UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

DEMOCRATIC GOVERNORS ASSOCIATION, Plaintiff, v. MICHAEL J. BRANDI, et.al, Defendants.	)	Civil Action No. 3:14-CV-00544-JCH

MEMORANDUM OF CAMPAIGN LEGAL CENTER, COMMON CAUSE OF CONNECTICUT, CONNECTICUT CITIZEN ACTION GROUP AND THE LEAGUE OF WOMEN VOTERS OF CONNECTICUT AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

J. Gerald Hebert
Lawrence M. Noble
Megan P. McAllen
Catherine Hinckley Kelley
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
Tel.: (202) 736-2200
ghebert@campaignlegalcenter.org
lnoble@campaignlegalcenter.org
mmcallen@campaignlegalcenter.org
ckelley@campaignlegalcenter.org

Counsel for *Amici Curiae*

Patrick Tomasiewicz*
Fazzano & Tomasiewicz, LLC
96 Oak Street
Hartford, CT 06106
Tel.: (860) 231-7766
pt@ftlawct.com

Counsel for *Amici Curiae*

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes & Regulations:

Federal:

State:

Miscellaneous Resources:

STATEMENT OF INTEREST

The Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization that works in the area of campaign finance law, and participates in state and federal court litigation throughout the nation regarding contribution limits, disclosure, political advertising and other campaign finance matters. It also participates in rulemaking and advisory opinion proceedings at the Federal Election Commission (FEC) to ensure that the agency is properly enforcing federal election laws, and files complaints with the FEC requesting that enforcement actions be taken against individuals or organizations which violate the law.

The CLC has provided legal counsel to parties and *amici curiae* in numerous campaign finance cases at the federal and state court levels, including representing intervening defendants in *McConnell v. FEC*, 540 U.S. 93 (2003), and serving as an *amicus curiae* in *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014), *Citizens United v. FEC*, 130 S. Ct. 876 (2010) and *Wisconsin Right to Life v. FEC*, 127 S. Ct. 2652 (2007). The CLC has also participated as an *amicus* in several recent cases concerning coordination and coordinated expenditure limits that are directly relevant to this matter, including *Vermont Right to Life Committee, Inc. v. Sorrell*, 875 F. Supp. 2d 376 (D. Vt. 2012), on appeal No. 12-2904 (2d Cir. argued Mar. 15, 2013) (challenge to application of contribution limits to purported independent expenditure committee), and *Cao v. FEC*, 619 F.3d 410 (5th Cir. 2010) (challenge to federal party coordinated expenditure limits).

Common Cause is a nonprofit, nonpartisan citizens' organization with approximately 400,000 members and supporters nationwide, including 4,500 in Connecticut. Common Cause has long been concerned with the growing problem of money in the political process, and has publicly advocated for appropriate regulation in order to restore integrity to the electoral system

at the federal, state and local levels. Common Cause was a strong advocate for congressional enactment of the Bipartisan Campaign Reform Act of 2002.

Common Cause was a leader in the development and enactment of Connecticut's 2005 public campaign financing program, the Citizens' Election Program, in the wake of political corruption scandal at the highest level of government in the state. Common Cause has championed strong contribution limits, disclosure reforms, and helped protect and strengthen the ability of the State Elections Enforcement Commission (SEEC) in its ability to enforce Connecticut's strong campaign finance regime. Common Cause in Connecticut was one of the parties that acted as an intervenor-defendant in the *Green Party of Connecticut v. Garfield*, 616 F.3d 213 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 3090 (2011), the case that challenged the constitutionality of the Citizens' Election Program.

The League of Women Voters of Connecticut, a statewide organization with over 1600 members in 27 local Leagues, is committed to effective public policy and the active involvement of citizens in their government. The League believes that the goals of a campaign finance system should ensure the public's right to know, combat corruption and undue influence, and enable candidates to compete more equitably for public office. For over a decade, the League has been a leading Connecticut organization advocating for campaign finance reform. It worked to pass the 2005 and 2010 laws; supported the creation of the Citizens' Election Program, a public financing system with spending limits for state-wide election campaigns; and has worked consistently to protect the campaign finance disclosure and attribution provisions. Its members and Connecticut residents at large have a strong interest in preserving laws that were enacted and have been enforced in the face of state political corruption scandals.

Connecticut Citizen Action Group (CCAG) is a 501(c)(4) social justice organization with more than 20,000 members in Connecticut. CCAG is concerned with the increasing role that money has in corrupting the political process. CCAG has been advocating for public financing of elections since the organization's inception in 1971. In Connecticut, CCAG was a leader in the development and enactment of the 2005 Citizens' Election Program—the voluntary state public campaign financing program in the wake of the corruption scandal of then-Governor John G. Rowland. In addition, CCAG was one of the parties that acted as an intervenor defendant in the *Green Party of Connecticut v. Garfield* case.

INTRODUCTION AND SUMMARY OF ARGUMENT

On June 18, 2013, Connecticut Governor Dannel P. Malloy signed into law Public Act No. 13-180, *An Act Concerning Disclosure of Independent Expenditures and Changes to Other Campaign Finance Laws and Election Laws*, 2013 Conn. Acts 13-180 (Reg. Sess.) ("2013 Act"). Upon the signing of the bill, Governor Malloy issued a statement which read in part:

> Let me be very clear about why I'm signing this bill into law. The Supreme Court's decision in the *Citizens United* case was a tragic decision. The *Citizens United* decision reversed years of campaign finance reforms and allowed unlimited private money into politics, empowering the wealthy few at the expense of our democracy.[1]

Among the changes the 2013 Act made to Connecticut's law was to amend the definition of "expenditure" to cover activity "to promote the success or defeat of any candidate," including communications that refer to a clearly identified candidate within 90 days of an election. 2013 Act, Sec. 3. Section 9-601b (codified at Conn. Gen. Stat. § 9-601b (2014)). In addition, the 2013 Act revised the definition of an independent expenditure to provide greater guidance and ensure that independent expenditures were made "without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee." Conn. Gen. Stat. § 9-601c (2014). These changes included defining (1) activity that would create a rebuttable presumption of coordination, (2) methods of rebutting the presumption, (3) activity that would not establish a presumption of coordination, but could be considered evidence of coordination and (4) evidence that could never be considered evidence of coordination.

