# 12-2904-cv

**In the United States Court of Appeals for the Second Circuit**

**Vermont Right to Life Committee, Inc., et al.,**
*Plaintiffs-Appellants*,

**v.**

**William H. Sorrell, et al.,**
*Defendants-Appellees*.

On Appeal from the United States District Court for the District of Vermont,
Case No. 2:09-cv-188 (Sessions, J.)

**Brief *Amici Curiae* for the Campaign Legal Center and Democracy 21 Supporting Appellees and Urging Affirmance**

J. Gerald Hebert*
THE CAMPAIGN LEGAL CENTER
215 E Street, N.E.
Washington, D.C. 20002
Tel.: (202) 736-2200

Counsel for *Amici Curiae*

**Application for admission pending*

## CORPORATE DISCLOSURE STATEMENT

The Campaign Legal Center (CLC) is a nonprofit corporation that neither has a parent corporation nor issues stock. There are no publicly-held corporations that own ten percent or more of the CLC.

Democracy 21 is a nonprofit corporation that neither has a parent corporation nor issues stock. There are no publicly-held corporations that own ten percent or more of Democracy 21.

/s/ J. Gerald Hebert
J. Gerald Hebert

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases:**

**Statutes and Regulations:**

## STATEMENT OF INTEREST[1]

*Amici curiae* Campaign Legal Center (CLC) and Democracy 21 are nonprofit, nonpartisan organizations that work to strengthen laws governing campaign finance and political disclosure. *Amici* have participated in numerous cases addressing campaign finance issues, including *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). *Amici* have a longstanding, demonstrated interest in the laws at issue here.[2]

## SUMMARY OF ARGUMENT

Appellants Vermont Right to Life Committee ("VRLC") and its "independent-expenditure-only" fund, Vermont Right to Life Committee – Fund for Independent Political Expenditures ("FIPE"), wish to make expenditures to sway Vermont's elections without providing meaningful disclosure of their spending. In addition, FIPE requests an exemption from the $2,000 contribution limit applicable to political committees, Vt. Stat. Ann. tit. 17 ("V.S.A."), § 2805(a), although the record shows that there is "no significant functional divide"

---

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirm that no party's counsel authored the brief in whole or in part, and no person—other than the *amici*—contributed money that was intended to fund the brief.

[2] Counsel for appellants and appellees have been contacted and all parties have consented to the participation of the CLC and Democracy 21.

between FIPE and VRLC's political committee ("PC"), which makes contributions to Vermont candidates. SpA.101.

Appellants' demands have no legal basis and would gut Vermont's campaign finance law. The district court's decision to grant summary judgment to defendants-appellees should be affirmed.

In terms of appellants' disclosure claims, the district court was correct in rejecting their challenge on vagueness grounds to the definitions of "political committee," V.S.A. § 2801(4), "electioneering communication" ("EC"), *id*. at § 2891, and "mass media activities" ("MMA"), *id*. at § 2893. The Supreme Court has endorsed the "support-oppose" language that is part of the "political committee" and "EC" definitions, finding that it "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003) (internal quotations omitted). And as the district court found, the language of the "EC" and "MMA" definitions is "itself clear and further clarified by administrative action." SpA.59.

Also lacking merit is appellants' argument that Vermont's disclosure requirements for political committees are overbroad because they may apply to groups whose "major purpose" is not the nomination or election of a candidate. The First, Seventh, Ninth and Eleventh Circuits have all recognized that the

Supreme Court has never applied a "major purpose" test to a state's regulation of political committees. *See* Section II *infra*.

Finally, the district court correctly found that FIPE is not entitled to an exemption from the $2,000 contribution limit. It recognized that several lower courts have invalidated contribution limits as applied to "independent-expenditure-only" committees, but found that FIPE is not such a committee, citing record evidence of the "structural melding" of VLRC, PC and FIPE and the "fluidity of funds" across these three entities. SpA.97-107. Appellants did not contest this evidence, but claimed that even if the facts are true, they did not demonstrate that FIPE had made contributions to, or coordinated expenditures with, candidates. But the Supreme Court has reiterated that only expenditures that are "totally," "wholly," or "truly" independent from candidates and political parties are non-corruptive. *See* Section IV.A.1 *infra*. FIPE's lack of formal independence, the common management of the VRLC entities, and most importantly, the commingling of funds between the VRLC entities, all support the district court's rejection of FIPE's claim of independence.

## ARGUMENT

### I. Vermont's Disclosure Laws Are Not Unconstitutionally Vague.

#### A. *McConnell* Establishes the Constitutional Validity of "Support-Oppose" Language.

Appellants maintain that Vermont's "political committee" definition is unconstitutionally vague, even as narrowly construed by the district court,[3] because it incorporates the phrase "supporting or opposing one or more candidates." Appellants' Br. 36 (citing V.S.A. § 2801(4)). Similarly, appellants assert that Vermont's definition of "EC," V.S.A. § 2892, which contains the same operative "support-oppose" language, is unconstitutionally vague. *See* Appellants' Br. 36-39.

