

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Before: WESLEY and DRONEY, *Circuit Judges*, and BRICCETTI, *Judge*.*

Plaintiffs, a non-profit corporation and a Vermont political committee, appeal from an order of the United States District Court for the District of Vermont (William K. Sessions, III, *Judge*) granting summary judgment to Defendants, Vermont officials charged with enforcing Vermont elections statutes. The non-profit corporation asserts that statutory provisions requiring identification of the speaker on any “electioneering communication,” requiring reporting of certain “mass media activities,” and defining and requiring reporting by “political committees” are void for vagueness and violate the First Amendment facially and as applied. The Vermont political committee brings an as-applied challenge against a provision limiting contributions to political committees. We **AFFIRM** the judgment of the district court.

RANDY ELF (James Bopp, Jr., *on the brief*), James Madison Center for Free Speech, Terre Haute, Indiana, *for Vermont Right to Life Committee, Inc. and Vermont Right to Life Committee – Fund for Independent Political Expenditures*.

EVE R. JACOBS-CARNAHAN (Megan J. Shafritz, *on the brief*), Assistant Attorneys General for the State

* The Honorable Vincent L. Briccetti, of the Southern District of New York, sitting by designation.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 of Vermont, Montpelier, Vermont, for William H.
2 Sorrell, et al.

3
4 George Jepsen, Attorney General for the State of
5 Connecticut, Hartford, Connecticut; Maura
6 Murphy Osborne, Assistant Attorney General for
7 the State of Connecticut, Hartford, Connecticut,
8 for amici curiae States of Connecticut, New York,
9 Hawaii, Iowa, Kentucky, Minnesota, Montana, New
10 Mexico, and Washington, in support of William H.
11 Sorrell, et al.

12
13 J. Gerald Hebert, The Campaign Legal Center,
14 Washington, D.C., for amici curiae The Campaign
15 Legal Center, and Democracy 21, in support of
16 William H. Sorrell, et al.

17

18 DRONEY, Circuit Judge:

19 The two Plaintiffs-Appellants here are Vermont Right to Life
20 Committee, Inc. (“VRLC”) and Vermont Right to Life Committee –
21 Fund for Independent Political Expenditures (“VRLC-FIPE”). VRLC
22 is a Vermont non-profit corporation and VRLC-FIPE is a political
23 committee formed under Vermont law. Both advocate the
24 “universal recognition of the sanctity of human life from conception
25 through natural death.” J.A. 657, ECF No. 34. VRLC challenges

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 three disclosure provisions of Vermont’s elections laws, contending
2 that they are unconstitutionally vague and violate VRLC’s freedom
3 of speech. First, VRLC challenges the statute requiring that
4 “electioneering communications” identify their sponsor. Second,
5 VRLC challenges the statute requiring that groups engaged in any
6 “mass media activity” must submit certain reports to the Vermont
7 Secretary of State and relevant candidates. Third, VRLC challenges
8 Vermont’s definition of “political committees” and its requirement
9 that such committees submit campaign finance reports. VRLC-FIPE
10 raises an as-applied challenge to Vermont’s limit on contributions to
11 political committees, contending that VRLC-FIPE is an independent-
12 expenditure-only group and therefore the limit violates its freedom
13 of speech. The Defendants-Appellees are various Vermont officials
14 responsible for enforcing Vermont’s elections laws. The district
15 court (Sessions, J.) granted Defendants summary judgment on every
16 claim. We AFFIRM the judgment of the district court.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

BACKGROUND

I. Parties

VRLC is a Vermont corporation that files federal tax returns as a non-profit entity under 26 U.S.C. § 501(c)(4). VRLC-FIPE was formed by VRLC in 1999 as a registered Vermont political committee under the Vermont campaign finance statutes. VRLC-FIPE contends that it is an “independent expenditure committee” because the resolution of VRLC creating VRLC-FIPE provides that it may not “make monetary or in-kind contributions to candidates,” or “coordinate the content, timing or distribution of its communications or other activities with candidates or their campaigns.” J.A. 1125, ECF No. 36. A third entity, Vermont Right to Life Committee, Inc. Political Committee (“VRLC-PC”), also formed by VRLC, engages in campaign activities, including making direct contributions to pro-life political candidates. VRLC-PC is not a party in this action.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 **II. Statutory Scheme**

2 This is not our first encounter with challenges to Vermont
3 election laws by VRLC entities. In *Vermont Right to Life Committee,*
4 *Inc. v. Sorrell* (“VRLC I”), 221 F.3d 376, 387, 389 (2d Cir. 2000), we
5 held that previous versions of Vermont’s electioneering
6 communication and mass media activity provisions were facially
7 unconstitutional. We also rejected a facial challenge by VRLC-FIPE
8 to Vermont’s contribution limit for political committees in a separate
9 lawsuit. *Landell v. Sorrell*, 382 F.3d 91, 139-40 (2d Cir. 2004), *rev’d in*
10 *part sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006).

11 In the instant case, VRLC has challenged the revised versions
12 of the “electioneering communication,” “mass media activity,” and
13 “political committee” provisions of Vermont’s campaign finance
14 laws. VRLC contends that the definitions of particular terms in
15 those laws render the statutes unconstitutional under the First and

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Fourteenth Amendments. VRLC-FIPE challenges the contribution
2 limits as applied to it.

3 While this appeal was pending, Vermont repealed and
4 replaced its campaign finance statutes. Act of Jan. 23, 2014, 2014 Vt.
5 Acts & Resolves No. 90, Sec. 2, *available at*
6 <http://www.leg.state.vt.us/DOCS/2014/ACTS/ACT090.PDF> (codified
7 at Vt. Stat. Ann. tit. 17, § 2901 *et seq.*). In deciding this appeal, this
8 Court must apply the law now in effect. *See Starbucks Corp. v. Wolfe's*
9 *Borough Coffee, Inc.*, 477 F.3d 765, 766 (2d Cir. 2007). The previous
10 law, however, still governs VRLC-FIPE's as-applied challenge to
11 Vermont's contribution limits because the new contribution limits
12 do not take effect until January 1, 2015. Act of Jan. 23, 2014, 2014 Vt.
13 Acts & Resolves No. 90, Sec. 8(a)(2).

14 We first set out the relevant statutory language.

15 **A. Electioneering Communication**

16 The definition of "electioneering communication" includes:

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 any communication that refers to a clearly
2 identified candidate for office and that
3 promotes or supports a candidate for that
4 office or attacks or opposes a candidate for
5 that office, regardless of whether the
6 communication expressly advocates a vote
7 for or against a candidate, including
8 communications published in any
9 newspaper or periodical or broadcast on
10 radio or television or over the Internet or
11 any public address system; placed on any
12 billboards, outdoor facilities, buttons, or
13 printed material attached to motor vehicles,
14 window displays, posters, cards,
15 pamphlets, leaflets, flyers, or other
16 circulars; or contained in any direct
17 mailing, robotic phone calls, or mass e-
18 mails.

19
20 Vt. Stat. Ann. tit. 17, § 2901(6). With few exceptions, electioneering
21 communications must identify “the name and mailing address of the
22 person, candidate, political committee, or political party that paid
23 for the communication.” *Id.* § 2972(a). Electioneering
24 communications “paid for by or on behalf of a political committee or
25 political party” must also identify certain contributors. *Id.* § 2972(c).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 **B. Mass Media Activity**

2 Mass media activities include television commercials, radio
3 commercials, mass mailings, literature drops, newspaper
4 advertisements, robotic phone calls, and telephone banks, “which
5 include[] the name or likeness of a clearly identified candidate for
6 office.” *Id.* § 2901(11). A person engaging in certain “mass media
7 activity” must file a report with the Vermont Secretary of State and
8 send a copy to relevant candidates. *Id.* § 2971(a)(1). “The report
9 shall identify the person who made the expenditure; the name of
10 each candidate whose name or likeness was included in the activity;
11 the amount and date of the expenditure; to whom it was paid; and
12 the purpose of the expenditure.” *Id.* § 2971(b).

13 The disclosure requirements concerning electioneering
14 communications and mass media activities apply to all individuals
15 and entities engaging in such activities, not just political action
16 committees.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 **C. Political Committee**

2 A “political committee” (“PAC”) is defined as:

3 any formal or informal committee of two or
4 more individuals or a corporation, labor
5 organization, public interest group, or
6 other entity, not including a political party,
7 which accepts contributions of \$1,000.00 or
8 more and makes expenditures of \$1,000.00
9 or more in any two-year general election
10 cycle for the purpose of supporting or
11 opposing one or more candidates,
12 influencing an election, or advocating a
13 position on a public question in any
14 election, and includes an independent
15 expenditure-only political committee.

16
17 *Id.* § 2901(13). The definition of “political committee” is based in
18 part on the definitions of “contribution” and “expenditure.” *Id.* A
19 “contribution” is “a payment, distribution, advance, deposit, loan, or
20 gift of money or anything of value, paid or promised to be paid for
21 the purpose of influencing an election, advocating a position on a
22 public question, or supporting or opposing one or more candidates

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 in any election.” *Id.* § 2901(4).¹ As is relevant here, the term
2 “election” refers only to efforts to elect officials within the state of
3 Vermont, *id.* § 2901(5), and “public question” refers to “an issue that
4 is before the voters for a binding decision,” *id.* § 2901(15). An
5 “expenditure” is “a payment, disbursement, distribution, advance,
6 deposit, loan, or gift of money or anything of value, paid or
7 promised to be paid, for the purpose of influencing an election,
8 advocating a position on a public question, or supporting or
9 opposing one or more candidates.” *Id.* § 2901(7).