As the Governor noted, these changes were prompted by the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), which struck down the federal prohibition on

[1] *Gov. Malloy Statement on Signing Campaign Finance Legislation*, (June 19, 2013), http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=526936.

corporations and labor unions making unlimited independent expenditures. In finding that the government did not have a sufficiently strong interest in restricting corporate and union independent expenditures, the Court relied on a constitutional framework it had established more than 34 years earlier in *Buckley v. Valeo*, 424 U.S. 1 (1976). This framework is rooted in the Court's view of the distinction between election-related spending that is independent of a candidate, which cannot be subject to limits (but can be required to be disclosed), and spending that is coordinated with a candidate, which is treated as a contribution to the candidate and can be subjected to amount limits and source prohibitions.

Because whether or not an expenditure is coordinated with a candidate determines whether the expenditure is subject to limits and source prohibitions, a tremendous amount of weight rests on the definition of coordination. That definition must reflect the Supreme Court's determination that "prearrangement and coordination" present a real danger of potential corruption, whereas truly independent spending to support a candidate does not.

It is against this background that the Democratic Governors Association (the DGA or Plaintiff) is seeking a preliminary injunction that would enable it to spend without limit in support of Governor Malloy's candidacy without having to abide by Connecticut's contribution limitations or source prohibitions, and in many cases without being subject to the very disclosure of which Governor Malloy spoke. While this challenge is framed as a facial attack on the statute, the DGA claims it was actually triggered by the Connecticut State Elections Enforcement Commission's (SEEC) issuance of Declaratory Ruling 2014-02 to the law firm of Perkins Coie.[2] Perkins Coie asked the SEEC to guarantee that fundraising undertaken by a candidate for a "527

[2] While Perkins Coie represents the DGA in this lawsuit, the DGA was not a party to, or named in, the request for a Declaratory Ruling submitted to the SEEC. The letter from Perkins Coie to the SEEC Legal Compliance Unit (Oct. 9, 2013) is attached as Exhibit C to the DGA's Motion for a Preliminary Injunction.

political organization"[3] that transferred the money raised to a third-party for the purpose of paying for communications advocating the election of the candidate, would not be considered relevant if the SEEC was called upon to decide whether to investigate allegations that the organization had coordinated its expenditures with that candidate. Compl. ¶ 3; Mem. Supp. Pl.'s Mot. Prelim. Inj. 8 (PI Mot.).

In its response, the SEEC refused and pointed out that the requestor was "asking whether such fundraising may ever constitute evidence of coordination." SEEC, Dec. Rul. 2014-02 (Mar. 19, 2014), at 5. The SEEC responded:

> The answer must be in the affirmative. Although it is impossible to envision all possible scenarios that might arise where non-earmarked fundraising could constitute evidence of coordination (and where it would not), they are not difficult to imagine.

Id. The SEEC then went on to give examples of such factual scenarios.

Even though not a party to the request, the DGA responded to the Ruling by initiating this litigation, which asks the court to declare that the 2013 Act cannot constitutionally be applied to a broad range of political activities and to prohibit the SEEC from looking at all relevant facts if it is called upon to determine whether any of the DGA's expenditures have been coordinated with the Malloy campaign and should be treated as contributions. As will be shown, the 2013 Act and the SEEC's description of the types of facts that could be relevant to an inquiry into coordination are well within the constitutional limits the Supreme Court has identified.

First, however, this court should find that the DGA lacks standing to bring this suit, as it has not presented a case or controversy appropriate for adjudication. The DGA was not a party to the request for a Declaratory Ruling and has not alleged that the statute prohibits its proposed

[3] A tax-exempt organization under Section 527 of the U.S. Internal Revenue Code (26 U.S.C. § 527) is organized to directly or indirectly accept contributions and/or making expenditures for the primary purpose of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a federal, state, or local public office or office in a political organization.

activity or that the SEEC has indicated that the DGA's activities may be illegal. Furthermore, the DGA has never described the activity it plans to undertake or the specific nature of the fundraising Governor Malloy will undertake that it believes the law prohibits,[4] and the SEEC has never said that fundraising by candidate for an organization, by itself, would convert an independent expenditure into a contribution. This "dispute" exists only because of the DGA's interpretation of what it believes the SEEC has "implied" in its rulings and how it believes that interpretation will be applied to facts known only to the DGA. Therefore, the DGA has presented no real case or controversy and this case should be dismissed for lack of standing.

Even if the DGA has standing, its arguments in support of this court enjoining enforcement of critical parts of the statute—and thereby hobbling the ability of the SEEC to ensure that independent expenditures are truly independent—are contrary to the Supreme Court's precedent regarding the nature of independent expenditures. In fact, the DGA's argument is largely based on asserting that Supreme Court decisions holding that persons and organizations have a right to make independent expenditures require the SEEC to find that any expenditure the DGA undertakes is independent. Moreover, the DGA, a self-styled political organization that exists to elect Democratic governors, attempts to conflate the Supreme Court's constitutional analysis regarding the regulation of issue advocacy groups with its very different analysis of the broader permissible regulation of organizations, such as the DGA, whose major purpose is the election of candidates.

FACTS

[4] In fact, the DGA alleges in its complaint that it has established a firewall to protect the independence of its expenditures. *See* Compl. ¶¶ 7, 32, 43; PI Mot. 4, 7-8. However, the request for a ruling Perkins Coie made to the SEEC never asked about the application of the rules to an organization which had established a firewall. Of course, even the references to a firewall in the DGA's Complaint and Memorandum are cursory and conclusory.

The DGA is registered with the Internal Revenue Service as a "political organization" under section 527 of the Internal Revenue Code. 26 U.S.C. § 527 (2012). According to the DGA, it is "the only organization dedicated to electing Democratic governors and candidates…[participating] at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages."[5] The chairperson of the DGA, as well as two other governors selected by the DGA, are members of the Democratic National Committee.

