm not going to sign this bill. That same President of the Senate testified in a legislative hearing -- I -- he admitted that he makes decisions in performing

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1 his legislative duties because of that whole lot of 2 money that he had collected in the year before. 3 CHIEF JUSTICE ROBERTS: So your position is 4 that that official's official positions were determined 5 by the donor groups, as you say in your brief. 6 MR. SORRELL: Influenced and --7 CHIEF JUSTICE ROBERTS: Well, your brief says 8 determined. And did -- did you --9 MR. SORRELL: Have an influence and we would 10 suggest an undue influence in some cases. 11 CHIEF JUSTICE ROBERTS: So it should say 12 influenced rather than determined. 13 MR. SORRELL: We didn't have anyone, as 14 Justice Scalia asked, who stood up and admitted to 15 having taken bribes. We did have the Senator, who was 16 the chair of the Senate Finance Committee, who said 17 that she's not in favor of tax credits, but she had a 18 donor to her campaign who had given \$500 in one 19 campaign cycle and \$1,000 in another cycle, and she 20 allowed a tax credit to go through her taxing 21 committee, even though substantively she didn't like 22 tax credits. 23 CHIEF JUSTICE ROBERTS: How many prosecutions 24 for political corruption have you brought? 25 MR. SORRELL: We have not had any of

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1 legislators or statewide officers that I'm aware of. 2 CHIEF JUSTICE ROBERTS: Do you think that political corruption in Vermont is a serious problem? 3 4 MR. SORRELL: It is a serious problem. Over 5 70 percent of Vermonters at -- there was testimony at 6 trial from an expert that over 70 percent of Vermonters 7 believed that corporate interests and wealthy 8 individuals have an undue influence on politics in the 9 State, and I think 73 percent believe that the average 10 citizen --11 CHIEF JUSTICE ROBERTS: Would you describe 12 your State as a clean State politically or as a corrupt 13 one? 14 MR. SORRELL: We have a real problem in 15 Vermont. We haven't had a Governor go to prison. We 16 haven't had legislators tearfully apologizing for 17 having taken bribes, facing an indictment the next day. 18 But we have got a problem in Vermont. In over 65 19 hearings before our legislature and then through a 10-20 day trial, we established that as the trial court said, 21 the threat of corruption in Vermont is far from 22 illusory. 23 JUSTICE SCALIA: To the extent that Vermont 24 legislators can be bought off by \$51? 25 (Laughter.)

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1 MR. SORRELL: There's nothing in the record 2 ___ 3 JUSTICE SCALIA: That's very sad. 4 (Laughter.) 5 JUSTICE SCALIA: But that's the limit you've 6 placed on -- on contributions. 7 MR. SORRELL: I -- no. 8 JUSTICE SCALIA: I mean, the -- you know, if 9 -- if you accept more than \$51, you're -- you're likely 10 to have your vote determined by that. 11 MR. SORRELL: No, I -- we don't suggest -- we 12 don't suggest that. 13 JUSTICE SCALIA: Then why -- why the \$50 14 limit? It certainly isn't based on the corruption --15 MR. SORRELL: I don't know what \$50 limit you 16 are talking --17 JUSTICE BREYER: No, no. He's thinking in --18 he sometimes thinks in the past. He's --19 (Laughter.) 20 JUSTICE BREYER: He's translated it into 1974 21 or '72 real dollars. 22 MR. SORRELL: Oh, it's --23 JUSTICE BREYER: It's \$200. The same 24 question or \$201. 25 MR. SORRELL: It's the math.

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1 The reality is that these contribution limits 2 that we had -- we had examples under the old 3 contribution limits. Even Petitioner Randall admitted that in Vermont, a \$1,000 contribution -- if you 4 5 receive a \$1,000 contribution in Vermont -- this is one 6 of the petitioners -- then Vermonters think that you've 7 been bought. And that's the reality --8 CHIEF JUSTICE ROBERTS: And they can -- and 9 presumably they act accordingly at the polls. If they

10 think someone has been bought, I assume they don't 11 reelect the person.

MR. SORRELL: The Buckley court thought that disclosure obligations and contribution limits alone would be -- would suffice to address corruption and --JUSTICE BREYER: But I have the same question Justice Scalia had. I mean, the -- the question is you -- you have limits here of \$100 per election. It's

18 \$200 per cycle.