10 Prior to the district court’s decision below, a Vermont
11 Superior Court considered a vagueness and overbreadth challenge
12 to the phrase “influencing an election” in the definition of “political
13 committee” in the former version of Vermont’s campaign finance

¹ The definition then enumerates a number of exceptions such as volunteer services and personal loans from lending institutions. Vt. Stat. Ann. tit. 17, § 2901(4).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 statutes.² *Vermont v. Green Mountain Future*, Civ. Div. No. 758-10-10
2 Wncv, slip op. at 12 (Wash. Super. Ct. June 28, 2011), *available at*
3 http://www.vermontjudiciary.org/20112015_Tcdecisioncvl/2011-6-30-
4 1.pdf. The Superior Court interpreted this phrase as “the equivalent
5 of ‘supporting or opposing one or more candidates.’” *Id.* Under this
6 interpretation, the phrase “influencing an election” would reach no
7 farther than the phrase “supporting or opposing one or more
8 candidates.” After the district court granted summary judgment in
9 this case, however, the Vermont Supreme Court interpreted the
10 “influencing” language in a manner slightly different than the
11 Vermont Superior Court. *Vermont v. Green Mountain Future*, 86 A.3d
12 981 (Vt. 2013) (“*Green Mountain Future*”). Although the Vermont
13 Supreme Court agreed with the Superior Court that a narrowing
14 construction was required to address the phrase’s potential
15 vagueness, it determined that the Superior Court had overly

² The decision also addressed the language “affecting the outcome of an election,” which is not contained in the new law and so does not need to be considered here. *See* Vt. Stat. Ann. tit. 17, § 2801(4) (repealed 2014).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 narrowed the statute. *Id.* at 996-98. The Vermont Supreme Court
2 found that the phrase “influencing an election” referred only to the
3 “class of advocacy” captured by the phrase “supporting or opposing
4 one or more candidates,” *id.* at 997, but concluded that the phrase
5 covered a broader range of *methods* than the “supporting or
6 opposing one or more candidates” language. *Id.* at 997-98. The
7 Vermont Supreme Court also found the definition of “electioneering
8 communication” not to be overbroad or vague. *Id.* at 995.

9 A Vermont PAC satisfying these definitions is subject to
10 numerous requirements under Vermont law. For example, a PAC
11 must make all expenditures from a single checking account, file
12 campaign finance reports with the Vermont Secretary of State
13 identifying each person who contributed more than \$100 to the PAC,
14 and list all PAC expenditures in certain circumstances. Vt. Stat.
15 Ann. tit. 17, §§ 2922(b), 2963, 2964(b)(1). These reports must be filed

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 three to four times during an election year. *Id.* § 2964(b)(1), (c).³
2 Additionally, PACs “shall not accept contributions totaling more
3 than \$2,000.00 from a single source, political committee or political
4 party in any two-year general election cycle.” Vt. Stat. Ann. tit. 17, §
5 2805(a).⁴

6 **III. District Court Proceedings**

7 The district court began its analysis of the parties’ cross
8 motions for summary judgment by considering VRLC’s vagueness
9 challenges to the Vermont statutes. Beginning with the definitions
10 of “political committee,” “contribution,” and “expenditure,” the
11 district court concluded that the definitions were not vague because
12 the phrase “influencing an election” was no broader than the phrase

³ Plaintiffs also note that certain federal requirements apply to groups qualifying as a “political committee” as defined under federal law. *See* Appellants’ Br. 44 (citing 2 U.S.C. § 441b). Plaintiffs have not challenged the federal requirements in this action.

⁴ The new contribution limitations take effect on January 1, 2015, on which date a “political committee shall not accept contributions totaling more than: (A) \$4,000.00 from a single source; (B) \$4,000.00 from a political committee; or (C) \$4,000.00 from a political party.” Vt. Stat. Ann. tit. 17, § 2941(a)(4).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 “supporting or opposing one or more candidates.” *Vt. Right to Life*
2 *Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 387-90 (D. Vt. 2012). In so
3 ruling, the district court noted that the U.S. Supreme Court had
4 rejected a vagueness challenge to similar statutory language. *Id.* at
5 389 (citing *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 140 n.64
6 (2003), *overruled in part by Citizens United v. Fed. Election Comm’n*, 558
7 U.S. 310, 365-66 (2010)). The district court rejected VRLC’s
8 vagueness challenge to the terms “promotes or supports” and
9 “attacks or opposes” in the definition of electioneering
10 communications on similar grounds. *Id.* at 390. The district court
11 further rejected the vagueness challenge to the phrase “on whose
12 behalf” because its use elsewhere in related Vermont law made its
13 application “clearly defined.” *Id.* at 390-91.

14 The district court then considered VRLC’s overbreadth claims.
15 Drawing on *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam), and

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 subsequent Supreme Court precedent,⁵ the district court concluded
2 that the Vermont statutes' lack of explicit reference to a "major
3 purpose" or "express advocacy" test did not make the laws
4 unconstitutionally overbroad. *Vt. Right to Life Comm., Inc.*, 875 F.
5 Supp. 2d at 395-97.

6 The district court also concluded that the First Amendment
7 challenge to the PAC definition should be reviewed under "exacting
8 scrutiny," because designation as a "political committee" triggered a
9 disclosure regime. *Id.* at 392-93. Applying this standard of review,
10 the district court concluded that the statute did not impose

⁵ In *Buckley*, the Supreme Court responded to vagueness and overbreadth concerns by construing a federal elections statute to reach only "organizations that are under the control of a candidate or the major purpose of which is the . . . election of a candidate," and to reach only express advocacy, as opposed to issue advocacy. 424 U.S. 1, 79 (1976) (per curiam) (emphasis added). Subsequent Supreme Court decisions clarified that when *Buckley* construed the federal statute to reach express advocacy but exclude issue advocacy, it did not hold "that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 192 (2003), *overruled in part by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365-66 (2010). In *Citizens United v. Federal Election Commission*, the Supreme Court clarified that disclosure regimes could sweep more broadly than speech that is the functional equivalent of express advocacy. 558 U.S. at 368-69.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 impermissible burdens or sweep in a substantial amount of
2 protected speech. *Id.* at 397. Applying exacting scrutiny to the
3 electioneering communication and mass media activity statutes, the
4 district court reached the same conclusion, finding them
5 appropriately tailored to Vermont's important interests. *Id.* at 398-
6 400.

7 The district court then addressed Vermont's limits on
8 contributions to PACs. VRLC-FIPE contended that the law was
9 unconstitutional as applied to it because VRLC-FIPE did not make
10 contributions to any political campaigns and makes its expenditures
11 independent of any candidate or political campaign.⁶ The district

⁶ The district court noted that VRLC-FIPE was barred from launching a facial challenge to the statute because of a judgment against it in previous litigation, *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 383 n.5 (D. Vt. 2012), and VRLC did not join in VRLC-FIPE's as-applied challenge. The district court also determined that the challenge survived *Randall v. Sorrell*, 548 U.S. 230 (2006), because the "Supreme Court did not examine that portion of the law when it struck down other Vermont contribution limits." *Id.* Neither party has questioned this conclusion, but we note that the Supreme Court "[did] not believe it possible to sever some of the Act's [unconstitutional] contribution limit provisions from others that might remain fully operative." *Randall*, 548 U.S. at 262.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 court agreed that the State could not limit contributions to a group
2 that did not coordinate with or make contributions to candidates –
3 that is, a group that only made independent expenditures. The
4 district court noted that “because independent expenditures cannot
5 corrupt, governments have no valid anti-corruption interest in
6 limiting contributions to independent-expenditure-only groups.” *Id.*
7 at 403. By contrast, groups that made contributions to or
8 coordinated with candidates could be subjected to contribution
9 limits. *Id.* at 402 (citing *Landell*, 382 F.3d at 140-41). The district
10 court went on to reject arguments that applying limits to an
11 independent-expenditure-only group would be justified by
12 Vermont’s “unique record of corruption” or by an informational
13 interest in channeling funds into more transparent outlets.⁷ *Id.* at
14 403-04.