These claims, however, are flatly contradicted by the Supreme Court's decision in *McConnell*, which upheld virtually identical language in Title I of the Bipartisan Campaign Reform Act (BCRA). Reviewing one prong of the federal definition of "federal election activity," 2 U.S.C. § 431(20)(A)(iii), the Court concluded that words like "'promote,' 'oppose,' 'attack,' and 'support' [PASO] …

---

[3] The statutory definition of "political committee," "contribution" and "expenditure" all rely upon the phrase "for the purpose of influencing" and similar language, and were challenged on this basis as vague by appellants in the district court. However, following the guidance of a Vermont state court decision, the district court narrowly construed these definitions to encompass only entities accepting contributions or making expenditures for the purpose of "supporting or opposing one or more candidates." SpA.52 (citing *Vermont v. Green Mountain Future*, No. 758-10-10 (Wash. Super. Ct. June 28, 2011)).

'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'" *McConnell*, 540 U.S. at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). The language at issue here mirrors the language upheld in *McConnell*.

Moreover, lower courts have followed *McConnell* to uphold "PASO" language in various contexts. The Seventh Circuit, for example, recently rejected a vagueness claim involving an Illinois statute containing analogous "support" and "oppose" language, and reiterated that "[t]his part of *McConnell* remains valid after *Citizens United*[.]" *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 486 (7th Cir. 2012), *petition for reh'g en banc denied* (7th Cir. Nov. 6, 2012). *See also Human Life of Wash. v. Brumsickle*, No. 08-cv-0590, 2009 WL 62144, at *14-*15 (W.D. Wash. Jan. 8, 2009) (citing *McConnell* to uphold state statute defining "political committee" as a group that receives contributions or makes expenditures "in support of, or opposition to, any candidate or any ballot proposition"), *aff'd*, 624 F.3d 990 (9th Cir. 2010) ("*HLW*"); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62-64 (1st Cir. 2011) (rejecting vagueness challenge to Maine law containing the words "promoting," "support," and "opposition," and noting that "*McConnell* remains the leading authority relevant to interpretation of the terms before us"); *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115, 120 (1st Cir. 2011)

(rejecting a vagueness challenge to Rhode Island law containing the phrase "to support or defeat a candidate").

Appellants provide no valid authority to justify their assertion that the presence of the phrase "supporting or opposing" in Vermont's definitions of "political committee" or "EC" places speakers in an unconstitutional "quandary" as to the law's requirements. *See* Appellants' Br. 38-39. Appellants cite Justice Scalia's concurring opinion in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 492 (2007), but a concurrence does not overrule *McConnell*'s endorsement of a PASO standard. They also cite *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 662-63 (5th Cir. 2006), *cert. denied*, 549 U.S. 1112 (2007), which employed a limiting construction to uphold a Louisiana definition of "expenditure" that included PASO language. But in so holding, the *Carmouche* court identified the phrase "or otherwise influenc[e]" as the source of potential vagueness, not the PASO language. Hence, neither decision supports appellants' claims.

The Supreme Court has confirmed that PASO language is sufficiently clear, and the PASO language in Vermont's statutory definition of electioneering communication is "nearly verbatim the phrase interpreted in *McConnell*." SpA.56. Taken as a whole, Vermont law "clearly set[s] forth the confines within which … speakers must act." *McConnell*, 540 U.S. at 170 n.64.

### B. The Phrases "on Whose Behalf" and "Relating to" Do Not Render Vermont's "Electioneering Communication" and "Mass Media Activities" Definitions Unconstitutionally Vague.

Appellants' challenge to the phrases "on whose behalf" and "relating to" also has no merit. With respect to the former, appellants contend that requiring sponsors of ECs to "clearly designate the name of the candidate, party, or political committee by or *on whose behalf* the [communication] is published or broadcast," V.S.A. § 2892 (emphasis added), is invalid because the phrase "on whose behalf" is ambiguous. But as the district court observed, the phrase "on whose behalf" under Vermont law applies only where there is "coordination between the party benefited and the party paying for the communication," making its application both limited and readily ascertainable. SpA.59.

In a similar vein, Vermont's MMA reporting requirements are not unconstitutionally vague by virtue of the phrase "relating to," which is defined in a separate provision. The challenged law requires MMA reports to "identify the person who made the expenditure with the name of the candidate involved in the activity and any other information *relating to* the expenditure that is required to be disclosed under the provisions of 2803(a) and (b) of this title." V.S.A. § 2893(b) (emphasis added). "Relating to" is not vague merely because it cross-references another statutory provision, V.S.A. § 2803, which in turn details what "relat[ed]" information must be reported. The existence of a standard, one-page MMA

reporting form enumerating the law's requirements leaves no doubt as to what information "relating to the expenditure" must be reported. Because "the law is itself clear" and has been "clarified by administrative action," SpA.59, appellants' challenge should be rejected.