As part of its mission to elect Democratic governors, the DGA makes independent expenditures that expressly advocate the election or defeat of candidates for governor, as well as direct contributions to gubernatorial candidates and contributions to other organizations that support the election of Democratic governors. Compl. ¶ 25. In order to support its activities, the DGA relies heavily on its members, who are Democratic governors, soliciting contributions to the organization. *Id.*.¶ 26. Member governors are called upon to directly solicit contributions and to attend and participate in fundraising events on behalf of the DGA. According to the DGA, its ability to undertake nationwide activities that support the election of its member governors "would be severely compromised" if it cannot rely on those members' abilities to raise funds for the organization. *Id.*

Connecticut governor Dannel P. Malloy is a member of the DGA who is running for reelection in 2014. The DGA alleges it intends to make independent expenditures expressly advocating the reelection of Governor Malloy and/or the defeat of his opponent, as well as make expenditures for communications that refer to Governor Malloy and/or his opponent without expressly advocating their election or defeat. Compl. ¶¶ 2, 30. The DGA also plans to make

[5]Democratic Governors Association, http://democraticgovernors.org/#about (last visited May 13, 2014).

"covered transfers"[6] to other political committees for the purpose of those committees making independent expenditures in support of Governor Malloy. The DGA further alleges that the contributions it solicits and receives are not "earmarked" to support or oppose any Connecticut candidates.[7] According to the complaint, all of these communications will be made "independently" of the candidate and the DGA has established a "firewall policy" so that its expenditures and covered transfers "will not be made in concert, coordination, or consultation with Connecticut candidates or parties." Compl. ¶ 32.

As noted, the DGA was not a party to the request for the Declaratory Ruling from the SEEC and has not provided either the SEEC or this Court with any examples of the types of ads it plans to undertake in support of Governor Malloy; any facts regarding the nature of the fundraising Governor Malloy will undertake; what he will represent to those he is soliciting and any groups for which he is fundraising; or any details about the interaction between Governor Malloy and the DGA had or will have regarding the DGA's support for his candidacy. Instead, their complaint and motion for preliminary injunction rely assertions that their activity will either not be election related, not advocate the election of Governor Malloy and/or will not be coordinated with Governor Malloy.

In October 2013, the Perkins Coie law firm asked the SEEC three broad questions regarding the application of the 2013 Act to organizations making independent expenditures under the new law. The third question asked the SEEC to make a blanket declaration that the agency would never consider "a candidate's non-earmarked fundraising for an entity that makes

---

[6] Conn. Gen. Stat. § 9-601(29)(A)(2014).

[7] The SEEC has defined "earmarked" for fundraising purposes to mean:

> [F]unds provided for the purpose of promoting or opposing the nomination or election of Connecticut candidates or political parties. Funds are considered earmarked when the person giving or receiving them has manifested an intention that they will be used to promote attack support or oppose Connecticut candidates or parties.

SEEC, Decl. Rul. 2014-02 (Mar. 19, 2014) at 3.

'covered transfers'" as relevant to a factual determination of whether or not the candidate and the entity receiving the transfers had coordinated expenditures for which the transferred funds were used. In its request, Perkins Coie asserted that the expenditures would not be made "in concert, coordination, or consultation with a candidate, candidate's agent, candidate committee, or party committee."[8] On March 19, 2014, the SEEC issued Declaratory Ruling 2014-02, which assured the firm that "a candidate's nonearmarked fundraising activity for an entity that makes 'covered transfers' is not presumed to establish coordination between the candidate and the entity receiving such covered transfers," but explained that it was possible that such fundraising might be considered evidence in an investigation into whether there had been coordination between the candidate who raised the funds and the entity that received the covered transfers.[9] This lawsuit was filed by the DGA following the issuance of that ruling.

ARGUMENT

I. The DGA Lacks Standing to Bring this Action.

Article III of the Constitution of the United States limits courts to "resolving real and substantive controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477 (1990) (internal quotation marks omitted). The determination of the constitutionality of a law outside of concrete facts and prior to it having any immediate adverse effect on the plaintiff "involves too remote and abstract an inquiry for the proper exercise of judicial function." *Int'l Longshoremen's and Warehousemen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954). This is true even in cases involving the First Amendment. "The constitutional question, First Amendment or otherwise,

[8] Letter from Perkins Coie (Oct. 9, 2013), Pl.'s Exhibit C.
[9] The SEEC declaratory ruling is attached as Exhibit A to the DGA's complaint.

must be presented in the context of a specific live grievance." *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). "Even the 'chilling' of the most protected First Amendment rights of free speech does not create a case or controversy without a 'specific present objective harm or a threat of specific harm.'" *Nat'l Conference of Catholic Bishops v. Smith*, 653 F.2d 535, 539-40 (D.C. Cir. 1981) (quoting *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972)).

In the instant litigation, the plaintiff has failed to allege a "specific and present objective harm or a threat of harm." According to the complaint, "the state's sweeping definition of 'expenditure'" found at Conn. Gen. Stat. § 9-601b, and the SEEC's Declaratory Rulings 2014-01 and 2014-02, which plaintiff refers to as the "Challenged Provisions and Rulings," regarding the evidence that may be considered in determining when an expenditure will be treated as coordinated, "*create uncertainty*" as to what kinds of expenditures or speech DGA may make without threat of prosecution." Compl. ¶ 3 (emphasis added). To be clear, the DGA is *not* saying, and cannot say, that its planned activities are, in fact, prohibited by the 2013 Act or the SEEC's Declaratory Rulings. Rather, it is saying it is "uncertain" whether its activities will lead to an investigation or an enforcement action.

There is an excellent reason the DGA cannot assert any real likelihood its activities are prohibited by the 2013 Act: it has pled almost no specific facts as to such activities in its papers. The law defines coordination in terms of factors that would be evidence of coordination, factors that would give rise to a rebuttable presumption, ways to rebut the presumption of coordination and factors that would not be considered evidence of coordination. Thus, whether the DGA has coordinated its expenditures depends on the specific facts, which the DGA has not alleged. Rather than deal with the facts, the DGA tries to manufacture a controversy by accusing the SEEC of claiming "essentially unfettered discretion to find coordination based on the general

relationship between an organization and a candidate." PI Mot. 10. In support of this claim, DGA focuses only on statements in the SEEC's Declaratory Ruling 2014-02 to the effect that fundraising by a candidate for a political organization which advocates for the election of that candidate, as well as the overall relationship between the candidate and the organization, could be relevant—though not dispositive—to determining whether any of the organization's expenditures were coordinated with that candidate.