⁷ In light of *McCutcheon v. Federal Election Commission*, 134 S. Ct. 1434 (2014), and “the developing legal framework emerging from other courts,” Vermont has withdrawn its argument that limits on contributions to independent-expenditure groups are constitutionally permitted based on a state interest in transparency.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 The district court concluded, however, that VRLC-FIPE could
2 not benefit from any protections accorded to independent-
3 expenditure-only groups because of its close connection to VRLC-
4 PC, an arm of VRLC that “contributes funds to candidates.” *Id.* at
5 404-410. Based on the undisputed facts before it, the district court
6 concluded “that the structural melding between [VRLC-FIPE] and
7 [VRLC-PC] leaves no significant functional divide between them for
8 the purposes of campaign finance law.” *Id.* at 408. The district court
9 acknowledged that “it is unclear whether even a complete overlap in
10 staff and symmetry in spending permit extending contribution
11 limits that undisputedly apply to a PAC that makes candidate
12 contributions to one that does independent expenditures.” *Id.* at 409
13 (citing *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 12 (D.C. Cir.
14 2009)). Nevertheless, the unchallenged evidence indicating that
15 VRLC-FIPE and VRLC-PC had a “fluidity of funds” made it

Appellees’ Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) 2,
April 14, 2014, ECF No. 199.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 impossible to ensure “that contributions to [VRLC-FIPE], intended
2 for independent expenditures, are truly aimed at that purpose when
3 spent.” *Id.* at 409-10 (internal quotation marks omitted). As a result,
4 the district court rejected VRLC-FIPE’s as-applied challenge to
5 Vermont’s limitations on contributions.

6 LEGAL STANDARDS

7 I. Summary Judgment

8 This Court reviews a summary judgment decision *de novo* and
9 applies “the same standards that govern the district court’s
10 consideration of the motion.” *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537,
11 546 (2d Cir. 2010).

12 II. Scope of Review

13 A. Vagueness

14 We first must clarify the scope of the legal challenge before us.
15 VRLC describes its suit as both a facial and an as-applied challenge
16 and argues that the “mass media,” “electioneering communication,”

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 and “political committee” provisions are unconstitutionally vague
2 facially and as applied. However, it is not the label that matters in
3 deciding what standard applies. *Doe v. Reed*, 561 U.S. 186, 194
4 (2010). The inquiry is whether “plaintiffs’ claim and the relief that
5 would follow . . . reach beyond the particular circumstances of these
6 plaintiffs.” *Id.*

7 VRLC has done little, if anything, to present its as-applied
8 vagueness challenge. *See Vt. Right to Life Comm., Inc.*, 875 F. Supp. 2d
9 at 387 (noting that VRLC “offer[ed] minimal explanation of how the
10 law is unconstitutional as it pertains to the specific communications
11 it either has made or hopes to publish”). The only semblance of an
12 as-applied challenge on appeal is VRLC’s claim that it wants to
13 publish speech that it fears “promotes, supports, attacks, or
14 opposes” a clearly identified candidate. Appellants’ Br. 24. “But
15 such groups constitute a broad range of entities The claim
16 therefore seems ‘facial’ in that it is not limited to plaintiff’s particular

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 case, but challenges application of the law more broadly.” *Iowa*
2 *Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 588 (8th Cir.
3 2013) (citing *Reed*, 561 U.S. at 194), *cert. denied*, 134 S. Ct. 1787 (2014)
4 (internal quotation marks omitted). Moreover, VRLC describes its
5 “as-applied and facial vagueness challenges” as “largely parallel,”
6 Appellants’ Br. 32, and its request that the provisions be declared
7 unconstitutional and enjoined from enforcement certainly reaches
8 beyond VRLC’s particular circumstances.

9 We recognize the preference for as-applied challenges, *United*
10 *States v. Farhane*, 634 F.3d 127, 138 n.9 (2d Cir. 2011), but where
11 plaintiffs asserting both facial and as-applied challenges have failed
12 to “[lay] the foundation for an as-applied challenge,” courts have
13 proceeded to address the facial challenge, *Ctr. for Individual Freedom*
14 *v. Madigan*, 697 F.3d 464, 475 (7th Cir. 2012); accord *Human Life of*
15 *Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1021-22 (9th Cir. 2010)
16 (applying facial standard where the plaintiff did “not provide any

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 evidence to support an as-applied challenge” or “distinguish
2 between its facial and as-applied claims in its briefs”).

3 VRLC has not presented any legal arguments or facts specific
4 to an as-applied vagueness challenge. We will therefore analyze
5 these claims under the standards governing facial challenges.

6 **B. First Amendment**

7 Plaintiffs also argue that Vermont’s political committee, mass
8 media, and electioneering communication definitions and the
9 disclosure regime violate the First Amendment right to free speech
10 “as applied and facially.” In support of the claim that these
11 provisions are “facially unconstitutional,” VRLC relies on cases
12 dealing with overbreadth. Appellants’ Br. 101-03 (citing *United*
13 *States v. Williams*, 553 U.S. 285, 292-93 (2008); *Broadrick v. Oklahoma*,
14 413 U.S. 601, 615 (1973)); see also *Members of City Council of L.A. v.*
15 *Taxpayers for Vincent*, 466 U.S. 789, 796 (1984) (“There are two quite
16 different ways in which a statute may be considered invalid ‘on its

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 face’ – either because it is unconstitutional in every conceivable
2 application, or because it seeks to prohibit such a broad range of
3 protected conduct that it is unconstitutionally ‘overbroad.’”).⁸

4 VRLC’s facial and as-applied challenges are substantively
5 identical. VRLC contends that Vermont’s PAC disclosure
6 requirements are overbroad – and therefore facially unconstitutional
7 – because, according to VRLC, Vermont may only impose a
8 disclosure regime on an organization if the organization’s “major
9 purpose” is to advance a candidacy. VRLC additionally argues that
10 Vermont’s “electioneering communication” and “mass media”
11 disclosure and identification requirements are overbroad because,
12 according to VRLC, Vermont cannot impose a disclosure or
13 identification requirement on speech unless that speech is “express

⁸ “A law is unconstitutionally overbroad if it punishes a substantial amount of protected free speech, judged in relation to its plainly legitimate sweep.” *United States v. Farhane*, 634 F.3d 127, 136 (2d Cir. 2011) (internal quotation marks and alteration omitted). An overbroad law can never be validly enforced unless a limiting construction is available. *Id.* As a result, a party may challenge a law as being overbroad even if a narrower law might have validly prohibited her conduct.

No. 12-2904-cv

Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 advocacy” or broadcast speech that is run shortly before an election
2 and targeted at the relevant electorate. VRLC simultaneously asserts
3 that these provisions are unconstitutional as applied to it because
4 the organization does not have the major purpose to advance a
5 candidacy and does not engage in express advocacy.

6 Because the merits of VRLC’s arguments do not depend on
7 whether they have been raised as part of an as-applied or facial
8 overbreadth challenge, we consider both claims together. VRLC-
9 FIPE has separately brought an as-applied challenge against
10 Vermont’s contribution limits, which will be addressed separately.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 precise guidance have never been required even of regulations that
2 restrict expressive activity.” *Id.* at 19 (internal quotation marks
3 omitted). A facial vagueness challenge will succeed only when the
4 challenged law can never be validly applied. *Vill. of Hoffman Estates*
5 *v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982).

6 **A. “Promotes or Supports . . . or Attacks or Opposes”**

7 The “electioneering communication” definition, which
8 triggers disclosure requirements, uses the words “promotes,”
9 “supports,” “attacks,” and “opposes.” Vt. Stat. Ann. tit. 17, §
10 2901(6). VRLC contends that these terms are impermissibly vague.
11 We disagree; this language is sufficiently precise.

12 In *McConnell*, the Supreme Court explained that these terms
13 are not unconstitutionally vague in a similar context, because they
14 “clearly set forth the confines within which potential party speakers
15 must act in order to avoid triggering the provision.” 540 U.S. at 170
16 n.64.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 The *McConnell* Court included an additional basis for its
2 conclusion, the nature of the speaker being regulated: “This is
3 particularly the case here, since actions taken by political parties are
4 presumed to be in connection with election campaigns.” *Id.* A
5 communication that refers to a “clearly identified candidate for
6 office” is also presumably made in connection with election
7 campaigns. Thus, *McConnell* applies with equal force here: the
8 Vermont definition of “electioneering communication” requires a
9 reference to a clearly identified candidate, and a communication
10 referring to a clearly identified candidate is presumed to be in
11 connection with an election campaign.⁹ Also, the language of
12 *McConnell* indicates that the result did not depend on the
13 presumption. Indeed, the First Circuit has applied *McConnell* to
14 hold that use of the terms “promote,” “support,” and “oppose” was
15 not unconstitutionally vague without apparent reference to the

⁹ This does not apply to the “support” or “oppose” language in the PAC definition, discussed below.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 additional reasons of *McConnell. Nat'l Org. for Marriage v. McKee*,
2 649 F.3d 34, 63-64 (1st Cir. 2011).

3 VRLC points to a concurring opinion by Justice Scalia in
4 which he described the issue of whether an advertisement
5 “promotes, attacks, supports, or opposes the named candidate,” as
6 “inherently vague,” asking, “Does attacking the king’s position
7 attack the king?” *Fed. Election Comm’n v. Wisc. Right to Life, Inc.*, 551
8 U.S. 449, 493 (2007) (Scalia, J., concurring). But the controlling
9 opinion rejected Justice Scalia’s concerns. *Id.* at 474 n.7. Nor does
10 the electioneering communication definition here include the term
11 “influence,” which other courts have found requires a limiting
12 construction to avoid impermissible vagueness. *See, e.g., Ctr. for*
13 *Individual Freedom v. Carmouche*, 449 F.3d 655, 664 (5th Cir. 2006), *cert.*
14 *denied*, 549 U.S. 1112 (2007); *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d
15 705, 712-13 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 **B. “On Behalf Of”**

2 Electioneering communications “paid for by or *on behalf of* a
3 political committee or political party” must also identify certain
4 contributors. Vt. Stat. Ann. tit. 17, § 2972(c) (emphasis added).
5 VRLC urges that the phrase “on behalf of” is unconstitutionally
6 vague. It is not.