## II. Vermont's "Political Committee" Definition and Related Disclosure Requirements Are Not Unconstitutionally Overbroad.

Appellants also contend that the state definition of "political committee," V.S.A. § 2801(4), is unconstitutional because it may impose "PAC status" on groups whose "major purpose" does not relate to the nomination or election of a candidate. *See* Appellants' Br. 49-50. But the "major purpose" test was formulated as a narrowing construction to the federal definition of "political committee," and there is no justification for importing this "major purpose" requirement into a state law. *See, e.g.*, *McKee*, 649 F.3d at 59 (noting that "[t]he Court has never applied a 'major purpose' test to a state's regulation of PACs ….").

The Supreme Court first formulated the "major purpose" test in *Buckley* to address the constitutional concern that the definition of "political committee" in the Federal Election Campaign Act ("FECA") was vague and overbroad to the extent it relied upon the statutory definition of "expenditure." FECA defined a "political committee" as a group that "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).

The statute in turn defined "expenditure" as any spending "for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). The Court feared that the definition of "political committee"—because it relied upon this expansive definition of "expenditure"—could "be interpreted to reach groups engaged purely in issue discussion." *Buckley*, 424 U.S. at 79.

To resolve its concerns about the definition of "political committee," the *Buckley* Court narrowed the definition to encompass only "organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*" *Id.* (emphasis added). For such "major purpose" groups, there was no vagueness concern about the broad statutory definition of "expenditure" because, the Supreme Court held, their disbursements "can be assumed to fall within the core area sought to be addressed by Congress." *Id.*

The "major purpose" test was thus intended to narrow the federal definition of "political committee" to ensure that federal political committee requirements would not "reach groups engaged purely in issue discussion." *Id*. But the Supreme Court did not state that the "major purpose" test was the *only* way to ensure that groups engaged purely in issue advocacy would not be subject to undue regulation. This was recognized by the Ninth Circuit in *HLW*:

> *Buckley*'s statement that defining groups with "the major purpose" of political advocacy as political committees is sufficient "[t]o fulfill the purposes of the Act," … does not indicate that an entity must have that major purpose to be

> deemed constitutionally a political committee. … Rather, in stating that disclosure requirements "(1) cannot cover 'groups engaged purely in issue discussion' and (2) can cover 'groups the major purpose of which is the nomination or election of a candidate,'" the *Buckley* Court defined the outer limits of permissible political committee regulation.

624 F.3d at 1009-10 (internal citations omitted). Otherwise expressed, the "major purpose" test operates as a sort of "safe harbor (from a regulatory perspective)." *Yamada v. Weaver*, No. 10-497, 2012 WL 983559, *17 (D. Haw. Mar. 21, 2012), *appeal docketed*, No. 12-15913 (9th Cir. Apr. 20, 2012). Groups meeting the "major purpose" test can be permissibly regulated as political committees, but it does not necessarily follow that groups engaged in multiple types of advocacy must be exempt from all regulation, even disclosure requirements, such as those at issue here. To the contrary, multiple Circuits have recognized that states have far more latitude to regulate in the area of disclosure, and may require registration and reporting from groups that do not have campaign activity as their sole or even "major" purpose. *See Madigan*, 697 F.3d at 488; *Nat'l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1222 (N.D. Fla. 2010), *aff'd per curiam*, No. 11-1493, 2012 WL 1758607 (11th Cir. 2012); *McKee*, 649 F.3d at 56; *HLW*, 624 F.3d at 1009-10.

It is also important to note that the "major purpose" test was developed in light of the full panoply of regulations applicable to federal political committees when *Buckley* was decided, which included contribution limits and source

restrictions. *See Madigan*, 697 F.3d at 488 (noting that "[w]hen *Buckley* was decided, political committees faced much greater burdens under FECA's 1974 amendments," than they did under a state disclosure law). By contrast, under Vermont law, "PAC status" principally entails registration and reporting requirements. *See* V.S.A. §§ 2802, 2803, 2811, 2831(a). Indeed, appellants do not hide the fact that their case centers on disclosure, acknowledging that they believe the "major purpose" test is a prerequisite for "PAC status" even when such status triggers only registration, record-keeping and reporting requirements—*not* contribution restrictions. *See* Appellants' Br. 51 ("[T]he major-purpose test is not a narrowing gloss, so it applies to state law, … both when there are limits or source bans on contributions received, … and when there are not.") (internal citations omitted).

Nevertheless, in the alternative, appellants assert that the challenged definitions implicate more than disclosure, and cite a list of contribution limits, V.S.A. § 2805(a), and federal source restrictions, 2 U.S.C. §§ 441b, 441e, allegedly triggered by PAC status under Vermont law. Appellants' Br. 44. This is calculated misdirection. First, insofar as FIPE and VRLC are engaged only in "independent" activities, they will not be subject to the cited contribution limits even if they are classified as political committees. *See* SpA.92. And if FIPE and VRLC are so intertwined with PC that they are deemed to be making contributions

to candidates, then they will be subject to contribution limits notwithstanding whether they separately qualify as "political committees."[4] *See* Section IV.B, *infra*. Second, the federal contribution source restrictions cited by appellants either apply to FIPE regardless whether it is a committee, 2 U.S.C. § 441e, or have no application to state committees, 2 U.S.C. § 441b. Thus, the contribution restrictions cited by appellants should not obscure the fact that appellants' case implicates only the *disclosure requirements* that such status triggers.