As *amici* discuss below (*infra* at 18-22), the SEEC's approach is necessitated by the Supreme Court's requirement that coordination be determined based on a functional analysis of the facts in a given situation. Thus, the only way the SEEC can determine whether the DGA's activities would give rise to coordination would be if the DGA presented the facts to the SEEC. However, the DGA never formally participated in the request for a Declaratory Ruling from Perkins Coie, who is representing the DGA in this litigation, even though that would have been the appropriate opportunity for it to provide the SEEC with specific facts so it could avoid "uncertainty."[10]

Instead, both the request for the Declaratory Ruling and the DGA's complaint in this action essentially just assert that the candidate will fundraise and the DGA will make "covered transfers" and independent expenditures and other communications. The conclusory statements to the effect that the expenditures will not be coordinated with the candidate assume the answer the DGA wants. Of course, if the SEEC had said the DGA was prohibited from undertaking truly independent expenditures on behalf of Governor Malloy, then the DGA might arguably have

[10] The DGA's failure to formally participate in its counsel's request for a ruling is striking in light of a June 2011 agreement it entered into with the SEEC to settle charges it violated the disclosure laws. In that agreement, it acknowledged that "in consideration of the differing views of the Parties regarding the applicability of the statutes[,]" the SEEC encouraged the DGA to "petition for a Declaratory Ruling from the Commission…appealable to courts, or petition for regulation…before making similar expenditures." *Agreement Containing Henceforth Order for Violations of Connecticut General Statutes §§ 9-612(e) and 9-621(h)(2)*, ¶ 14. *Available at*, http://seec.ct.gov/e2casebase/data/fd/FD_2011_008.pdf (last visited May 13, 2014).

suffered an injury, as it is undisputed that they have a constitutional right to undertake independent expenditures. But, even the SEEC's discussion in the Declaratory Ruling regarding factors that may be relevant to coordination merely put the ball in the DGA's court, since only the DGA and Governor Malloy know how that fundraising will be conducted and what interaction they will have regarding the expenditures the DGA will make. It does not create a justiciable case or controversy.

All the SEEC has done is to refuse to take off the table the possibility that a coordination investigation could look at fundraising done by the candidate the DGA is supporting with expenditures. The SEEC has not said, contrary to what the DGA implies, that fundraising by a candidate would be sufficient to find coordination. It is in some ways ironic that the DGA is complaining that legislature's efforts to provide more detailed guidance on coordination have resulted in unconstitutional vagueness, while at the same time arguing that the guidance makes it clear that they cannot undertake their planned activity, which it has described only in general terms.

Nevertheless, the DGA asserts that the SEEC's refusal to take fundraising off the table as possibly relevant to coordination leaves them vulnerable to allegations of coordination and a possible investigation. *See* Compl. ¶ 44 ("A mere allegation of coordination, even if unfounded, can result in a SEEC investigation that chills future political activity and requires the respondents and witnesses to incur significant burden and expense.").

However, the DGA does not explain how narrowing the definition of coordination and preventing the SEEC from considering evidence related to fundraising in a coordination case will prevent someone from making even "unfounded allegations" against the DGA and stop the SEEC from launching an investigation under the narrower standards. *See McConnell v. FEC*, 540

U.S. 93, 223 (2003) ("And, although plaintiffs speculate that the FEC could engage in intrusive and politically motivated investigations into alleged coordination, they do not even attempt to explain why an agreement requirement would solve that problem."). Only injunctions barring anyone from ever alleging the DGA coordinated its activities with a candidate and prohibiting the SEEC from ever initiating an investigation of the DGA involving any allegations of coordination would prevent the harm they are alleging. Clearly, that is a ludicrous proposition.

Finally, the fact that the DGA has attempted to create a case or controversy by relying on SEEC staff comments and Declaratory Rulings further demonstrates a fatal flaw in this action. They have framed this case as a facial challenge to the constitutionality of the statute, but issues concerning how the agency interprets that statute are not properly raised as a facial challenge and must be pursued in a different proceeding. *See id*. ("[P]laintiffs' challenge to [the statute] is not ripe to the extent that the alleged constitutional infirmities are found in the implementing regulations rather than the statute itself.").

What the DGA is attempting to do is create a case or controversy to enable it to obtain a broad ruling based on scant facts barring the SEEC from conducting a full investigation into whether the DGA coordinated its expenditures with Governor Malloy, should the issue ever arise. This may be what they want, but it is not a basis for Article III standing.

II. Connecticut's Definition of Coordinated Expenditure is Not Unconstitutionally Vague or Overbroad.

Any constitutional analysis of a statute that defines the line between an independent and a coordinated expenditure must begin with *Buckley*, where the Supreme Court first divided campaign financing into two categories for purposes of review under the First Amendment: contributions and independent expenditures. 424 U.S. at 12-23. In *Buckley*, the Court held that

the limits on contributions, defined broadly as "any gift . . . of money or anything of value . . . for the purpose of influencing [an] election [for] Federal office," 2 U.S.C. § 431(8) (1975), were constitutional based on the government's interest in limiting "the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26. In contrast, the Court defined an independent expenditure as money spent to advocate the election or defeat of a candidate without any "prearrangement and coordination" with the candidate. *Id.* at 47. [11]

In the Court's view, election related expenditures "made totally independently of the candidate and his campaign" did not present the opportunity for real or apparent corruption.

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign, and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.

Id.

Thus, the Court found that the government's interest in limiting independent expenditures was insufficient to justify the burden on First Amendment rights.[12]

Against this background, the Connecticut statute defines independent expenditure to mean "an expenditure, as defined in section 9-601b, that is made without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee" and then defines certain expenditures as giving rise to a rebuttable presumption that they are not independent of a candidate. The first rebuttable presumption listed is for:

---

[11] The Court also referenced as an example of an independent expenditure someone purchasing a billboard endorsing a candidate "completely on his own" and included in the definition of contribution "expenditures placed in cooperation with or with the consent of a candidate." 424 U.S. at 46 n. 53.

[12] The Supreme Court reiterated and affirmed this analysis in *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010) and in *McCutcheon v. FEC*, Slip Op. No. 12-536, at *22 (U.S. Apr. 2, 2014), *available at* http://www.supremecourt.gov/opinions/13pdf/12-536_e1pf.pdf.