7 Vermont’s previous campaign finance law – and the law
8 considered by the district court below – required that electioneering
9 communications identify “the name of the candidate, party, or
10 political committee by or on whose behalf the same is published or
11 broadcast.” Vt. Stat. Ann. tit. 17, § 2892 (repealed 2014). The district
12 court rejected Plaintiffs’ vagueness challenge to the phrase “on
13 whose behalf” in the previous electioneering communication
14 reporting provision, concluding that the phrase “contemplates an
15 agreement between the sponsor and the beneficiary to run the
16 communication.” *Vt. Right to Life Comm., Inc.*, 875 F. Supp. 2d at 390.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 The current law now requires that “an electioneering
2 communication *paid for* by or on behalf of a political committee or
3 political party shall contain the name of” certain contributors. Vt.
4 Stat. Ann. tit. 17, § 2972(c) (emphasis added). “On behalf of” now
5 clearly modifies “paid for.” The most natural reading of “on behalf
6 of” in the context of this provision, then, is the passing of money
7 through a third party such that the advocacy is “paid for” by a third
8 party who was hired by the PAC to place the electioneering
9 communication. *See Farhane*, 634 F.3d at 142 (“[W]e do not look at
10 statutory language in isolation to determine if it provides adequate
11 notice of conduct proscribed or permitted. Rather, we consider
12 language in context.”). Such ads would still be paid for “on behalf
13 of” the PAC and regulated by Vermont’s electioneering
14 communication identification requirements. So construed, the
15 provision is clear and not impermissibly vague.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 **C. “Expenditure”**

2 VRLC contends that the definition of the statutory term
3 “expenditure” is unconstitutionally vague. “Expenditure” is used in
4 the mass media activity statute.¹⁰ As noted above, “expenditure” is
5 defined as “a payment, disbursement, distribution, advance,
6 deposit, loan, or gift of money or anything of value, paid or
7 promised to be paid, for the purpose of *influencing an election*,
8 *advocating a position on a public question*, or *supporting or opposing*
9 *one or more candidates.*” Vt. Stat. Ann. tit. 17, § 2901(7) (emphases
10 added). VRLC challenges both italicized phrases. As discussed
11 above, the Supreme Court has held that “supporting” and
12 “opposing” are not unconstitutionally vague. *McConnell*, 540 U.S. at
13 170 n.64 (concluding that the words promote, support, attack, and
14 oppose are not unconstitutionally vague).

¹⁰ VRLC also asserts that the PAC definition is vague where it too uses the term “expenditure.” This challenge will be dealt with below when addressing the constitutional challenges to Vermont’s PAC definition.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 As also mentioned above, the Vermont Supreme Court has
2 supplied a narrowing interpretation to the phrase “influencing an
3 election” in the “political committee” definition. As that court
4 explained, the “influencing” phrase “refer[s] only to [the] class of
5 advocacy” covered by the phrase “supporting or opposing”: “they
6 both refer to advocacy to vote in a particular way in an election.”
7 *Green Mountain Future*, 86 A.3d at 997. The term “influencing”
8 simply embraces a broader set of methods (*i.e.*, not only where the
9 identification of the candidate is explicit, but also where absent such
10 reference, it is nonetheless clear to the objective observer that the
11 purpose of an advertisement is to persuade voters to vote yes or no
12 on a candidate). *Id.* at 997-98. The Vermont Supreme Court
13 explained that:

14 The purpose of the methods used by
15 [Green Mountain Future] in this case was
16 very clear, partially because [Green
17 Mountain Future] identified the candidate
18 by name and included his pictures in the
19 advertisements. If in the next case,

No. 12-2904-cv

Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 however, an organization ran
2 advertisements in the same way and in the
3 same timeframe with respect to an election
4 without mentioning the candidate's name,
5 and without including a picture of the
6 candidate, we would be reluctant to hold
7 that the statute as narrowed by the trial
8 court could cover this method—even if an
9 objective observer would find the purpose
10 to be the same as when the candidate name
11 and picture was used. As in this case, the
12 objective observer should look to multiple
13 factors: for example, the timing of the
14 advertisement, the images used in the
15 advertisement, the tone of the
16 advertisement, the audience to which the
17 advertisement is targeted, and the
18 prominence of the issue(s) discussed in the
19 advertisement in the campaign. But where
20 the objective observer concludes that the
21 purpose of an advertisement is to influence
22 voters to vote yes or no on a candidate, the
23 “influencing an election” language should
24 apply. Other than in this circumstance, we
25 agree with the trial court's narrowing
26 construction.

27
28 *Id.* at 998 (footnote omitted). In other words, if an organization ran
29 an advertisement “for the objective purpose of persuading
30 someone” to vote for or against a candidate, but the advertisement

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 did not identify a candidate in that election, it could still fall within
2 Vermont's definition of "influencing an election." *Id.* at 998.

3 The expansion of the "influencing" language in the Vermont
4 Supreme Court's *Green Mountain Future* decision has no impact here.
5 A communication only qualifies as a mass media activity if it
6 "includes the name or likeness of a *clearly identified candidate.*" Vt.
7 Stat. Ann. tit. 17, § 2901(11) (emphasis added). If a communication
8 does not qualify as a mass media activity, it does not trigger the
9 disclosure statute in which the term "expenditure" is used. *See* Vt.
10 Stat. Ann. tit. 17, § 2971(a)(1) ("[A] person who makes *expenditures*
11 for any one *mass media activity* totaling \$500.00 or more . . . within 45
12 days before a primary, general, county, or local election shall, for
13 each activity, file a mass media report." (emphases added)). As a
14 result, the "influencing" language in the expenditure definition has
15 no force in this context. Because the "supporting or opposing"
16 language in the statutory definition of "expenditure" is not vague

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 and the “influencing” language in its definition has no relevance to
2 the mass media activity statute, we reject VRLC’s vagueness
3 challenge to the term “expenditure” as it is used in the mass media
4 activity statute.

5 **II. First Amendment**

6 **A. Express Advocacy**

7 VRLC contends that Vermont cannot impose a disclosure or
8 identification requirement on speech unless that speech is “express
9 advocacy” or broadcast speech that is run shortly before an election
10 and targeted at the relevant electorate. Because Vermont’s
11 definitions of regulated “electioneering communications” and “mass
12 media activities” apply to speech that falls outside of these
13 categories, VRLC contends that they violate the First Amendment.
14 Although VRLC’s position finds some support in pre-*Citizens United*
15 decisions, it cannot be squared with *Citizens United*.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 In *Buckley*, the Supreme Court responded to vagueness and
2 overbreadth challenges by adopting a narrow construction of the
3 term “political committee” in the Federal Election Campaign Act,
4 which required “political committees” and other persons to disclose
5 their “expenditures.” 424 U.S. at 80. Specifically, the Supreme
6 Court interpreted “political committee” to “only encompass
7 organizations that are under the control of a candidate or the *major*
8 *purpose* of which is the nomination or election of a candidate” and
9 reasoned that the “[e]xpenditures of candidates and of ‘political
10 committees’ so construed can be assumed to fall within the core area
11 sought to be addressed by Congress.” *Id.* at 79 (emphasis added).
12 The Supreme Court further explained that “when the maker of the
13 expenditure is . . . an individual other than a candidate or a group
14 other than a ‘political committee,’” the term “expenditure” should
15 “reach only funds used for communications that *expressly advocate*

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 the election or defeat of a clearly identified candidate.” *Id.* at 79-80
2 (emphasis added).¹¹

3 Although *Buckley’s* narrowing construction arose in the
4 context of constitutional vagueness and overbreadth challenges,
5 subsequent Supreme Court decisions suggest that the limits the
6 Court imposed on the statute were not coextensive with

¹¹ In *VRLC I*, this Court relied on *Buckley’s* distinction between express and issue advocacy to hold that a previous version of the Vermont disclosure statute was “unconstitutional on its face. The section apparently requires reporting of expenditures on radio or television advertisements devoted to pure issue advocacy in violation of the clear command of *Buckley*.” 221 F.3d at 389 (footnote omitted). As described in the text, *McConnell* did not read *Buckley* as suggesting “that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line.” 540 U.S. at 192. As a result, it is unclear whether *VRLC I’s* holding that “pure issue advocacy” cannot be the subject of a valid governmental regulation remains viable. See *Minn. Citizens Concerned for Life, Inc. v. Kelley*, 427 F.3d 1106, 1111 (8th Cir. 2005) (noting that challenger’s position found support in *VRLC I*, but rejecting challenger’s position because the “court must follow the latest pronouncement of the Supreme Court,” which had become *McConnell*). In any event, as described in the text, the *Citizens United* Court clarified that disclosure requirements can sweep more broadly than “express advocacy.” Even if it were not affected by *Citizens United*, *VRLC I* does not apply here, as Vermont’s more recent statute does not reach *pure* issue advocacy. Speech does not qualify as an “electioneering communication” unless it refers to a “clearly identified candidate,” and “promotes,” “supports,” “attacks,” or “opposes” a candidate. Vt. Stat. Ann. tit. 17, § 2901(6). And the mass media activity reporting requirement is not triggered absent an “expenditure” (which requires a purpose of “supporting or opposing one or more candidates”) and “mass media activity” (which requires a “clearly identified candidate”). *Id.* § 2971(a)(1), (b).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 constitutional limits. *See McConnell*, 540 U.S. at 191-92 (“[A] plain
2 reading of *Buckley* makes clear that the express advocacy limitation .
3 . . . was the product of statutory interpretation rather than a
4 constitutional command.”). For instance, the *McConnell* Court
5 concluded, without indicating that the First Amendment would
6 prohibit further disclosure requirements, that the government could
7 regulate broadcast speech clearly identifying a candidate that is
8 aired in a specific time period and targeted at the relevant electorate.
9 *Id.* at 194. The Supreme Court explained that it was not drawing “a
10 constitutional boundary that forever fixed the permissible scope of
11 provisions regulating campaign-related speech.” *Id.* at 192-93.