In short, *Buckley*'s limiting "major purpose" construction was drawn to correct the deficiencies of the federal statute under review, and in light of the specific legal obligations that statute imposed. The Supreme Court has never applied a "major purpose" test to a state's regulation of political committees, and this Court should not start here. *Madigan*, 697 F.3d at 487-88.

## III. Vermont's Reporting Thresholds Are Not "Wholly Without Rationality."

Appellants also charge that Vermont's $100 contribution disclosure threshold, V.S.A. § 2803(a), is unconstitutionally low. Contrary to appellants' assertions, however, a $100 disclosure threshold does not fail to satisfy the "wholly without rationality" constitutional standard articulated in *Buckley*.

---

[4] In *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit suggested that although contributions given to a nonprofit to fund independent expenditures could not be limited, contributions given to fund the nonprofit's contributions to candidates or coordinated expenditures could be subject to contribution limits. *See infra* Part IV.B.

It is well-settled that the determination of disclosure thresholds is a task best left to the legislature. *See Buckley*, 424 U.S. at 83. As with other issues that demand difficult line-drawing, courts cannot substitute their policy preferences for those of the elected branches. Accordingly, disclosure thresholds are constitutionally valid so long as they are not "wholly without rationality." *Id.* As *Buckley* itself made clear, even apparently "low" thresholds pass constitutional muster under this forgiving standard. *See id.* (noting that although there was "little in the legislative history to indicate that Congress focused carefully on the appropriate level at which to require recording and disclosure," the requirement was not "wholly without rationality"). Indeed, the Supreme Court suggested in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), that even zero-dollar disclosure thresholds could be constitutionally sound. *Id.* at 300 ("[I]f it is thought wise, legislation can outlaw anonymous contributions.").

Other courts have recognized that *Buckley* is controlling on this point. In *McKee*, the First Circuit relied on the "wholly without rationality" standard to uphold Maine's $100 disclosure threshold. The *McKee* court noted that the plaintiff's argument "operate[d] from a mistaken premise" because reporting thresholds are not subject to "exacting scrutiny" review. 649 F.3d at 60. Instead, the court restated *Buckley*'s "wholly without rationality" standard as one requiring "judicial deference to plausible legislative judgments." *Id.* (internal citations

omitted). *See also Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012) (recognizing that "disclosure thresholds … are inherently inexact[,]" so courts "owe substantial deference to legislative judgments fixing these amounts"); *Daluz*, 654 F.3d at 118-19 (applying *Buckley*'s "wholly without rationality" standard to uphold Rhode Island's $100 reporting threshold); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 946 (E.D. Cal. 2011) (observing that California's $100 threshold "falls wells within the spectrum of those mandated by its sister states, which range from no threshold requirement to $300").

As the district court determined, Vermont's $100 threshold "has a rational foundation" and effectuates Vermont's interest in political transparency. SpA.83.

## IV. The $2,000 Contribution Limit Is Constitutional As Applied to FIPE.

Appellants argued, and the district court accepted, that contributions cannot constitutionally be limited to groups that make only independent expenditures and do not contribute to, or coordinate expenditures with, candidates or political parties.

Appellants and the district court diverged, however, on the issue of whether FIPE was sufficiently "independent" from candidates and political parties to qualify for such an exemption from the $2,000 contribution limit applicable to political committees under Vermont law. V.S.A. § 2805(a). The district court perceived this to be an issue of fact, and found that FIPE was not independent

based on record evidence of the "structural melding" of VRLC, PC and FIPE, and in particular, the failure of these entities to strictly segregate their funding. Appellants did not contest these facts below, but claimed that FIPE engaged only in independent expenditures and that this allegation "must be the end of the Court's analysis." SpA.92-93.

On appeal, appellants compound this error. They again claim that even if the facts found by the court are true, this evidence does not demonstrate, as a matter of law, that FIPE had made contributions to, or coordinated expenditures with, candidates. The problem with appellants' stance is not only that they are unable to dispute the facts, but that they are wrong on the law. The Supreme Court has made explicit that only expenditures that are "totally," "wholly," or "truly" independent from candidates and political parties are non-corruptive. This is a standard that FIPE cannot meet. FIPE's failure to incorporate, the common management of VRLC-PC-FIPE, the relationships between FIPE's officers and Vermont candidates, and most importantly, the commingling of funds between the VRLC entities all support the district court's finding that FIPE made expenditure that were not "independent."

### A. The Supreme Court Has Held that Expenditures Must Be "Totally," "Wholly," or "Truly" Independent to Be Deemed Non-corruptive.