> (1) An expenditure made by a person in cooperation, consultation or in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding with (A) a candidate, candidate committee, political committee or party committee, or (B) a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee[.]

Conn. Gen. Stat. § 9-601c(b)(1) (2014). The statute contains eight additional rebuttable presumptions, Conn. Gen. Stat. § 9-601c(b)(2)–(9) (2014), and identifies facts that will not give rise to a rebuttable presumption, Conn. Gen. Stat. § 9-601c(c) (2014). The statute also provides that the establishment of a firewall "designed and implemented to prohibit the flow of information" shall be sufficient to rebut an established presumption. Conn. Gen. Stat. § 9-601c(d) (2014).

The DGA argues that this coordinated expenditure definition is unconstitutionally overbroad and vague unless the State tells the DGA in advance exactly what activities will result in coordination, looks at every expenditure as an isolated act and excludes from consideration anything related to fundraising that the candidate does on behalf of DGA or a third-party group, regardless of the surrounding facts. There is absolutely no support for this position, and it runs contrary to the long-standing treatment of coordinated expenditures by the Supreme Court.

First, DGA's assertion that you cannot find coordination "[w]ithout actual …coordination" is of no help. PI Mot. 13 (citing *Buckley*, 424 U.S. at 47-48). The DGA may be citing the Supreme Court, but the Court was using the term to define an expenditure that is independent, and not offering it as a definition of coordination. As used by the DGA to define coordination, it is nothing more than a tautology, which the DGA is forced to use because it has built an argument for limiting the factual coordination inquiry on cases that say coordination is a question of fact. Not wanting to deal with that analysis, the DGA is left to argue, in effect, "coordination can only be found where the parties have coordinated."

For example, the DGA places heavy reliance on *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I"*), and *McConnell*, 540 U.S. 93, for the proposition that the government cannot presume coordination or "find it from general relationships between a candidate and a spending entity that are unrelated to a particular expenditure." PI Mot. 2. However, both *Colorado I* and *McConnell*, as well as the Supreme Court's decision in *FEC v. Colorado Republican Federal Campaign Committee*, 533 U. S. 431 (2001) ("*Colorado II"*), in fact, stand for the proposition that determining coordination requires a factual inquiry into the functional relationship between the candidate and the person or group undertaking the expenditures.

In *Colorado I*, the government argued that political party committees could not, as a matter of law, make independent expenditures on behalf of candidates because of a "metaphysical identity" between the party and its candidates. 516 U.S. at 619-623. The Supreme Court disagreed, and held that the party committees had a constitutional right to make independent expenditures and that the government would have to prove coordination on a case-by-case basis. *Id.* at 614. The Court then went on to review the evidence of coordination in the summary judgment record below. The expenditure at issue was a radio ad advocating the defeat of then Democratic Congressman Tim Wirth, who had announced he was running for an open Senate seat in Colorado. As the Court noted,

> In a deposition, the Colorado Party's Chairman, Howard Callaway, pointed out that, at the time of the expenditure, the [Republican] Party had not yet selected a senatorial nominee from among the three individuals vying for the nomination. He added that he arranged for the development of the script at his own initiative, that he, and no one else, approved it, that the only other politically relevant individuals who might have read it were the party's executive director and political director, and that all relevant discussions took place at meetings attended only by party staff.

Id. at 614-15 (internal citations omitted).

Once the Court determined that the issue of coordination required a factual inquiry, it is not surprising that it looked at the record for evidence of the contacts and relationships of those involved in the expenditure and found no coordination had taken place, because the ad was developed "independently and not pursuant to *any general or particular understanding* with a candidate." In fact, the Colorado Republican Party had not yet even nominated a candidate with whom they could coordinate. *Id.* at 614 (emphasis added). The Court most certainly did not suggest, as the DGA does, that evidence of the relationship between a candidate and the organization unrelated to the specific expenditure is not relevant to a determination of whether that expenditure was coordinated.

In *Colorado II*, the Court noted that independent expenditures are those "without any candidate's approval (or wink or nod) …." 533 U.S. at 442. The Court went on to acknowledge that "facts speak less clearly once the independence of the spending cannot be taken for granted, and money spent by an individual or PAC according to an arrangement with a candidate is therefore harder to classify." *Id*. at 442-443. This requires the government to use "a functional, not a formal, line between contributions and expenditures." *Id.* at 443. Thus, contrary to what the DGA suggests, the Supreme Court has already acknowledged that "[c]oordinated spending …covers a spectrum of activity." *Id*. at 445.

In fact, the Supreme Court in *McConnell* rejected a challenge to the definition of coordination found in the Federal Election Campaign Act of 1971 (FECA), as amended, 2 U.S.C. § 431 *et seq.*, as being overbroad and unconstitutionally vague because it allowed a finding of coordination even when there was no agreement on specific expenditures. FECA defines an independent expenditure, in part, as an expenditure "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or

their agents, or a political party committee or its agents." 2 U.S.C § 431(17)(B). Prior to 2002, Federal Election Commission (FEC) regulations narrowed the definition of coordinated expenditures to require that it be shown the candidate "exercised control or decision-making authority" over key aspects of the communication or that the communication was made "[a]fter substantial discussion or negotiation…the result of which is collaboration or agreement." 11 C.F.R. §100.23(c)(2) (2001). Congress found the FEC's narrowing construction of the statute contrary to its original intent and, when it enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), it directed the FEC to repeal the regulations and enact new regulations that did "not require agreement or formal collaboration to establish coordination." 2 U.S.C. §441a(a) note.[13] The new definition of coordination was challenged in *McConnell* as being overbroad and unconstitutionally vague because it allowed a finding of coordination even when there was no agreement on a specific expenditure.

The Supreme Court rejected the plaintiffs' challenge to the new definition of coordination as being overbroad, saying that FECA "long has provided that expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate… shall be considered to be a contribution to such candidate." 540 U.S. at 219 (internal quotation marks omitted).

> Thus, the rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view….For that reason, Congress has always treated expenditures made at the request or suggestion of a candidate as coordinated. A supporter easily could comply with a candidate's request or suggestion without first agreeing to do so, and the resulting expenditure would be virtually indistinguishable from [a] simple contributio[n]. Therefore, we cannot agree with the submission that new FECA §315(a)(7)(B)(ii)

[13] *See McConnell*, 540 U.S. at 219.