MR. SORRELL: For a House race, yes. JUSTICE BREYER: For a House. \$300 for the Senate, \$400 for a candidate for statewide office, including the Governor. That's \$200 for an election for Governor. You throw in contributions in kind. You say that the political parties themselves cannot give more than that \$200 for an election for the Governor.

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1 If we translated those into 1974 dollars, they're just 2 the numbers Justice Scalia mentioned, and I would like 3 to know why are they -- why does not give incumbents a 4 tremendous advantage, that if you have the incumbent 5 plus a newspaper, it's hopeless, that there's no way of 6 spending as a challenger. In other words, why aren't 7 these limits far too low?

8 MR. SORRELL: Incumbents had a much more of 9 an advantage in the pre-Act 64 world. They could raise 10 more money and spend more money than --

11 JUSTICE BREYER: It's not going to help to 12 say incumbents had a bigger advantage before. That is, 13 the question is, what we're interested in is -- at 14 least what I've written that I'm interested in, is at 15 what point do these become so low that they really, as a significant matter, shut off the possibility of a 16 17 challenge. And from that point of view, your numbers, 18 which do not tell me the expenditures in a competitive 19 district, and your numbers, which do not explain all 20 the problems that Judge Winter had with these things, 21 That's why I'm asking you the question. do not help. 22 MR. SORRELL: Vermont has the --23 JUSTICE BREYER: I want your answer. 24 MR. SORRELL: Vermont has the second lowest 25 gubernatorial spending in the country. In the record

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1 it shows that in the largest urban area in the State, in the Burlington area, you can buy three 30-second TV 2 ads in prime time on tier one cable for \$45. 3 4 JUSTICE BREYER: I'm not talking about the 5 I'm talking about the contribution expenditure. 6 I and my friends have the following thought. limits. 7 We don't know who the candidates for State rep are, but 8 we want a Republican slate or we want a Democratic 9 slate. So we get all our \$5 together, give them to the 10 Democratic Party or the Republican Party in Vermont, 11 and lo and behold, that party cannot give more than 12 \$100 in an election to a State rep, et cetera. 13 Now, to the -- to the ear, that sounds as if 14 a challenger or a slate of challengers or a party that 15 wants to challenge is going to have a really tough 16 So I want you to explain it. time. 17 MR. SORRELL: The extensive record below 18 shows that with these contribution limits, attacking 19 the corruption and the appearance of corruption issue, 20 the candidates can amass the resources necessary to run 21 effective campaigns at all levels. 22 JUSTICE SCALIA: It shows that on average. 23 It doesn't show that in the competitive races, which is 24 where the -- where the shoe pinches.

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25 MR. SORRELL: The -- the reality is that --

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that in virtually all classes of races, other than the single-member Senate races, that average spending was below these expenditure limits, and these include contested cases with primaries, without.

JUSTICE SCALIA: That's just what I said. Your figures show that the average spending is below, but that's not what's significant. What's significant is what Justice Breyer posed, where -- where there is a contested race and -- and some new candidate wants to unseat somebody who's been in there for years. That's -- that's where the shoe pinches.

MR. SORRELL: And, Justice Scalia, under our law, the challenger can spend more than the incumbent because the incumbent has a lid not -- of 85 percent or 90 percent of the expenditure limit, depending on whether it's a legislative race or a -- or a statewide race. But the -- the issue here is you're going to have some -- some outliers.

But we have core constitutional interests in trying to enhance the integrity of our campaigns. We have this problem. The legislature reached a balance here. It looked at what -- how much you would need to run effective campaigns. It set --

JUSTICE KENNEDY: But in -- in any -- or in many campaigns, the -- the issues take shape during the

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process of the campaign, and there are historical events, national events that suddenly occur that people want to comment on. And I -- I just don't see that there's any capacity for adjusting so that the public can know how candidates are facing issues that are beginning to emerge that the public has a vital interest in.

8 My understanding was that a quarter-page ad 9 in the Burlington newspaper was, I think, \$1,400. Now, 10 it's -- it's gratifying to know that Vermonters are 11 splurging on cable television, but it -- it --

12 (Laughter.)

JUSTICE KENNEDY: -- it seems to me that this is a highly restrictive rule insofar as having the campaign be able to address the issues that the voters say that they've become interested in.