12 *Citizens United* removed any lingering uncertainty concerning
13 the reach of constitutional limitations in this context. In *Citizens*
14 *United*, the Supreme Court expressly rejected the “contention that
15 the disclosure requirements must be limited to speech that is the
16 functional equivalent of express advocacy,” because disclosure is a

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 less restrictive strategy for deterring corruption and informing the
2 electorate. 558 U.S. at 369; accord *Buckley*, 424 U.S. at 66-68.¹² The
3 Court explained that even if *Citizens United*'s "ads only pertain to a
4 commercial transaction," the government could constitutionally
5 require identification and disclosure with respect to the
6 advertisements because "the public has an interest in knowing who
7 is speaking about a candidate shortly before an election." *Id.*

8 As a result, the Vermont statutes' extension beyond express
9 advocacy does not render them unconstitutional.

10 **B. Standard of Review**

11 Although the Vermont statutes' reach beyond express
12 advocacy does not render them unconstitutional, the statutes remain

¹² The Seventh Circuit has recently interpreted this portion of *Citizens United* as confined to its "specific and narrow context." *Wis. Right to Life, Inc. v. Barland*, No. 12-2915, 2014 WL 1929619, at *29-33 (7th Cir. May 14, 2014). We disagree. There is no indication that the *Citizens United* ruling depended on the type of disclosure requirements it upheld, and the Court specifically referred to three other instances where disclosure requirements were upheld. *Citizens United*, 558 U.S. at 369 (citing *Buckley*, 424 U.S. at 75-76; *McConnell*, 540 U.S. at 321; and *United States v. Harriss*, 347 U.S. 612, 625 (1954)).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 subject to “exacting scrutiny,” which “requires a substantial relation
2 between the disclosure requirement and a sufficiently important
3 governmental interest.” *Id.* at 366-67 (internal quotation marks
4 omitted). A governmental interest in “providing the electorate with
5 information about the sources of election-related spending” may
6 justify disclosure requirements. *Id.* at 367 (internal quotation marks
7 and brackets omitted). Applying exacting scrutiny, the Supreme
8 Court has upheld a federal statutory provision that required
9 “televised electioneering communications funded by anyone other
10 than a candidate” to include an identification statement stating “that
11 ‘ _____ is responsible for the content of this advertising.’” *Id.* at
12 366-71.¹³

¹³ In a decision that predated *Citizens United*, the Second Circuit stated that “[m]andatory disclosure requirements may represent a greater intrusion into the exercise of First Amendment rights of freedom of speech and association than do reporting provisions” *VRLC I*, 221 F.3d at 387 (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 355 (1995)). This view now appears inconsistent with *Citizens United*.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Review of the monetary threshold for requiring disclosure of a
2 contribution or expenditure is highly deferential. In *Buckley*, the
3 Supreme Court suggested that a disclosure threshold will be upheld
4 unless it is “wholly without rationality,” specifically stating that it
5 would not require the legislature “to establish that it has chosen the
6 highest reasonable threshold.” 424 U.S. at 83.

7 **C. Application**

8 The electioneering communication and mass media activity
9 statutes are within the scope of regulation permitted under *Citizens*
10 *United*. An electioneering communication, which under section
11 2972(2) must identify the speaker, includes any “communication that
12 refers to a clearly identified candidate for office and that promotes
13 or supports a candidate for that office or attacks or opposes a
14 candidate for that office, regardless of whether the communication
15 expressly advocates a vote for or against a candidate” Vt. Stat.
16 Ann. tit. 17, § 2901(6). This definition by its terms only reaches

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 communications that take a position on an actual candidacy. Also,
2 although the provision is not explicitly time limited, an individual
3 can only be a “candidate” within the meaning of the statute once she
4 has taken an “affirmative action” to become a candidate for office by
5 accepting \$500 of contributions, making \$500 of expenditures, filing
6 a petition for nomination, being nominated, or announcing her
7 candidacy. *Id.* § 2901(1). Thus, the statute will only apply during a
8 campaign for public office. As a result, the electioneering
9 communication reporting requirements have a substantial relation
10 to the public’s “interest in knowing who is speaking about a
11 candidate shortly before an election.” *Citizen’s United*, 558 U.S. at
12 369; *see also* Act of Jan. 23, 2014, 2014 Vt. Acts & Resolves No. 90, Sec.
13 1(15) (“Increasing identification information in electioneering
14 communications will enable the electorate to evaluate immediately
15 the speaker’s message and will bolster the sufficiently important

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 interest in permitting Vermonters to learn the sources of significant
2 influence in our State's elections.").

3 Admittedly, the mass media reporting requirements, because
4 they do not directly inform the public about the identity of the
5 speaker, are less tailored to the asserted public interest in
6 information about the sources of election-related spending than an
7 identification requirement. But notwithstanding this less direct
8 nexus, the requirement is still substantially related to a permissible
9 informational interest. The mass media provision is explicitly
10 limited in time and scope: (a) a mass media activity will only trigger
11 the reporting requirement if it occurs "within 45 days before a
12 primary, general, county, or local election," Vt. Stat. Ann. tit. 17, §
13 2971(a)(1); (b) a communication only qualifies as a mass media
14 activity if it includes "the name or likeness of a clearly identified
15 candidate for office," *id.* § 2901(11); and (c) a report is only required
16 when "expenditures" (which, under section 2901(7), must have the

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 “purpose of influencing an election, advocating a position on a
2 public question, or supporting or opposing a candidate”) “for any
3 one mass media activity total[] \$500.00 or more,” *id.* § 2971(a)(1).

4 These targeted mass media disclosure requirements are
5 substantially related to a sufficiently important governmental
6 interest. By alerting candidates whose image or name is used, the
7 reporting requirement will identify the source of election-related
8 information and encourage candidate response. And by requiring
9 that the speaker notify the candidate whose image or name was
10 used, the provision brings so-called “whisper campaigns” into the
11 sunlight¹⁴ and also helps ensure that candidates are aware of and
12 have an opportunity to take a position on the arguments being made

¹⁴ As an example of so-called “whisper campaigns,” there have been (still unproven) accusations that during the Republican presidential primary race in 2000, groups supporting a candidate arranged for mass phone calls that strongly suggested that John McCain had an illegitimate child. See Richard Gooding, *The Trashing of John McCain*, VANITY FAIR, Nov. 2004, available at <http://www.vanityfair.com/politics/features/2004/11/mccain200411>. If such conduct occurred in Vermont, the group that arranged the phone calls would be required to report it to the candidate being attacked. This would allow the candidate to more quickly and effectively respond.

No. 12-2904-cv

Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 in their name. This public benefit is in line with the informational
2 interest approved by *Citizens United*. The requirement that such
3 reports be filed within twenty-four hours of the communication is
4 also directly related to the State's informational interest given the
5 need to rapidly address election-related speech in the final weeks of
6 a campaign.

7 As a result, the Vermont statutes governing electioneering
8 communications and mass media activities survive exacting
9 scrutiny.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Also explained above, a Vermont Superior Court has
2 interpreted the phrase “influencing an election” such that it is co-
3 extensive with the “supporting or opposing” language. *Green*
4 *Mountain Future*, Civ. Div. No. 758-10-10 Wncv, slip op. at 12 (Wash.
5 Super. Ct. June 28, 2011). We acknowledge that the narrowing
6 construction provided by the Vermont Superior Court and relied on
7 by Judge Sessions differs from the narrowing construction more
8 recently provided by the Vermont Supreme Court. This difference,
9 however, does not change the result. The Vermont Supreme Court
10 merely broadened the Superior Court’s interpretation in the sense
11 that it read “influence an election” to also embrace communications
12 that do not identify a specific candidate. *Green Mountain Future*, 86
13 A.3d at 997-98. The Vermont Supreme Court explained that the
14 “influencing” phrase still “refer[s] only to [the] class of advocacy”
15 covered by the phrase “supporting or opposing.” *Id.* at 997.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 The fact that “influencing an election” covers communications
2 that do not necessarily identify a specific candidate does not make
3 the phrase unconstitutionally vague. In *McConnell*, 540 U.S at 184,
4 the U.S. Supreme Court upheld against a vagueness challenge a
5 definition of “Federal election activity” that included:

6 a public communication that refers to a
7 clearly identified candidate for Federal
8 office (regardless of whether a candidate
9 for State or local office is also mentioned or
10 identified) and that promotes or supports a
11 candidate for that office, or attacks or
12 opposes a candidate for that office
13 (regardless of whether the communication
14 expressly advocates a vote for or against a
15 candidate).