> is overbroad because it permits a finding of coordination or cooperation notwithstanding the absence of a pre-existing agreement.

Id. at 221-22 (citations, footnotes and internal quotation marks omitted). The Court also rejected the claim that a phrase such as "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate was unconstitutionally vague, finding that it used words of "common understanding." *Id.* The definition of coordination found in Connecticut's 2013 Act is strikingly similar to language the Supreme Court found constitutionally sound in *McConnell*.

As support for its claim that examining the specific facts of the case to determine coordination is unconstitutional, the DGA also cites the *McConnell* Court's invalidation of BCRA's requirement that a party committee choose between making coordinated expenditures and independent expenditures for a particular candidate. *See* PI Mot. 16. However, like the other cases plaintiff cites, the Court's analysis in *McConnell* stands for the exact opposite proposition. What the Court in fact held was that it was unconstitutional to deprive a party committee of the right to make independent expenditures as a matter of law just because it also made a coordinated expenditure. *McConnell*, 540 U.S. at 213. Instead, the independence of a party committee's expenditure would have to be determined based on the facts in a given case. That is all that the 2013 Act provides by establishing indicia of coordination, including some that raise rebuttable presumptions. Likewise, the litany of cases cited in footnote 3 of plaintiff's motion all addressed whether specific facts compromised the independence of an organization's activities in support of a candidate. *See* PI Mot. 17 (citing *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999)). None of these cases support the argument that a candidate fundraising for an organization making

expenditures to support the candidate can never be considered relevant to whether the expenditures are independent.

Despite the DGA's arguments to the contrary, since 1976 the Supreme Court has consistently described coordination by reference to such concepts as "cooperation, consultation, or concert," "request or suggestion," "not pursuant to any general or particular understanding," and "without any candidate's approval (or wink or nod)." It is clear that Supreme Court understands what the DGA does not, that "[c]oordinated spending …covers a spectrum of activity." *Colorado II*, 533 U.S. at 445.

III. Federal Law and the FEC's Coordination Regulations Do Not Support the DGA's Arguments

The DGA's argument that the Federal Election Commission's treatment of coordination "reflects the federal constitutional limits" is not only without basis in law, but would not support plaintiffs challenge, even if it were true. PI Mot. 20. First, no court has ever suggested that the FEC's regulations have reached the outer limits of what can be considered coordination. In fact, given that Congress had to direct the FEC to repeal its previous regulations in BCRA because it allowed coordinated activity to pass for independent, as well as the challenges to the FEC's post-BCRA regulations for being too narrow (*see, e.g.*, *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005) and *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008)), using the FEC's rules as the gold standard for the outer boundaries of defining coordination, or even as an example of the most effective approach to ensuring independent expenditures are in fact independent, may not be the best idea.

Moreover, even if the FEC's regulations are used as a guide, Plaintiff's attack on the 2013 Act based on the FEC's regulations fails. The FEC's coordination regulations consider who is paying for a communication, the content of the communication, and the conduct of the candidate and the spending party, to determine if there is coordination. *See* 11 C.F.R. § 109.21.

In several critical respects, they present the same issues the DGA finds objectionable with the Connecticut law.

First, not directly mentioned by the DGA is that the content portion of the FEC's regulations does not limit coordination to communications that contain express advocacy or its functional equivalent, which the DGA argues is constitutionally required for Connecticut. In fact, the FEC's regulations expressly cover "electioneering communications," 11 C.F.R. § 109.21(c)(1), and communications that merely reference a clearly identified House or Senate Candidate within 90 days of an election or refer to a presidential candidate within the period running from 120 days before a primary through the general election, 11 C.F.R. § 109.21(c)(4)(i)-(ii). Nevertheless, the DGA describes the FEC's coordination regulations as having been "drafted and redrafted under judicial supervision to respect the constitutional boundaries." PI Mot. 20-21. If the DGA truly believes that the FEC's coordination regulations "respect constitutional boundaries" even though they apply to communications that do not contain express advocacy, it is difficult to fathom why the DGA believes that Connecticut's coordination rules are unconstitutional because they are not limited to communications that contain express advocacy.[14]

Moreover, the FEC's regulations require as much, if not more, of a case-by-case factual inquiry as does Connecticut's rules. According to the FEC's regulations, if a communication is "created, produced, or distributed at the request or suggestion of a candidate" or "is created, produced, or distributed" at the suggestion of a person paying for the communication and the candidate "assents" to the suggestion, the communication will be considered coordinated with the candidate. 11 C.F.R. §109.21(d)(1)(i)-(ii). The regulations also provide that a communication

[14] As is discussed *infra* at 25-28, there is no constitutional requirement that coordination rules applicable to an organization with a major purpose of electing candidates be limited to communications containing express advocacy.

will be considered coordinated if the candidate or his or her agent has "material involvement" in certain aspects of the communication, 11 C.F.R. §109.21(d)(2); "[t]he communication is created, produced, or distributed after one or more substantial discussions about the communication," including discussion of the candidate's "campaign plans, projects, activities or needs," 11 C.F.R. §109.21(d)(3); there is use of a common vendor who is involved in certain specific aspects of the communication, 11 C.F.R. §109.21(d)(4); there is involvement of a former employee or independent contractor of the candidate in specified aspects of the communication, in specified aspects of the communication, 11 C.F.R. §109.21(d)(5); or the communication involves the "dissemination, distribution, or re-publication of campaign material," 11 C.F.R. §109.21(d)(6). Under each of these categories of conduct, there are a number of additional factors to be considered. Clearly, the references to "material involvement" and "substantial discussions" introduce some level of uncertainty as to where the lines will be drawn and suggest a finding of coordination will involve some subjective judgments by the FEC. Finally, nowhere do the FEC's regulations state that fundraising on behalf of the group making the expenditure will never be relevant to a coordination finding.

In comparison, the 2013 Act provides that an "expenditure made by a person in cooperation, consultation or in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding" with a candidate or "consultant or other agent acting on behalf of a candidate" will raise "a rebuttable presumption" that the expenditure is not independent. Conn. General Statutes § 9-601c(b). The statute also describes eight additional situations that will raise a rebuttable presumption that an expenditure was coordinated with the candidate and then discusses "facts that, standing alone, are not presumed indicate coordination."