MR. SORRELL: We have the second lowest -smallest legislative districts in the country, 4,000 citizens per single-member legislative district.

20 Sure, that's what it costs to take out an ad 21 in the Free Press, but there's nothing in the record to 22 show that House candidates, legislative candidates, 23 take out those size ads in -- in the Burlington Free 24 Press. The record is otherwise. The record reflects 25 that it's primarily door-to-door campaigning for

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1 legislative races. If you're taking out an ad, it's in 2 -- it's a flyer in one of the -- the weekly papers. Petitioner Donald Brunelle admitted that he ran a 3 4 competitive race for the House, spending \$1,000, that 5 included yard signs, a mailing to his constituents, and 6 flyer advertisements in -- in the newspaper. 7 JUSTICE SCALIA: Did he have a primary? 8 MR. SORRELL: I don't know whether he had a 9 primary or not. 10 JUSTICE SCALIA: That's another feature of --11 of this scheme that I find quite puzzling. You get the 12 same expenditure limit for the election cycle whether 13 you go through a primary or not. What an advantage 14 that is for the incumbent. 15 MR. SORRELL: The -- there was testimony in 16 the record that those who have a primary might actually 17 get a bump over others who are not challenged. 18 But as the district court pointed out, in 19 Vermont what makes Vermont different is that our 20 primary is late. It's the second Tuesday in September, and so it's less than 8 weeks from the general 21 22 election. It's not like having a primary in the 23 spring. 24 And as the legislature during those 65 25 hearings considered the campaigning, they considered

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all kinds of campaigns, including contested primaries and not, and again, average spending in these campaigns was, with minor exception of the single-member Senate districts, of which there are three -- that average spending was below these expenditure limits. So in the average campaign, you could actually spend more than -than on average is being spent.

8 And the issue, when you've got competing 9 constitutional interests, is whether we address our problems of corruption, appearance of corruption. 10 We 11 try to free up candidates' and public officials' time 12 from fund raising. We try to create competitive 13 elections and bring more citizens into the process 14 voting, grassroots campaigning, and standing for 15 election. We want more people to run.

JUSTICE SOUTER: Mr. Sorrell, would you go back to the -- your comment on -- on average expenditures? Do we know from the record how many of the -- how many of the contests, on the basis of which the average was calculated, were contests in which there was a -- a contested primary?

22 MR. SORRELL: We don't have that evidence in 23 the record. What we have is that we -- the experts 24 looked at total spending, which would include primary 25 spending and general election spending, and our figures

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went from that. And our expert, by the way, considered all races, even those for which campaign finance reports were not filed, meaning that the candidate hadn't raised or expended more than \$500, and assumed \$500 in spending in each one of those -- each one of those races. So our average spending figures actually might be a little higher than -- than reality.

8 JUSTICE GINSBURG: Was there any testimony or 9 evidence on the other side of the point that Judge Winter makes? That is, you have someone running in a 10 11 primary and then faces an incumbent in the general 12 election, but there's nothing left in the till because 13 it was a hard-fought primary. That -- the advantage to the incumbent in that situation was a large concern to 14 15 at least some of the judges on the Second Circuit.

MR. SORRELL: And that might be an issue that on remand -- and this case is being remanded on a couple of issues that aren't even before this Court. JUSTICE GINSBURG: Not on the contributions, is it?

21 MR. SORRELL: No, it's not on the 22 contributions, but it is going back to the court on 23 issues of transfers of money from national parties to 24 State parties and on whether related or coordinated 25 expenditures are, indeed, allowed to be an expenditure.

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So the case is going back to the trial court on those
 bases anyway.

3 JUSTICE SOUTER: But it's not going back on 4 the expenditure limit.

MR. SORRELL: I --

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6 JUSTICE SOUTER: I mean, the problem, I mean, 7 I was getting at and Justice Ginsburg is getting at, 8 Judge Winter got at it. The -- the problem is -- is 9 the -- the total limitation on an election cycle, 10 including the primary, when the primary involves a 11 challenge so that the challenger has an uphill fight 12 presumably to start with in the primary. And if he's 13 going to maintain an effective uphill fight in the primary and he's lucky enough to win, he's going to get 14 15 to the general election and he's going to be broke. 16 That's -- I mean, that's -- that's the problem that 17 we're concerned with.