16
17 2 U.S.C. § 431(20)(A)(iii). Despite the statute’s explicit application
18 beyond express advocacy, the Supreme Court held that it was not
19 unconstitutionally vague. *McConnell*, 540 U.S. at 170 n.64.
20 Vermont’s use of “influencing” only describes speech that the
21 federal statute captures with the terms “promotes,” “supports,”
22 “attacks,” and “opposes.” Because the phrase “influencing” in the

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Vermont statute is coextensive with the federal statute, Vermont's
2 statute is also not unconstitutionally vague.

3 **II. First Amendment**

4 **A. "Major Purpose"**

5 As noted above, VRLC contends that Vermont's PAC
6 disclosure requirements violate the First Amendment, arguing that
7 Vermont may only impose a disclosure regime on an organization if
8 "the major purpose" of the organization is to advance a candidacy.

9 Prior to *Citizens United*, the Fourth Circuit held that an
10 organization could only be subjected to a political committee
11 regulatory regime if the organization met "the major purpose" test.
12 *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288-89, 295 (4th Cir.
13 2008) ("*NCRL III*"). However, since *Citizens United* and its approval
14 of extensive disclosure regimes, two Circuits have concluded that
15 the major purpose test is not a constitutional requirement. *See Ctr.*
16 *for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012)

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 (“[T]he line-drawing concerns that led the [Supreme] Court to adopt
2 the major purpose limitation for contribution and expenditure limits
3 in *Buckley* do not control our overbreadth analysis of the disclosure
4 requirements”);¹⁵ *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34,
5 59 (1st Cir. 2011) (“We find no reason to believe that this so called
6 ‘major purpose’ test, like the other narrowing constructions adopted
7 in *Buckley*, is anything more than an artifact of the Court’s
8 construction of a federal statute.”); *see also Human Life of Wash., Inc.*,
9 624 F.3d at 1009-11 (concluding that *Buckley* did not lay down a
10 bright-line test requiring that *the* major purpose of an organization
11 must be to support or oppose a candidate, and that a state law

¹⁵ The Seventh Circuit has since distinguished *Center for Individual Freedom v. Madigan* by applying the “major purpose” limitation to narrow a campaign finance regulation it found would otherwise violate the First Amendment. *Barland*, 2014 WL 1929619, at *33, 36-37. Although *Barland* seems to accept that the major purpose limitation is not a “constitutional command,” it asserts that the limitation remains an “important check” to determine whether a disclosure rule is closely tailored to the public’s information interest. *Id.* at *36 (internal quotation marks omitted). We believe it is unnecessary here to resort to a major purpose limitation to hold that the disclosure regime satisfies exacting scrutiny.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 regulating organizations with a major purpose of engaging in such
2 actions was constitutional).

3 We join the Circuits that have considered PAC definitions in
4 this context after *Citizens United* and hold that the Constitution does
5 not require disclosure regulatory statutes to be limited to groups
6 having “the major purpose” of nominating or electing a candidate.
7 The “express advocacy” analysis above applies with equal force to
8 “the major purpose” analysis here. When the *Buckley* Court
9 construed the relevant federal statute to reach only groups having
10 “the major purpose” of electing a candidate, it was drawing a
11 statutory line. See *McConnell*, 540 U.S. at 191-93. It was not holding
12 that the Constitution forbade any regulations from going further. *Id.*

13 **B. Standard of Review**

14 Although Vermont’s PAC statutes are not rendered
15 unconstitutional because they reach beyond organizations having
16 the “major purpose” of nominating or electing a candidate, they

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 remain subject to the appropriate degree of constitutional scrutiny.
2 VRLC argues that “[s]trict scrutiny applies to government’s defining
3 an organization as a political committee – or whatever label a
4 jurisdiction uses – and thereby imposing political-committee
5 burdens.” Appellants’ Br. 45. In essence, VRLC asks this Court to
6 aggregate the various statutory provisions that apply to a Vermont
7 “political committee,” decide that these provisions add up to an
8 “onerous burden,” and conclude from this that the definition of a
9 Vermont political committee must be evaluated using strict scrutiny.

10 But as the Fourth Circuit has recently explained:

11 [The *Citizens United*] Court used the word
12 “onerous” in describing certain PAC-style
13 obligations and restrictions [but] . . . the
14 Court distinguished its application of the
15 strict scrutiny standard to expenditure
16 restrictions from the exacting scrutiny
17 standard applicable to disclosure
18 requirement provisions In sum, we
19 conclude that even after *Citizens United*, it
20 remains the law that provisions imposing
21 disclosure obligations are reviewed under

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 the intermediate scrutiny level of “exacting
2 scrutiny.”
3
4 *The Real Truth About Abortion, Inc. v. Fed. Election Comm’n*, 681 F.3d
5 544, 549 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013); *accord Wis.*
6 *Right to Life, Inc. v. Barland*, No. 12-2915, 2014 WL 1929619, at *33 (7th
7 Cir. May 14, 2014) (applying exacting scrutiny to review rule that
8 imposed “PAC-like disclosure program” on “independent
9 disbursement organizations”); *Free Speech v. Fed. Election Comm’n*,
10 720 F.3d 788, 792-93 (10th Cir. 2013), *cert. denied*, 2014 WL 2011565
11 (May 19, 2014); *Human Life of Wash. Inc.*, 624 F.3d at 1012-13.

12 Vermont’s definition of “political committee,” which is then
13 used to impose disclosure obligations, does not require strict
14 scrutiny review. A defined term such as “political committee” is
15 simply a useful drafting tool. The definition sets out the domain of a
16 series of separate statutory provisions. For example, the statute
17 currently defines “political committee” in section 2901(13), then
18 subjects every “political committee” to disclosure requirements in

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 section 2964. The statute could be rewritten to dispense with the
2 defined term “political committee” by making the disclosure
3 requirements a standalone provision. The same process could be
4 followed with every other provision, including the contribution
5 limitations in section 2941(a)(4). This process would not alter the
6 substance of the statute, and the resulting statute likely would be
7 unwieldy; it would be more difficult to apply and review. But it
8 would lack a “political committee” definition that could be subjected
9 to the type of challenge envisioned by VRLC.

10 It is the challenged regulation, not the PAC definition,
11 therefore, that determines what level of scrutiny should apply.
12 VRLC highlights the following obligations that apply to an
13 organization once it is defined as a political committee: registration,
14 recordkeeping necessary for reporting, and reporting requirements.
15 It asserts these “are the very burdens that are ‘onerous’ as a matter
16 of law.” Appellants’ Br. 43. These requirements amount to the

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 establishment of a disclosure regime. As a result, we, like the
2 district court, apply exacting scrutiny to the “political committee”
3 definition as used to impose the registration and disclosure
4 requirements here.¹⁶ *Vt. Right to Life Comm., Inc.*, 875 F. Supp. 2d. at
5 393; *see also Yamada v. Weaver*, 872 F. Supp. 2d 1023, 1048 (D. Haw.
6 2012) (collecting cases that “analyzed various definitions of ‘political
7 committee,’ which include the burdens associated with such
8 classification, and considered them to be ‘disclosure requirements’”).

9 C. Application

10 Judge Sessions correctly found that Vermont’s PAC definition,
11 in the context of disclosure requirements, survives exacting scrutiny.
12 *Vt. Right to Life Comm., Inc.*, 875 F. Supp. 2d at 396-97. Vermont’s
13 regime only calls for disclosures of “contributions” and

¹⁶ Although there may be an open question as to what level of scrutiny should apply where the political committee definition is used to impose the burden of contribution limits, we, like the district court, do not find a need to reach that question here. VRLC has not challenged the contribution limits and expressly stated in its brief that such limits were “immaterial” for the purpose of its challenge to the political committee definition.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 “expenditures,” both of which are defined terms that require a
2 purpose to promote or oppose a candidacy. Vt. Stat. Ann. tit. 17, §
3 2901(4), (7). In other words, Vermont PACs need only disclose
4 transactions that have the purpose of supporting or opposing a
5 candidate.¹⁷ The disclosure regime is substantially related to the
6 recognized governmental interest in “providing the electorate with
7 information about the sources of election-related spending.” *Citizens*
8 *United*, 558 U.S. at 367 (internal quotation marks omitted).