In the course of invalidating the federal corporate expenditure ban in *Citizens United*, the Supreme Court endorsed the principle that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption." 130 S. Ct. at 909.

This principle has been extended to "independent-expenditure-only" political committees in a recent series of lower court decisions, including *SpeechNow.org*, *Wisconsin Right to Life State PAC v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011), and *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-21 (9th Cir. 2011). These courts struck down limits on contributions to groups that made only independent expenditures, reasoning that if their expenditures did not raise a significant risk of corruption, then limits on contributions to such groups could not be justified by the governmental interest in preventing corruption. The district court accepted this legal holding, and although *amici* disagree with this holding, *amici* do not address it in this brief.[5]

[5] *Amici* endorse and incorporate by reference appellees' argument supporting the constitutionality of limits on contributions to "independent-expenditure-only" committees in Section III.C. of their submission. *See* Brief of Appellees 57-72 (filed Nov. 29, 2012).

However, in holding that independent expenditures are not corruptive, the *Citizens United* Court did not analyze at length what it meant by an "independent" expenditure. 130 S. Ct. at 910. And as the district court noted, this is the crucial question here because "[t]he issue of independence from candidates is the touchstone of the contribution limit's constitutionality." SpA.94. Although *Citizens United* did not elaborate on this concept, the Supreme Court has in numerous past cases provided a more comprehensive analysis of the standards governing the determination of an expenditure's independence.

Beginning in *Buckley,* the Court distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" by an independent spender to influence an election. *Buckley* also recognized that, to be effective, any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47.

Drawing the line between "independent" and "coordinated" expenditures was thus crucial to averting circumvention of the contribution limits. *Buckley* explained that there was a difference between expenditures "made *totally* independently of the candidate and his campaign[,]" *id*. at 47 (emphasis added), and "coordinated expenditures," and construed the contribution limits to include

not only contributions made directly to a candidate, but also "all expenditures placed in cooperation with or with the consent of a candidate, his agents or [his] authorized committee …." *Id*. at 46-47 n.53; *see also id.* at 78.

The Supreme Court echoed *Buckley*'s broad language regarding coordination in later decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Supreme Court held that a political party ad aired prior to a candidate's nomination would not be treated as coordinated because the ad was developed "independently and not pursuant to *any general or particular understanding* with a candidate …." *Id*. at 614 (emphasis added).

In *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) ("*Colorado II*"), the Court—again in the context of party spending—underscored "the good sense of recognizing the distinction between independence and coordination." 533 U.S. at 447. Of particular importance, the Court noted that independent expenditures are only those "without any candidate's approval (or wink or nod) …." *Id*. at 442, 447.

*Colorado II* also described the dangers of unchecked coordinated spending in the context of party expenditures:

> There is no significant functional difference between a party's coordinated expenditure and a direct party contribution to the candidate, and there is good reason to expect that a party's right of unlimited coordinated spending would attract increased contributions to parties to finance exactly that kind

> of spending. Coordinated expenditures of money donated to a party are *tailor-made to undermine contribution limits*.

*Id*. at 464 (emphasis added). The Court went on to conclude that "a party's coordinated expenditures, unlike expenditures *truly independent*, may be restricted to minimize circumvention of contribution limits." *Id*. at 465 (emphasis added).

In *McConnell*, the Court again noted that the relevant "dividing line" was "between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that *truly* are independent." 540 U.S. at 221 (emphasis added). The Court explained: "Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. By contrast, *expenditures made after a wink or nod often will be as useful to the candidate as cash*." *Id*. at 221-22 (emphasis added) (internal citations and quotation marks omitted).

Throughout its campaign finance precedents, the Supreme Court has thus maintained a broad "wink or nod" view of what constitutes coordination between a candidate and an outside spender, a position it articulated in both *Colorado I* ("general or particular understanding") and *Colorado II* ("wink or nod"). It has spoken in expansive terms about the degree of independence that is necessary to prevent outside spending from "undermin[ing] contribution limits." Contrary to appellants' claims, only "totally independent," "wholly independent," and "truly independent" expenditures qualify.

### B. The District Court Was Correct in Finding as a Matter of Fact that FIPE Is Not "Independent."

The district court correctly found that FIPE did not meet the Supreme Court's high standard for independent spending, principally because of the commingling of funds between the VRLC entities. But the court's finding also relied on other aspects of FIPE's operations: namely, that FIPE was not separately incorporated, that the three VRLC entities shared common management, and that FIPE officers had significant contacts with state candidates. SpA.97-107.

Appellants claim the district court's inquiry into FIPE's organizational structure, management and funding is irrelevant to the determination of whether FIPE "engages in political speech other than independent spending," but offer no legal authority for this assertion. Appellants' Br. 83.

#### 1. No Formal Separation and Overlapping Management

The district court found that FIPE is not separately incorporated, and that FIPE is managed by VRLC and has no formal existence apart from VRLC. SpA.98.