SEEC, Decl. Rul. 2014-02, at 2. Even a cursory review of these provisions show they are similar to the FEC's regulations.

The fact that Connecticut uses a rebuttable presumption, as opposed to declaring certain facts as determinative, does not change the nature of the rules. A rebuttable presumption merely shifts the burden to the other party to show evidence that the presumption is not true. *See Mandell v. Cnty. of Suffolk*, 316 F.3d 368 (2d Cir. 2003). This means that if the DGA's activities trigger a rebuttable presumption of coordination, the DGA still has the opportunity to provide evidence that the activity was not coordinated. Once they do so, the burden again shifts the SEEC to prove there was coordination.

The FEC's regulations do not provide for a rebuttable presumption, suggesting that once the standards are met, coordination is found. However, there is a provision providing that the conduct standard is not met if a firewall is present to stop the dissemination of information. 11 C.F.R. § 109.21(h). Again, the Connecticut coordination rules are similar in effect to the FEC's regulations about which the DGA thinks so highly.

The DGA's reference to the federal law is problematic for the DGA for another reason. The DGA makes much of its need to have candidates for state office raise unlimited funds outside the regulation of the campaign finance laws for the organization, which it will use for express advocacy and issue communications, as well as other efforts to elect Democratic candidates. *See, e.g.*, PI Mot. 4-5 ("[A]ll of DGA's members are expected to participate in its programs and activities, and to help raise funds to support DGA…. If DGA were not able to utilize its members to raise funds …, particularly from wealthier states like Connecticut, its ability to function effectively would be severely compromised.") (internal citations omitted).

However, if Governor Malloy was either a candidate for federal office or held federal office, he would not be able to "solicit, receive, direct, transfer, or spend funds" in connection with an election for any office that were in excess of the federal contribution limits or from sources prohibited from giving under federal law, except in very limited circumstances. 2 U.S.C. § 441i(e)(1) and (2). Thus, it would not matter if the contributions were not earmarked or if his activity was not coordinated with the entity making expenditures—under federal law, candidates and officeholders are generally prohibited from soliciting unlimited contributions for groups like DGA that spend money in connection with elections. While the DGA would like to cherry-pick parts of the federal law and regulations it considers the outer limits of regulation, the admonition that one should be careful about what they wish for seems appropriate.

There is no doubt that it would benefit the DGA if Connecticut would tell it that the DGA could work closely with a candidate for governor of the State while undertaking independent expenditures on the candidate's behalf, all without having to consider whether the actual details regarding the arrangement would result in coordination. But that scenario is neither realistic nor constitutionally required. A case-by-case functional approach to determine coordination, guided by a statute that sets forth a variety of factors and establishes rebuttable presumptions, gives meaning to the contribution/independent expenditure distinction, while providing persons of ordinary intelligence sufficient guidance.

IV. The Definition of Expenditure As Applied to Political Organizations Like the DGA is Not Limited to Express Advocacy or Its Functional Equivalent.

The DGA argues that the 2013 Act and the SEEC's rulings are unconstitutional because they do not limit a finding of coordination to situations where communication contains express

advocacy or its functional equivalent. PI Mot. 28, Compl., Prayer for Relief 29-30.[15] However, the Connecticut legislature was not required to limit the application of the coordination rules to express advocacy or its functional equivalent because the Supreme Court formulated this test in connection to *independent* expenditures, not *coordinated* expenditures, which it has consistently treated as "contributions." Further, application of the narrowing construction of express advocacy is particularly inappropriate here because DGA has as its major purpose the election or defeat of candidates, and as a "major purpose" group, is not entitled under any circumstance to such a narrowing construction.[16]

First, the express advocacy standard is not applicable to coordinated expenditures. In *Buckley*, the Supreme Court addressed constitutional concerns that the federal definitions of "expenditure" and "contribution" were vague and overbroad because both definitions relied on the broad operative phrase "for the purpose of influencing any election for Federal office." 424 U.S. at 79; *see also* 2 U.S.C. § 431(8)(A)(i) (defining "contribution"), *id.* § 431(9)(A)(i) (defining "expenditure").The *Buckley* Court concluded, in the context of independent expenditures, that this phrase was vague because it potentially "encompass[ed] both issue discussion and advocacy of a political result. *See* 18 U.S.C. § 608(e)(1) (1970 ed., Supp. IV) (limiting independent expenditures); 2 U.S.C. § 434(e) (1970 ed., Supp. IV) (requiring reporting of independent expenditures). Consequently, where the actor was "an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate" 424 U.S. at 79-80.

[15] As is discussed *supra* at 18-20, the FEC's coordination regulations are not limited to communications that contain express advocacy.

[16] The DGA does not have standing to challenge the application of the law to groups who are not political organizations.

But this was in the context of independent expenditures. Importantly, the *Buckley* Court found that the "for the purpose of influencing" phrase "presents fewer problems in connection with the *definition of a contribution* because of the limiting connotation created by the general understanding of what constitutes a political contribution." *Id.* at 24 (emphasis added). Instead of imposing an "express advocacy" construction on the definition of "contribution," the Supreme Court merely clarified that a contribution includes: (1) "contributions made directly or indirectly to a candidate, political party, or campaign committee," (2) "contributions made to other organizations or individuals but earmarked for political purposes," and (3) "*all expenditures placed in cooperation with or with the consent of a candidate*, his agents, or an authorized committee of the candidate." *Id*. at 78 (emphasis added).

Thus, the *Buckley* Court recognized that within the bounds of the "general understanding" of what constitutes a political contribution—an understanding that included coordinated expenditures (*i.e.* expenditures "placed in cooperation with or with the consent of a candidate")—the limiting gloss of express advocacy was not necessary. Otherwise put, the *Buckley* Court affirmed that a broad statutory provision governing contributions—and by extension, coordinated expenditures—was neither vague nor overbroad.