18 MR. SORRELL: That has not been a problem 19 that was reflected in the record either before the 20 legislature or at trial. This is a facial challenge 21 for the law, and you know, that situation of a primary 22 candidate who, for whatever reason, felt that he or she 23 needed to expend up to close to the expenditure limit 24 -- it wouldn't be very prudent, but that could be an 25 issue.

1 But, you know, we do not control independent 2 expenditures under our law, and we certainly don't 3 limit volunteer services. There's a tremendous amount 4 of campaigning that can go on between a primary and a 5 general election even with a limited amount of funds 6 available. 7 JUSTICE SCALIA: If the burden is on the 8 candidate to establish that -- that somebody's 9 expenditure is independent and shouldn't be counted 10 against his expenditure limit. 11 MR. SORRELL: No. There is a presumption 12 under our law --13 JUSTICE SCALIA: A presumption, which means 14 the burden, to go forward and show the opposite, is on him. Right? 15 16 MR. SORRELL: Well, but it could be on the --17 on the party because --18 JUSTICE SCALIA: And the money that he spends 19 in overcoming that presumption is charged against his 20 expenditure. Isn't that right? 21 MR. SORRELL: No, Justice Scalia. The 22 Secretary of State reached a -- issued an opinion that 23 we -- our office agrees with, that expenditures on 24 attorneys for, you know, ballot access questions and 25 the like are not in furtherance of the candidacy and

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1 would not apply against the expenditure --2 JUSTICE SCALIA: The other side says the opposite. I'll ask them whether that's --3 4 MR. SORRELL: But the -- the Secretary of 5 State's public opinion that we, the enforcement authority, agree with is to the contrary. 6 7 JUSTICE SOUTER: May -- may I ask --8 JUSTICE KENNEDY: Well, I suppose the Vermont 9 courts could construe it more narrowly at some later 10 point. I would hate to rest the opinion on that. 11 MR. SORRELL: The -- the -- under Vermont 12 law, a presumption such -- such as this is not a burden 13 -- creates no burden of persuasion, nor does it change 14 the burden of proof. 15 JUSTICE SOUTER: Well, you know, I looked at 16 your -- the -- the references in your brief for that 17 proposition, and I did not see them borne out. You 18 referred to a -- a footnote in the district court 19 opinion which, in turn, refers to the remark of a 20 sponsor of the amendment that -- that resulted in the 21 presumption being in the law. And the only thing that 22 was attributed to the sponsor was that the presumption 23 should be regarded as rebuttable. The -- the footnote 24 in the statement did not indicate that the presumption 25 was a disappearing presumption, once the other side

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went forward with any evidence. So I don't see, based on your -- your citations, that the presumption goes away simply by -- by one party going forward with evidence.

5 MR. SORRELL: Well, if you -- if some entity 6 that has the burden of proof to show, in fact, that it 7 was a related or coordinated expenditure has the party 8 on the one hand and the candidate on the other saying, 9 we did not coordinate here, I didn't ask for it, I 10 didn't approve it, and then where is the evidence? 11 JUSTICE SOUTER: The -- the point is what if 12 we don't have that simple of a situation. 13 Let -- let me ask you this. Maybe we can 14 short-circuit this. I mean, do you represent as an --15 as a statement of Vermont law that this Court should 16 decide the case on the assumption that the presumption 17 is a disappearing presumption, once evidence is offered 18 against it? 19 MR. SORRELL: Yes. 20 JUSTICE SOUTER: Okay.

21 MR. SORRELL: Well, credible evidence, yes.

22 Yes.

23 CHIEF JUSTICE ROBERTS: Is -- is an affidavit 24 from the candidate enough credible evidence in your 25 view?

1 MR. SORRELL: Yes. 2 JUSTICE SCALIA: And thereafter, all the -all the candidate has to say is in an affidavit, no, it 3 4 wasn't coordinated, and then the burden is on the State 5 to show that it was. 6 MR. SORRELL: If the State is the party 7 that's trying to prove that it was, in fact, a 8 coordinated expenditure, under the law -- it would 9 typically be a opposing candidate who tries to --10 JUSTICE SCALIA: Okay, the opposing candidate 11 or the State. 12 MR. SORRELL: So Justice Brandeis said that 13 there's room under our system for a courageous State to 14 experiment. 15 JUSTICE BREYER: Just can I ask a technical 16 question here? 17 MR. SORRELL: Yes. JUSTICE BREYER: Just -- is -- is it the case 18 19 or not the case that if I contribute my car to drive 20 the candidate for Governor, let's say, between 21 Burlington and Montpelier, and I buy the gas, does that 22 count against the limit? Yes or no. I'm a volunteer 23 and I buy gas and drive him back and forth. 24 MR. SORRELL: Yes, you drive. Then the 25 answer is no.