The district court also found that although FIPE and PC have separate committees that direct their activities, these committees overlap almost entirely in membership. SpA.99. For example, Ms. Beerworth is VRLC's Executive Director and an ex officio member of FIPE's management committee. SpA.100. In 2010,

while also involved in the management of FIPE, Ms. Beerworth advised Republican gubernatorial candidate Brian Dubie, whom PC then endorsed and provided with VRLC's phone lists as an in-kind contribution. *Id*. There is no evidence that FIPE established intra-organizational "firewalls" to prevent Ms. Beerworth and other officers of VRLC or PC from directing the expenditures of FIPE.

Appellants do not dispute FIPE's failure to incorporate, or the common management of VRLC, PC and FIPE, but they argue that these facts have no bearing on the independence of FIPE's expenditures as a matter of law. But appellants cannot credibly claim that FIPE's expenditures are "truly," "totally" and "wholly" independent, given the "nearly complete organizational identity" of VRLC, PC and FIPE. SpA.101, SpA.103.

In support of their position, appellants cite case law stating that a federal political committee is a "separate association" from its corporate parent. *See* Appellants' Br. 85-86 (citing *Citizens United*, 130 S. Ct. at 897 and *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981) ["*CalMed"*]). But FIPE is not a federal political committee, so the relationship between a federal political committee and its parent organization has no bearing on FIPE's status here. Furthermore, even if FIPE were analogous to a federal political committee, the cases cited by appellants do not purport to announce a universal legal principle that all groups registered as

"committees" in the country are "separate" from their parent corporations regardless of any facts to the contrary. The *Citizens United* Court highlighted that a federal political committee is typically a "separate organization" from its parent to explain why the option to form a PAC under the federal corporate expenditure ban, 2 U.S.C. § 441b, did not allow corporations to fully exercise their First Amendment rights. As the district court found, "[n]either [*Citizens United* nor *CalMed*] stands for the proposition that Vermont PACs must be treated as wholly distinct entities as a matter of law when reviewing limits on contributions they may receive." SpA.103.

In addition to claiming that FIPE is "separate" as a matter of law, appellants also argue that even if FIPE is "just a VRLC or VRLC-PC fund/account," the VRLC-PC-FIPE conglomerate can make both independent expenditures and coordinated expenditures out of different accounts without imperiling its right to collect unrestricted contributions to fund its independent activities. Appellants' Br. 86.

*Amici* acknowledge that *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009), and *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011), suggest that a single committee has a constitutional right to simultaneously operate a "hard money" account for coordinated expenditures and a "soft money" account for independent spending. But insofar as these decisions suggest that a single "mixed-purpose"

committee making both coordinated expenditures and independent expenditures must be exempted from the contribution limits with respect to the latter, *amici* submit that these cases were wrongly decided.

In *EMILY's List*, while analyzing FEC allocation rules for federal committees engaging in both state and federal election activity, the D.C. Circuit stated in *dicta* that limits on contributions to a nonprofit that made only independent expenditures are unconstitutional. It further reasoned that such a nonprofit "does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates." *Id.* at 12. According to the Court of Appeals, such a nonprofit had a right to use unregulated funds ("soft money") for its independent expenditures, while using funds raised under the federal contribution limits ("hard money") for its contributions to candidates and parties. Relying on *EMILY's List*, the district court in *Carey* then held that a single "mixed-purpose" political committee could accept soft money for independent spending and hard money for campaign contributions, provided it segregated these two funding streams in separate accounts. 791 F. Supp. 2d at 131-32.

Both of these decisions depart from governing Supreme Court authority, specifically *CalMed* and *McConnell*.

In *CalMed*, the Court explained that the federal limits on contributions to multicandidate political committees "further the governmental interest in

preventing the actual or apparent corruption of the political process" by "prevent[ing] circumvention of the very limitations on contributions that this Court upheld in *Buckley*." 453 U.S. 197-98 (plurality opinion). It also found that the fact that a committee may also make independent expenditures does not eliminate the governmental interest in limiting contributions to the committee across the board. As the plurality noted, if donors were permitted to make unlimited contributions, even if they were designated for administrative expenses, these big donors could "completely dominate the operations and contribution policies of independent political committees …." *Id.* at 199 n.19. By leveraging their unlimited donations to control the committee's direct contributions, such donors could give to their favored candidate "to an extent … far greater than the [donor] that finances the committee's [independent expenditures] would be able to do acting alone." *Id*.

The governmental interest articulated in *CalMed* in preventing "donor domination" of a political committee applies equally well to the plaintiff committee in *Carey*, as well as to the VRLC-PC-FIPE conglomerate here. Permitting FIPE to accept unlimited contributions, even if those contributions will ostensibly fund only independent expenditures, could facilitate the "circumvention of the very limitations on contributions that th[e] Court upheld in *Buckley*." *Id.* at 197-98. Specifically, individuals and groups who seek to maximize their contributions to candidates could make large donations to FIPE for "independent

expenditures" as a means to gain control over PC's decisions as to contributions and coordinated expenditures.