Furthermore, the Supreme Court later affirmatively recognized that a coordination rule could extend past "express advocacy" to encompass "electioneering communications," a category of communications that is the federal counterpart to the Connecticut definition of "expenditure" at section 9-60lb(2). *Compare* 2 U.S.C.§ 434(f) *with* Conn. Gen. Stat. § 9-60lb(2). In *McConnell*, the Court considered a section of the Bipartisan Campaign Reform Act that provided that disbursements for "electioneering communications" that are coordinated with a candidate or party will be treated as contributions to, and expenditures by, that candidate or

party. 540 U.S. at 202. It noted that "*Buckley*'s narrow interpretation of the term 'expenditure' was not a constitutional limitation on Congress' power to regulate federal elections," and consequently concluded that "there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures." *Id*. at 202-03 (internal citations omitted).

Second, plaintiff's attempt to limit the coordination inquiry to express advocacy and the functional equivalent of express advocacy is particularly indefensible here, where DGA is a major purpose group.

In addressing vagueness concerns with the definition of "expenditure," the *Buckley* Court introduced the narrowing "express advocacy" construction only where the spender was "an individual *other than* a candidate or a group *other than* a 'political committee.'" *Id.* at 79-80 (emphasis added). By contrast, in the case of "organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate*," the Court deemed this narrowing construction unnecessary. Expenditures of candidates and of such "major purpose groups" "can be assumed to fall within the core area sought to be addressed by Congress. *They are, by definition, campaign related*." *Id.* at 79 (emphasis added). The Court in *Buckley* thus made it clear that when dealing with an organization whose major purpose is election of a candidate, such as the DGA, there was no reason to limit the definition of "expenditure" to communications that expressly advocate the election or defeat of a candidate.

The Supreme Court sustained this approach in *McConnell* in its consideration of a federal requirement that state parties use hard money to pay for a public communication that "promotes or supports" or "attacks or opposes" a federal candidate. 2 U.S.C. §§ 431(20)(A)(iii), 441i(b)(1). The Court rejected a vagueness challenge to this provision, finding that the words "clearly set

forth the confines within which potential party speakers must act in order to avoid triggering the provision." 540 U.S. at 169 n.64 (emphasis added). Quoting *Buckley*, the Court noted that "a general requirement that political committees disclose their expenditures raised no vagueness problems because the term 'political committee' 'need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate' and thus a political committee's expenditures 'are, by definition, campaign related.'" *Id*. Thus, the Court in *McConnell* reaffirmed that the express advocacy test does not apply to groups whose major purpose is to influence federal elections.

Nonetheless, the DGA cites *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (*WRTL*) and *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 248 (1986) (*MCFL*), for the proposition that the government may only regulate express advocacy or its functional equivalent. This is simply wrong. The *WRTL* and *MCFL* cases, as well as *Citizens United*, all dealt with organizations that did *not* have the election of candidates as their major purpose. All of the plaintiff organizations were issue advocacy groups organized under a different section of the Internal Revenue Code, *see* 26 U.S.C. §501(c)(4).

This precedent confirms that the DGA, as a "major purpose" group, is not entitled to an "express advocacy" construction of the governing statutory definition of "expenditure."

And the DGA does not deny that it is such a group. It is registered with the Internal Revenue Service (IRS) as a "political organization," 26 U.S.C. § 527, defined as a group "organized and operated *primarily for the purpose* of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1) (emphasis added). An "exempt function," in turn, is defined to mean the "function of *influencing or attempting to influence the selection, nomination, election, or appointment of any individual*

to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors…." 26 U.S.C. § 527(e)(2) (emphasis added). Organizations that self-identify as "political organizations" under section 527 thus have the self-proclaimed major purpose of influencing *the selection, nomination, election, or appointment* of individuals to public office—not issue advocacy, not lobbying. Furthermore, far from denying its "major purpose" status, the DGA heralds its purpose, boasting that it is "dedicated to electing Democratic governors and candidates… at all levels of campaigns, from providing resources to fund operations to helping articulate and deliver their messages."[17]

Plaintiff cannot point to one case in which the Supreme Court has held that the express advocacy requirement applies to expenditures made by organizations, like the DGA, that have as their major purpose the election of candidates.[18]

CONCLUSION

For the foregoing reasons, the DGA lacks standing to bring this action. Moreover, the 2013 Act and the SEEC's Declaratory Rulings defining coordination do not violate the First Amendment. Accordingly, this court should either dismiss this action or find that the DGA is unlikely to succeed on the merits of its challenge and deny the DGA's motion for a preliminary injunction.

---

[17] Democratic Governors Association, http://democraticgovernors.org/#about (last visited May 13, 2014).

[18] Nothing in this analysis is changed by the recent decision of the United States District Court for the Eastern District of Wisconsin in *O'Keefe v. Schmitz*, O'Keefe v. Schmitz, Slip. Op. No.14–C–139, 2014 WL 1795139 (E.D. Wis. May 6, 2014). The court preliminarily enjoined a state investigation of alleged coordination of ads paid for by the Wisconsin Club for Growth (WCFG), finding that only ads that expressly advocated the election or defeat of a candidate were subject to regulation. Even putting aside the long line of cases discussed above which the court ignored, O'Keefe does not help the DGA. Unlike the DGA, the WCFG is a 501(c)(4) social-welfare organization and not a political organization under section 527 of the Internal Revenue Code. In fact, Judge Randa relies on the portion of *Buckley* defining the phrase "for the purpose of influencing" where the Supreme Court said that the narrowing "express advocacy" construction was needed only for a group that did not have as its "the major purpose … the nomination or election of a candidate," since expenditures of "major purpose groups" "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." Buckley, 424 U.S. at 79. Therefore, one can assume Judge Randa would recognize how the WCFG and the DGA differ,

Respectfully submitted,

/s/ Patrick Tomasiewicz
Patrick Tomasiewicz*
Bar No. CT01320
FAZZANO & TOMASIEWICZ, LLC
96 Oak Street
Hartford, CT 06106
Tel.: (860) 231-7766
pt@ftlawct.com

J. Gerald Hebert
Lawrence M. Noble
Megan P. McAllen
Catherine Hinckley Kelley
THE CAMPAIGN LEGAL CENTER
215 E Street, NE
Washington, DC 20002
Tel.: (202) 736-2200
ghebert@campaignlegalcenter.org
lnoble@campaignlegalcenter.org
mmcallen@campaignlegalcenter.org
ckelley@campaignlegalcenter.org

Counsel for *Amici Curiae*

*Counsel of Record

Dated: May 13, 2014