JUSTICE BREYER: No. He drives. 1 2 MR. SORRELL: Well, but it's your car, you're 3 there. No. JUSTICE BREYER: No, I'm not there. I lent 4 5 him the car. 6 (Laughter.) 7 JUSTICE BREYER: Okay. I got the idea. If 8 he does -- if I do, it's not. 9 What about I have a coffee -- coffee. I wanted to get the line. I see it. Coffee. I want to 10 11 have coffee and donuts, free donuts because -- and 12 coffee for people to come in. Is that counted or not? 13 MR. SORRELL: As long as it's under \$100. 14 JUSTICE BREYER: No, no. It's \$200. Coffee 15 and donuts are expensive. 16 (Laughter.) JUSTICE BREYER: Okay? Count it or not? 17 18 MR. SORRELL: We don't -- our coffee is not 19 that expensive, but --20 JUSTICE BREYER: Donuts and coffee. In other 21 words, it counts as long as it's over \$100. 22 MR. SORRELL: Yes. JUSTICE BREYER: Under \$100. Under \$100. 23 24 MR. SORRELL: No. Over \$100 counts. 25 JUSTICE BREYER: Counts.

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1 MR. SORRELL: Under \$100, it does not. 2 My time is expired. 3 CHIEF JUSTICE ROBERTS: Thank you, counsel. 4 MR. SORRELL: Thank you. 5 CHIEF JUSTICE ROBERTS: Ms. Wright. 6 ORAL ARGUMENT OF BRENDA WRIGHT 7 ON BEHALF OF RESPONDENT 8 VERMONT PUBLIC INTEREST RESEARCH GROUP 9 MS. WRIGHT: Mr. Chief Justice, and may it 10 please the Court: 11 I'd like to return to a question that Justice 12 Kennedy asked earlier about why, if there are examples 13 of corruption that the public becomes aware of, why the public doesn't respond simply by voting the individual 14 15 out of office. And I think it's important to point out 16 that some of the most serious examples of corruption on 17 this record or of the undue influence achieved by 18 monetary concerns were not examples that ever became 19 public except in the course of the trial of this case 20 when we had witnesses come forward to testify about 21 some of their own personal experiences in the 22 legislature. By the very nature of the problem of 23 candidates becoming unduly beholden to the interests

24 that can provide the greatest sums for their campaigns,

25 those kinds of incidents are not going to typically be

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1 a matter of discussion --

2 JUSTICE SCALIA: No, but I -- I thought that 3 the point was that the public mistrusts their 4 representatives because of large donations, and I 5 thought the point being made was, well, if that's the 6 case and the public sees that this fellow has gotten a 7 \$10,000 donation, the public will say this -- this 8 fellow is in that -- is in that corporation's or that 9 person's pocket.

10 MS. WRIGHT: But the --

11 JUSTICE SCALIA: And I won't vote for that 12 person. You -- you don't have to show that -- out of 13 the mouth of the candidate, that -- that he voted for the bill because he got \$10,000. The mere fact that 14 15 it's on the public record that he got \$10,000, if -- if 16 what you say is correct, that -- that people are 17 worried about, the -- the corruptive effect of such 18 donations, people should logically vote against that 19 candidate who accepts so much money.