9 The definition also reaches groups only once they have
10 accepted contributions of \$1,000 or more and made expenditures of
11 \$1,000 or more in any two-year general election cycle for the
12 purpose of supporting or opposing one or more candidates. See Vt.
13 Stat. Ann. tit. 17, § 2901(13). This is different from the Wisconsin
14 regulation struck down by the Seventh Circuit that imposed a
15 disclosure regime on “*every* independent group that crosses the very

¹⁷ The statutory scheme only asks for information that PACs would track even absent a legal requirement. A contributor database is a valuable asset for a PAC, and few organizations would fail to maintain an accounting of its expenditures.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 low \$300 threshold in express-advocacy spending.” *Barland*, 2014
2 WL 1929619, at *35 (emphasis in original). The Seventh Circuit itself
3 relied on regulatory differences to distinguish *Barland* from its
4 earlier decision to uphold Illinois’ disclosure system because that
5 political committee definition covered “only groups that accept
6 contribution or make expenditures ‘on behalf of or in opposition to’
7 a candidate or ballot initiative.” *Id.* at *33 (quoting *Madigan*, 697 F.3d
8 at 488). Factual distinctions aside, we find the Seventh Circuit’s
9 reasoning in *Center of Individual Freedom v. Madigan* the more
10 persuasive: “[O]ur inquiry depends on whether there is a substantial
11 relation between [Vermont’s] interest in informing its electorate
12 about who is speaking before an election and [its] regulation of
13 campaign-related spending by groups whose major purpose is *not*
14 electoral politics. We find that there is.” 697 F.3d at 491 (emphasis
15 in original).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Moreover, Vermont’s PAC definition is limited to
2 organizations that make expenditures *and receive* contributions. Vt.
3 Stat. Ann. tit. 17, § 2901(13). This definition has a substantial relation
4 to Vermont’s legitimate informational interests. Defining PACs as
5 entities that receive contributions and then imposing disclosure
6 requirements simply addresses the situation where, for example, a
7 corporation creates an entity with an opaque name – say,
8 “Americans for Responsible Solutions” – contributes money to that
9 entity, and has that entity engage in speech on its behalf. By
10 requiring that entity to meet reporting and organizational
11 requirements, Vermont can ensure that the underlying speaker is
12 revealed. If the same corporation wishes to engage in independent
13 expenditures, however, it is free to do so without limitation and
14 without falling under the PAC definition and disclosure
15 requirements as long as it does not receive contributions.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Vermont's tailored disclosure regime is distinguishable from
2 the perpetual reporting and organizational requirements that raised
3 concern for the Eighth Circuit. See *Minn. Citizens Concerned for Life,*
4 *Inc. v. Swanson*, 692 F.3d 864, 867-69, 872-73 (8th Cir. 2012) (en banc)
5 (addressing Minnesota statute that required any association seeking
6 to engage in independent expenditures to set up a PAC). The Eighth
7 Circuit expressed doubt over Minnesota's reporting requirements,
8 which were "untethered from continued speech." *Id.* at 876.
9 Similarly, in *Iowa Right to Life Committee, Inc. v. Tooker*, the Eighth
10 Circuit rejected an Iowa statute on the basis of its requirement that
11 groups "file perpetual, ongoing reports." 717 F.3d 576, 597 (8th Cir.
12 2013), *cert. denied*, 134 S. Ct. 1787 (2014). By contrast, the Vermont
13 statute at issue only considers a group a "political committee" and
14 subjects it to reporting requirements if it receives contributions and
15 makes expenditures of \$1,000 or more in a two-year general election
16 cycle. Vt. Stat. Ann. tit. 17, § 2901(13). The reporting requirement,

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 therefore, is not “perpetual”; it is contingent upon qualifying as a
2 PAC based on a group’s ongoing contributions and expenditures. In
3 addition, the Vermont statute recognizes the ability of a PAC to file a
4 “final report” that lists all of its contributions and expenditures and
5 terminates its campaign activities. *Id.* § 2965(b).

6 VRLC-FIPE also contends that the \$100 threshold for
7 reporting a contribution, *see id.* § 2963(a)(1), is too low. In *Buckley*,
8 the Supreme Court upheld a disclosure threshold after observing
9 that it was not “wholly without rationality.” 424 U.S. at 83. The
10 Ninth Circuit has applied a “wholly without rationality” standard in
11 evaluating a disclosure threshold, although it evaluated the overall
12 scheme using an “exacting scrutiny” standard. *Canyon Ferry Rd.*
13 *Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1031,
14 1033-34 (9th Cir. 2009).¹⁸ Regardless of the applicable standard, the

¹⁸ Although VRLC-FIPE contends that the Fourth Circuit has applied a more stringent test to a disclosure threshold, it is not clear whether the Fourth Circuit was inquiring into the actual dollar value that would trigger a report. *N.C. Right*

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 threshold is not so low as to prompt any real constitutional doubt.
2 *See Nat'l Org. for Marriage v. McKee*, 669 F.3d 34, 40-41 (1st Cir. 2012)
3 (upholding \$100 threshold); *Family PAC v. McKenna*, 685 F.3d 800,
4 809 n.7 (9th Cir. 2012) (approving disclosure requirements triggered
5 by \$25 and \$100 contributions, and noting that “[i]t is far from clear .
6 . . . that even a zero-dollar disclosure threshold would succumb to
7 exacting scrutiny”). We thus also sustain the district court’s
8 approval of the disclosure threshold.

9 **POLITICAL COMMITTEE CONTRIBUTION LIMITS**

10 Vermont law provides that a “political committee . . . shall not
11 accept contributions totaling more than \$2,000.00 from a single
12 source, political committee or political party in any two-year general
13 election cycle.” Vt. Stat. Ann. tit. 17, § 2805(a).¹⁹ We have previously
14 held that it is “unquestionably constitutional” for the State to limit

to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427, 439 (4th Cir. 2008).

¹⁹ As mentioned in note 4 *supra*, new contribution limits will take effect on January 1, 2015.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 contributions to groups “making contributions to or coordinated
2 expenditures with candidates for office.” *Landell*, 382 F.3d at 140.
3 As a result, Vermont may impose contribution limits on VRLC-PC,
4 an entity that makes contributions to candidates. The only question
5 here is whether the statute’s contribution limits are unconstitutional
6 as applied to VRLC-FIPE, which claims to be an independent-
7 expenditure-only PAC.

8 **I. Campaign Finance Standards of Review**

9 **A. Expenditure Limits**

10 Strict scrutiny applies when the government seeks to ban or
11 limit political expenditures. *Ognibene v. Parkes*, 671 F.3d 174, 182 (2d
12 Cir. 2012). In order for a restriction to survive strict scrutiny, the
13 government must show that the restriction “furthers a compelling
14 interest and is narrowly tailored to achieve that interest.” *Citizens*
15 *United*, 558 U.S. at 340 (internal citations and quotation marks
16 omitted).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 The Supreme Court has recognized only one interest that is
2 sufficiently compelling to justify an expenditure limitation:
3 preventing the actuality or appearance of *quid pro quo* corruption. *Id.*
4 at 358-59. It has expressly rejected any governmental interest in
5 preventing the appearance of influence or access, *id.* at 359-60,
6 limiting distortions of the marketplace of ideas, *id.* at 349-50,
7 protecting the dissenting shareholders of corporate speakers, *id.* at
8 361-62, equalizing the resources of candidates, *Buckley*, 424 U.S. at
9 56, or ensuring that government officials do not devote excessive
10 time to raising money, *Randall*, 548 U.S. at 243, 245-46. The anti-
11 corruption rationale cannot justify a limitation on expenditures that
12 are not coordinated with any political campaign. *Ariz. Free Enter.*
13 *Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826 (2011).

14 **B. Contribution Limits**

15 Contribution limits are “more leniently reviewed because they
16 pose only indirect constraints on speech and associational rights.”

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 *Ognibene*, 671 F.3d at 182-83. Contribution limitations or bans “are
2 permissible as long as they are closely drawn to address a
3 sufficiently important state interest.” *Id.* at 183; *see also Green Party of*
4 *Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) (quoting *Fed.*
5 *Election Comm’n v. Beaumont*, 539 U.S. 146, 162 (2003)). The Supreme
6 Court recently stated that campaign finance restrictions must target
7 *quid pro quo* corruption or its appearance in order to survive First
8 Amendment scrutiny. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct.
9 1434, 1441-42, 1450 (2014).²⁰ Special deference is due to the
10 legislature’s selection of the precise contribution amount limits.
11 *Ognibene*, 671 F.3d at 189.

²⁰ The Court also allowed for the possibility that such regulation could be justified as preventing circumvention of contribution limits. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1452-53, 1457 (2014); *see also Ognibene v. Parkes*, 671 F.3d 174, 194-95 (2d Cir. 2012) (identifying as two interests that could justify contribution limitations: (1) an anti-corruption interest in avoiding *quid pro quo* corruption or the appearance of *quid pro quo* corruption; and (2) an “anti-circumvention interest in preventing the evasion of valid contribution limits.”).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 II. Independent-Expenditure-Only Groups

2 In *Citizens United*, the Supreme Court declared that “[t]he
3 absence of prearrangement and coordination of an expenditure with
4 the candidate or his agent not only undermines the value of the
5 expenditure to the candidate, but also alleviates the danger that
6 expenditures will be given as a *quid pro quo* for improper
7 commitments from the candidate.” 558 U.S. at 345 (quoting *Buckley*,
8 424 U.S. at 47); see also *Cal. Med. Ass’n v. Fed. Election Comm’n*, 453
9 U.S. 182, 203 (1981) (Blackmun, J., concurring in part and concurring
10 in the judgment) (“*Cal. Med.*”). As we have noted, see *N.Y. Progress*
11 *& Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2d Cir. 2013), several Courts
12 of Appeals have concluded that an anti-corruption rationale
13 therefore cannot apply to contributions to groups that engage only
14 in independent expenditures. See *Wisc. Right to Life State Political*
15 *Action Comm. v. Barland*, 664 F.3d 139, 154 (7th Cir. 2011) (“*WRLC I*”);
16 *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1118-21 (9th Cir. 2011);

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 NCRL III, 525 F.3d at 295. For example, the U.S. Court of Appeals
2 for the District of Columbia stated that, in the context of groups that
3 make independent expenditures only, the Supreme “Court has
4 effectively held that there is no corrupting ‘quid’ for which a
5 candidate might in exchange offer a corrupt ‘quo.’” *SpeechNow.org v.*
6 *Fed. Election Comm’n*, 599 F.3d 686, 694-95 (D.C. Cir. 2010) (en banc).