The fact that PC and FIPE have opened separate bank accounts in no way eliminates the danger that soft money donors to FIPE might attempt to dictate the activities of VRLC and PC. Nor do they counteract "the appearance of improper influence[,]" which is critical "if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Buckley*, 424 U.S. at 27 (citation omitted). Segregated bank accounts simply avert the more immediate threat of soft money contributions *directly* financing a political committee's contributions to candidates.

Further, as the district court noted, the decisions in *EMILY's List* and *Carey* are "in tension with language in *McConnell*." SpA.104. The Supreme Court in *McConnell* confirmed that its *CalMed* decision had upheld across-the-board limits on contributions to "mixed-purpose" political committees:

> [In *CalMed*], we upheld FECA's $5,000 limit on contributions to multicandidate political committees. It is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's $1,000 limit on individual contributions to candidates. Given FECA's definition of "contribution," the $5,000 … limi[t] restricted not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage *in express advocacy and numerous other noncoordinated expenditures*.

540 U.S. at 152 n.48 (emphasis added). As *McConnell* noted, if contributions used by a "mixed-purpose" committee to make independent expenditures had no corruptive potential, the overall limit on contributions to political committees could not have been sustained by *CalMed*. Congress could have justified the limit only insofar as it remedied "pass-through" corruption, and much more narrowly tailored remedies, like "a strict limit on donations that could be used to fund candidate contributions," could have addressed such corruption concerns. *Id*.

*McConnell* and *CalMed* make clear that the governmental interest in preventing corruption and the appearance of corruption justifies application of an overall contribution limit to groups that make both contributions and independent expenditures. The D.C. Circuit has no authority to overrule these decisions. Thus, under these Supreme Court precedents, FIPE can constitutionally be required to comply with the applicable $2,000 contribution limit because its "structural melding" with VRLC and PC gives rise to corruption concerns and the potential for donor domination. SpA.101.

2. Commingling of Funds

Under *CalMed* and *McConnell*, the "nearly complete organizational identity" of VRLC, PC and FIPE justifies the application of the challenged contribution limit to FIPE. But even if these facts do not suffice to refute FIPE's claim that its expenditures are independent, the three entities also appear to

commingle their funds. The district court found that "[t]here is a fluidity of funds between VRLC-FIPE and VRLC-PC," and that "it is difficult to determine which fund is supporting which activity of VRLC." SpA.98. It noted that FIPE and PC often engage in joint projects, such as funding voter guides describing the pro-life positions of Vermont candidates. *Id*.

Appellants do not dispute that VRLC, PC and FIPE have failed to strictly segregate their funds or that PC and FIPE devote their resources to joint projects. But appellants again maintain that this fact is irrelevant to the determination of whether FIPE makes only independent expenditures. Its reasoning for this position, however, is utterly circular. Appellants state that "[t]he assertions of a 'permeable membrane' between VRLC and the other organizations, and a 'fluidity of funds between VRLC-FIPE and VRLC-PC[,]' … are relevant only if they prove (1) [that VRLC-FIPE engages in political speech other than independent spending]." Appellants' Br. 84. They then state, "[s]o what proves (1)? Nothing does." *Id*. Although thus difficult to discern, appellants' argument appears to be that commingling funds with VRLC or PC does not, in and of itself, prove that FIPE's funds are used for coordinated expenditures or contributions.

This argument defies logic. If FIPE's funds are shared by VRLC or PC, and these entities make contributions to candidates or coordinated expenditures, then FIPE is subsidizing "political speech other than independent spending" with soft

money. Further, if FIPE uses its resources on joint projects with PC, even if these projects purport to be "independent" of candidate and parties, then FIPE is indirectly subsidizing PC's direct contributions and coordinated expenditures. Money is fungible: even if the transfer of resources from FIPE to PC is ostensibly designated for PC's "independent" activities, the transfer will nevertheless mean that PC has a greater budget for direct contributions than it would have if it had funded the project alone. As noted by the district court below, "[w]ithout a clear accounting between dollars spent by each fund, it cannot be maintained that contributions to FIPE, intended for independent expenditures, are truly aimed at that purpose when spent." SpA.105.

Appellants can find no refuge in *EMILY's List* or *Carey* on this issue. Even those decisions recognized that a strict segregation of the soft money used for independent expenditures and the hard money used for coordinated expenditures and contributions is necessary to ensure that a "mixed-purpose" committee does not become a vehicle for sophisticated donors to evade contribution limits. *See, e.g.*, *EMILY's List*, 581 F.3d at 12. Indeed, to allay fears of circumvention, the *Carey* court further required a "mixed-purpose" political committee to allocate its administrative expenses across its hard money and soft money accounts in proportion to its coordinated and independent spending. 791 F. Supp. 2d at 130.