MS. WRIGHT: Two points on that, Your Honor. First of all, the problem of holding candidates accountable in that manner is greatly exacerbated when you have a system of unlimited spending in which all of the candidates involved feel compelled to go out and raise as much as they can in order to forestall the

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1 possibility of being outspent. Then when a voter says, 2 well, why are you doing this, the candidate has a ready-made answer. If I don't do this -- you know, 3 4 maybe I'd rather not, but if I don't, I'm going to be 5 bested in the fund-raising arms race. And voters 6 reluctantly have come to --7 CHIEF JUSTICE ROBERTS: But I thought --8 MS. WRIGHT: -- understand that that's --9 CHIEF JUSTICE ROBERTS: -- when you look at 10 the -- the record, Vermont would be the last place that 11 you'd be worried about it. The political culture, as 12 we just heard, is that it's easy to go door to door, 13 and that's what the Vermonters expect. And it doesn't 14 take an arms race to get on your feet and go door to 15 door. And it seems to me that there's a real dilemma 16 on the respondents' side of the case between justifying 17 low limits by saying you don't really need money to run 18 effectively and at the same time suggesting that 19 there's a serious problem with too much money. 20 MS. WRIGHT: Well, but --21 CHIEF JUSTICE ROBERTS: Which is it? 22 MS. WRIGHT: -- what we do have is candidates 23 -- even though it is possible to run effective 24 campaigns in Vermont for lower amounts, candidates 25 nevertheless go out and raise often much more than what

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1 they need. Here's an example from the record. We had 2 Senate candidate Vincent Illuzzi. In 1998, he raised 3 \$39,000, almost \$40,000, for his Senate campaign. His challenger was able to raise almost nothing. He only 4 5 spent \$30,000 worth of that. Candidates don't need 6 \$39,000 or \$30,000 to run an effective Senate campaign, 7 but an incumbent that builds a war chest has the 8 ability to deter serious challenges. 9 JUSTICE ALITO: Could candidates --10 JUSTICE BREYER: On your question -- the --11 I'm sorry. 12 JUSTICE ALITO: Could candidates run 13 effective campaigns if there were no -- with these 14 contribution limits if there were no expenditure

15 limits?

MS. WRIGHT: Yes, Your Honor. The -- we believe the record strongly shows that. For example, there was a mayoral election in Burlington run under these limits during the time that the case was --

JUSTICE ALITO: No. I mean, if there were no expenditure limits, if candidates could expend as much as they want, could they raise enough money with these contribution limits --

24 MS. WRIGHT: Yes.

25 JUSTICE ALITO: -- to run effective

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1 campaigns.

2 MS. WRIGHT: Yes, Your Honor, because this Burlington mayor's race, as an example, was one in 3 which there was no limit on -- on spending, and both 4 5 candidates were able to raise amounts either similar to 6 what they had raised in the past or at least amounts 7 that met the campaign budget that they had sought to --8 to follow. 9 I think in looking at the level of the the scale of politics in Vermont. If we want to compare them to Missouri, a \$2,000 limit for a

contribution limits, it's important again to understand 10 11 12 13 gubernatorial race in Missouri was approved by this 14 Court, and in Missouri you had an election in 2000 15 where each candidate was spending \$8 million or \$9 16 million in a gubernatorial race. I mean, that compares 17 very directly if you --18 JUSTICE BREYER: I thought the --19 MS. WRIGHT: -- did the same ratio for

20 Vermont. Pardon me?

JUSTICE BREYER: Wasn't it the State auditor?
MS. WRIGHT: Not the \$8 million or \$9

23 million.

JUSTICE BREYER: No, I know, but didn't we have in front of us a limit, which I wrote was rather

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1 border, that involved a State auditor campaign? 2 MS. WRIGHT: In Missouri? 3 JUSTICE BREYER: I thought so, in Shrink 4 Missouri. 5 MS. WRIGHT: It may have been the State 6 auditor, but it also the --7 JUSTICE BREYER: Which is not quite the same 8 political volatility perhaps, but --9 MS. WRIGHT: No, but the --10 JUSTICE BREYER: I have a different question 11 I'd like to ask you which I haven't heard addressed 12 yet. On the expenditure limits, there is a case, 13 Buckley v. Valeo, and the Court held in that case that expenditure limits are not constitutional. Now, 14 15 whether I agree with that or don't agree with that, am 16 I not bound by that? 17 And insofar as you try to distinguish it, 18 you've read what Judge Winter said about your efforts 19 to distinguish it. And therefore, I'd like to hear why 20 you think I'm not bound by a past precedent in an 21 important matter, with which I may or may not have 22 agreed at the time. 23 MS. WRIGHT: Yes, Your Honor. We believe 24 expenditure limits can be upheld without overruling 25 Buckley v. Valeo, and that's for several reasons.

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First, Buckley created a rule of exacting
 scrutiny that applies to expenditure limits. That is
 not a rule of automatic invalidation.

4 And very importantly, when Buckley declared 5 that the interest in deterring corruption and its 6 appearance was not adequate to support the expenditure 7 limits, that was on a record in which neither spending 8 nor contributions had been subject to meaningful limits 9 prior to the time of FECA and the amendments that the 10 Court was considering. There simply was no record to 11 show the Court of how contribution limits alone would 12 really work to address the problem of corruption and 13 the appearance of -- of corruption and encouraging 14 public confidence in government. Now --

JUSTICE SCALIA: I thought -- I thought what that case said and what many of our other cases say, with regard to expenditures in particular, is that you're not talking about money here. You're talking about speech. So long as all that money is going to campaigning, you're talking about speech.

And when you say you don't need any more speech than this, that's a very odd thing for -- for a -- a United States Government to say. Enough speech. You don't need any more than this. And that's the reason the expenditure limits, as opposed to

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1 contribution limits, were regarded guite differently in 2 Buckley and I think should still be regarded 3 differently today. You're constraining speech. It's 4 not money you're constraining. Contribution limits, 5 you're constraining money, but when you say you can't 6 expend more than this on your campaign, you're saying, 7 no, no, this is enough speech. We're going to --8 we, the State, are going to tell you how much you 9 should campaign. That's very unusual in -- in American 10 democracy.

11 MS. WRIGHT: Your Honor, I think that's 12 certainly why Buckley applied exacting scrutiny. But I 13 think what Vermont understood is that political 14 spending has inescapably a dual character. Yes, 15 campaign spending enables many forms of speech, but it 16 also has another side because higher and higher levels 17 of campaign spending result in candidates who are 18 beholden to the constituencies that can provide the 19 greatest amounts of funds for their campaigns. And 20 what you end up with, the consequence, is legislators 21 who say, you know, I've lost the drug money and I can't 22 afford to lose the food manufacturer money --23 JUSTICE SCALIA: Limit the contributions. 24 MS. WRIGHT: -- so I'm not going to --25 JUSTICE SCALIA: That solves that problem.

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1 Limit the contributions.

MS. WRIGHT: Well --JUSTICE SCALIA: But you want to limit expenditures, even if it's the person's own money. No possibility of corruption. You're saying, no, this is enough speech. We don't want to hear any more from you. We, the State, will tell you how much campaigning is enough. That's extraordinary.

9 MS. WRIGHT: Because the -- the interests 10 that Vermont is seeking to serve are fundamental to the 11 core functions of government, preserving the quality of 12 representative government, preserving the integrity of 13 government, assuring the public that its officeholders 14 can act in the best interests of the public and make 15 decisions on the merits, not simply based on their need 16 for campaign cash.

17 And this question of accountability that's so 18 important is tied to the ability to say, I've -- I've 19 met my spending limits, I've raised all that I need to 20 -- to raise. If somebody comes to me with 21 contributions from a source that I don't feel 22 comfortable taking, I can turn that down without 23 suffering a tremendous competitive disadvantage. 24 I think one of the other key features of the 25 expenditure limits that Vermont seeks to impose here is

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1 that they will do so much to encourage competitive 2 campaigns. We had a record in Vermont that showed that for the previous nine election cycles before the act 3 4 was enacted, only one incumbent had been defeated for a 5 statewide office. In the meantime, in the City of 6 Albuquerque where they had spending limits for 25 7 years, every challenger who came out to challenge an 8 incumbent mayor was successful. No one can say on that 9 record that spending limits would do anything but to 10 enhance competition.

11 In the -- one of the other interests that I 12 would like to turn to, before we close, is Vermont's 13 interest in protecting the time of officeholders from 14 the burdens and distractions of fund raising. We had a 15 record in which seasoned politicians in Vermont were 16 saying that candidates for office, even in Vermont, 17 were spending as much time begging for funds as they do 18 campaigning. We had a record in which a Senator 19 reported leaving the floor of the Senate during a floor 20 debate to take a call from a donor.