In short, the "fluidity of funds" between VRLC, PC and FIPE defeats any claim by FIPE that it engages in only independent spending, and raises the clear risk that donors will use FIPE as a pass-through to fund the VRLC-PC-FIPE conglomerate's coordinated activities and direct contributions to candidates.

### C. Appellants' Constitutional Theory of Independence Would Enable Widespread Circumvention of the Contribution Limits.

In addition to questioning the relevance of each of the specific facts found by the district court, appellants also advance a more general "constitutional" theory of coordination, namely, that FIPE's independence is "cemented as a matter of law." Appellants' Br. 64.

Appellants' attempt to cut off any fact-finding finds no support in Supreme Court precedent. The district court properly "decline[d] to accept FIPE as an independent-expenditure-only PAC without resort to the factual record." SpA.93. Its decision should be affirmed.

At no point in its campaign finance jurisprudence, *see* Section IV.A.1 *supra*, has the Supreme Court suggested that determining whether a specific expenditure is "independent" is not a question of fact. And, as the district court noted, the lower courts that have invalidated contribution limits as applied to "independent-expenditure-only" committees have been careful to note that this relief extends only to those committees that truly qualify for that designation. *See* SpA.95 (collecting cases).

To be sure, appellants appear to allow an extremely narrow inquiry into the independence of a group's expenditures, but imply that the only relevant evidence would be proof that a group coordinated a particular expenditure with a specific candidate at his explicit instruction.

They claim, for instance, that "[u]nder the Constitution, the coordination inquiry focuses not on whether the organizations are coordinated but on whether particular speech is coordinated," and consequently that evidence of "'coordination' *in general*" between VRLC, PC and FIPE does not establish that FIPE engages in speech other than independent spending. Appellants' Br. 90-91 (emphasis added). In the same vein, appellants argue that a candidate's knowledge that his actions will result in a coordinated expenditure, or his willful blindness thereto, "would not establish coordination under the Constitution." *Id.* at 89.

But appellants do not—and cannot—offer any Supreme Court authority precluding a fact-finder from inferring that an "independent" group's expenditures are coordinated under these circumstances. This is not surprising given that appellants' position, taken to its logical conclusion, would require a fact-finder to turn a blind eye to blatant coordination. According to appellants' theory, it would seem that no inference of coordination would be constitutionally permissible even in the following circumstances:

- A candidate's advisor or employee, such as Ms. Beerworth, simultaneously directs an "independent" committee;

- An "independent" group and a conventional political committee fund their activities out of the same account;

- A candidate and independent group engage in substantial discussions regarding the campaign's plans and planned communications, but claim they did not discuss the details of any particular expenditure.

Adopting appellants' standard would, as a practical matter, allow unchecked coordinated spending and make a mockery of the contribution limits.

The only authority appellants cite for this extreme proposition is federal administrative materials. *See* Appellants' Br. 90-91 (citing 11 C.F.R. §§ 109.20(b), 109.21(a); FEC Advisory Op. 2010-09, at 1-4). But none of these rules supports appellants' contention that the "general coordination" of an independent group and a conventional PAC or candidate is irrelevant. To the contrary, in the cited advisory opinion, the requestor was an independent committee that requested an analogous exemption from the federal contribution limits, but pledged to avoid exactly the "general coordination" that FIPE here claims has no bearing on independence. FEC Advisory Op. 2010-09, at 2 (stating that independent committee will not "accept contributions from [its parent organization], nor will it make any contributions or transfer any funds to [its parent organization]").

Furthermore, even if the FEC had promulgated rules that reflected appellants' position, the agency does not set constitutional standards for

coordination: the Supreme Court does. Federal law has no bearing on the constitutionality of the challenged Vermont law.

The Supreme Court has never held that the Constitution requires the degree of coordination urged by appellants; to the contrary, it has suggested that expenditures must be "totally," "wholly," or "truly" independent to be deemed non-corruptive. Adopting appellants' theory would allow ostensibly "independent" committees to engage in all but the most blatant forms of coordinated spending with candidates and political parties and would eviscerate the limits on contributions to candidates.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

**Respectfully submitted,**

/s/ J. Gerald Hebert
J. GERALD HEBERT*
ghebert@campaignlegalcenter.org
THE CAMPAIGN LEGAL CENTER
215 E Street, N.E.
Washington, D.C. 20002
Tel: (202) 736-2200

Counsel for *Amici Curiae*

**Application for admission pending*

**Dated: December 6, 2012**

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6959 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14 point font.

/s/ J. Gerald Hebert
J. GERALD HEBERT

**Dated**: December 6, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2012, I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system, which will accomplish electronic notice and service for the following participants in the case:

| | |
|---|---|
| James Bopp, Jr.<br>Randy Elf | Eve Jacobs-Carnahan<br>Megan Shafritz |
| *Counsel for Appellants* | *Counsel for Appellees* |

I also certify that I caused the required number of copies to be sent to the Clerk of the Court via U.S. Post, First Class Mail.

/s/ J. Gerald Hebert
J. GERALD HEBERT