21 CHIEF JUSTICE ROBERTS: How do you -- how do 22 you police that, though? Because an incumbent can --23 has so many opportunities to go before the public that 24 wouldn't necessarily be categorized as campaigning but 25 as part of his or her official duties, while everything

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1 a challenger does is going to be credited against his 2 account. MS. WRIGHT: Well, Your --3 4 CHIEF JUSTICE ROBERTS: You may answer the 5 question. 6 MS. WRIGHT: Yes, Your Honor. 7 We believe that under almost any system, 8 incumbents are going to still have advantages and no 9 campaign finance system can fully address that. But we 10 believe that if the challenger now has the ability to 11 outspend the incumbent and the incumbent doesn't have 12 that additional advantage of being able to outspend the 13 challenger, as is most often the case, then competition 14 can only be enhanced. 15 CHIEF JUSTICE ROBERTS: Thank you, counsel. 16 Mr. Bopp, you have 4 minutes remaining. 17 REBUTTAL ARGUMENT OF JAMES BOPP, JR. 18 ON BEHALF OF THE PETITIONERS 19 IN NOS. 04-1528 AND 04-1530 20 MR. BOPP: Thank you. 21 The one example that they keep going back to 22 regarding the President of the Senate tells the breadth 23 of this challenge. As long as Vermont allows periodic 24 elections, incumbents are going to consider the effect 25 that their votes have on future elections. And -- and

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while it makes it more scandalous to say we will lose the food manufacturers' money, what they are concerned about is losing the food manufacturers' support. So as -- if this the definition of corruption, it is sufficient now to -- for the State of Vermont to abolish elections generally.

7 Now, secondly, as to the effect on 8 challengers, the record demonstrates that challengers 9 -- and there's expert testimony to the fact that challengers are more frequently challenged in primaries 10 11 than are incumbents, and the Randall brief on pages 16 12 and 17 point out the testimony of people who have been 13 subject to a primary and demonstrates that they are not 14 able to mount an effective campaign in the general.

Furthermore, the expenditure limits have the perverse result of depriving challengers of more money than incumbents, probably making them attractive to incumbents. In the Senate, for instance, incumbents would be deprived of 20 percent of their total resources, while challengers would be deprived of 36 percent of their total resources.

JUSTICE SCALIA: I don't understand how that comes. How does that come about?

24 MR. BOPP: It comes about because challengers 25 frequently in Vermont actually spend more than do

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incumbents. I -- I know that -- that the general perception is the opposite, but the general perception is not true in Vermont. And -- and that points to the -- the fact that the way this law is constructed strongly suggests that is -- it is seeking to favor incumbents.

7 Furthermore, we had expert witness testimony 8 on the effect of contribution limits on competitive 9 races. The -- we had -- Mr. McNeil testified in 10 examining the competitive races in the 1998 election 11 that the vast majority in both the House and the Senate 12 would not be able to mount an effective campaign with 13 the available resources that would have been available 14 after imposing the contribution limits. And, of 15 course, these were in the amounts of 28 percent in the 16 Senate, 22 percent in the House, which is way beyond 17 the 5.1 percent that this Court in Buckley thought that 18 could be made up by the imposition of a \$1,000 limit. 19 I mean, this -- this law is so constructed 20 that it would make it virtually impossible for, for 21 instance, countywide candidates in Chittenden County, a

they would be limited to \$4,000 for the primary and the qeneral election. That's 3 cents for each person in

county of 150,000, the largest county in Vermont --

25 Chittenden County. And, of course, this is an

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important county. Senator Leahy came from that county
 as State's attorney and became the United States
 Senator.

4 And finally, with respect to the rebuttable 5 presumption, actually the -- the statute answers the 6 question of whether or not this presumption disappears. 7 If you look at 2809, subsection (e), the last sentence 8 says, the findings and determination of the court --9 and this is in this court proceeding by your opponent 10 that is trying to claim that this spending over here is 11 actually yours -- that the findings and the 12 determination of the court shall be prima facie 13 evidence in any proceeding brought for violation of the chapter. So it doesn't go away. The rebuttable 14 15 presumption never goes away. And, in fact, each person 16 -- each candidate and each independent spender can look 17 at the rebuttable presumption requirement and say, I 18 have to file a report and that governs my report. 19 Thank you. 20 CHIEF JUSTICE ROBERTS: Thank you, counsel. 21 The case is submitted. 22 (Whereupon, at 11:12 a.m., the case in the 23 above-entitled matter was submitted.) 24

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