7 VRLC-FIPE urges that we follow these courts and hold that
8 contribution limits may not be constitutionally applied to
9 “independent expenditure” entities. But even if contribution limits
10 would be unconstitutional as applied to independent-expenditure-
11 only groups, VRLC-FIPE would not succeed here. The district court
12 correctly concluded that based on the undisputed facts presented at
13 summary judgment, VRLC-FIPE is enmeshed financially and
14 organizationally with VRLC-PC, a PAC that makes direct
15 contributions to candidates. Thus, because contribution limits are

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 constitutional as applied to VRLC-PC, we agree with the district
2 court that they also may be applied to VRLC-FIPE.

3 In holding that independent expenditures cannot give rise to
4 *quid pro quo* corruption, the Supreme Court focused on the “absence
5 of prearrangement and coordination” when expenditures are
6 independent. *Citizens United*, 558 U.S. at 345, 357-61; *see also Ala.*
7 *Democratic Conference v. Broussard*, 541 F. App’x 931, 935 (11th Cir.
8 2013) (per curiam) (“In prohibiting limits on independent
9 expenditures, *Citizens United* heavily emphasized the independent,
10 uncoordinated nature of those expenditures, which alleviates
11 concerns about corruption.”). Although some courts have held that
12 the creation of separate bank accounts is by itself sufficient to treat
13 the entity as an independent-expenditure-only group, *see, e.g.,*
14 *Emily’s List v. Fed. Election Comm’n*, 581 F.3d 1, 12 (D.C. Cir. 2009),²¹

²¹ Even the D.C. district courts, however, have not resolved whether *Emily’s List* holds that a separate bank account alone is sufficient to allow for unlimited expenditures. *Compare Stop This Insanity, Inc. Emp. Leadership Fund v. Fed. Election Comm’n*, 902 F. Supp. 2d 23, 43 (D.D.C. 2012) (“When a single entity is allowed to

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 we do not believe that is enough to ensure there is a lack of
2 “prearrangement and coordination.” A separate bank account may
3 be relevant, but it does not prevent *coordinated* expenditures –
4 whereby funds are spent in coordination with the candidate. See
5 *Stop This Insanity, Inc. Emp. Leadership Fund v. Fed. Election Comm’n*,
6 902 F. Supp. 2d 23, 43 (D.D.C. 2012).

7 Nor is it enough to merely state in organizational documents
8 that a group is an independent-expenditure-only group. Some
9 actual organizational separation between the groups must exist to
10 assure that the expenditures are in fact uncoordinated. We therefore
11 decline to adopt the reasoning of the Fourth Circuit in *NCRL III*.
12 There, the Fourth Circuit rejected North Carolina’s argument that

make both limited direct contributions and unlimited independent expenditures, keeping the bank accounts for those two purposes separate is simply insufficient to overcome the appearance that the entity is in cahoots with the candidates and parties that it coordinates with and supports.”), with *Carey v. Fed. Election Comm’n*, 791 F. Supp. 2d 121, 135 (D.D.C. 2011) (“As long as Plaintiffs strictly segregate these funds . . . they are free to seek and expend unlimited soft money funds geared toward independent expenditures.”).

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 NCRL-FIPE (a similar organization to VRFC-FIPE) was “not actually
2 an independent expenditure committee because it [was] ‘closely
3 intertwined’” with NCRL and NCRL-PAC, two organizations
4 (similar to VRFC and VRFC-PC) that did not limit their activities to
5 independent expenditures. *NCRL III*, 525 F.3d at 294 n.8. The
6 Fourth Circuit concluded based only on NCRL-FIPE’s
7 organizational documents that the group was “independent as a
8 matter of law.”²² *Id.* We do not agree that organizational documents
9 alone satisfy the anti-corruption concern with coordinated
10 expenditures that may justify contribution limits.

11 There is little guidance from other courts on examining
12 coordination of expenditures, but we conclude that, at a minimum,

²² Dissenting from this conclusion, Judge Michael stated that “at any given moment, the same director or staffer is on the one hand ensuring that NCRL-PAC’s activities follow a candidate’s campaign strategy, while on the other hand ‘independently’ designing NCRL-FIPE’s expenditure strategy to promote that same candidate.” *NCRL III*, 525 F.3d 274, 336 (4th Cir. 2008) (Michael, J., dissenting). He concluded that without any organizational separation it was “hard to understand how NCRL-FIPE could, whether intentionally or not, avoid incorporating the coordinated campaign strategies used by NCRL-PAC into its own ostensibly independent campaign work.” *Id.*

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 there must be some organizational separation to lessen the risks of
2 coordinated expenditures. Separate bank accounts and
3 organizational documents do not ensure that “information [] will
4 only be used for independent expenditures.” *Catholic Leadership*
5 *Coal. of Tex. v. Reisman*, No. A-12-CA-566-SS, 2013 WL 2404066, at *17
6 (W.D. Tex. May 30, 2013) (emphasis added) (“The informational wall
7 [that plaintiff] asserts it can raise to keep its independent
8 expenditure activities entirely separate from its direct campaign
9 contribution activities is thin at best. This triggers the precise
10 dangers of corruption, and the appearance of corruption, which
11 motivated the Court in *Buckley* to uphold the challenged
12 contribution limits.”). As discussed below, whether a group is
13 functionally distinct from a non-independent-expenditure-only
14 entity may depend on factors such as the overlap of staff and
15 resources, the lack of financial independence, the coordination of
16 activities, and the flow of information between the entities.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 The decisions cited by VRLC-FIPE to challenge the district
2 court's conclusion that VRLC-FIPE is not sufficiently separate from
3 VRLC-PC are inapposite. In *Citizens United*, the Supreme Court
4 observed that a corporation's "PAC is a separate association from
5 the corporation." 558 U.S. at 337. But it did so only to emphasize
6 how the challenged statute was "a ban on corporate speech
7 notwithstanding the fact that a PAC created by a corporation can
8 still speak." *Id.* In *Cal. Med.*, the Supreme Court observed that a
9 PAC was not "merely the mouthpiece" of its contributor because the
10 PAC was a "multicandidate political committee" and "receive[d]
11 contributions from more than 50 persons during a calendar year."
12 453 U.S. at 196. The Court's reliance on these facts supports our
13 conclusion that whether two entities are separate depends on their
14 particular circumstances. The Supreme Court rejected the assertion
15 that a contributor's contributions to a PAC "should receive the same
16 constitutional protection as [the PAC's] independent expenditures."

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 *Id.* at 195. These decisions do not support VRLC-FIPE’s position that
2 the facts regarding its relationships with VRLC and VRLC-PC are
3 irrelevant to the constitutional analysis. *See Ala. Democratic*
4 *Conference*, 541 F. App’x at 936 (“In this as-applied challenge,
5 whether the establishment of separate bank accounts by . . . a hybrid
6 independent expenditure and campaign contribution organization[]
7 eliminates all corruption concerns is a question of fact.”)

8 **III. Undisputed Facts in the District Court’s Evaluation of the**
9 **Summary Judgment Motions**

10
11 The role of the court on a summary judgment motion is “to
12 determine whether, as to any material issue, a genuine factual
13 dispute exists.” *In re Dana Corp.*, 574 F.3d 129, 151 (2d Cir. 2009).
14 VRLC-FIPE did not contest the evidence presented by Vermont or
15 present opposing evidence at summary judgment. Vermont argued
16 “that [VRLC-FIPE] in fact is enmeshed completely with [VRLC-PC],
17 which contributes funds to candidates.” VRLC-FIPE apparently
18 “chose[] not to take the fallback position of contesting the factual

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 showing [Vermont] has made to prove its point,” but simply
2 asserted that “its status is cemented as a matter of law” and argued
3 that it is “entitled to judgment as a matter of law regardless of
4 [Vermont’s] evidence.” *Vt. Right to Life Comm., Inc.*, 875 F. Supp. 2d
5 at 384, 404-05.

6 The State’s summary judgment motion included numerous
7 depositions, financial reports, emails, meeting minutes, and expert
8 reports. Both parties attached statements of undisputed materials
9 facts to their summary judgment motions. In its response brief, the
10 State attached a statement of disputed facts, which contested
11 Plaintiffs’ showing. Plaintiffs did not file an opposing statement of
12 disputed facts. Therefore, we, like the district court, consider the
13 factual record undisputed. On the basis of the State’s evidence,
14 described below, we agree with the district court that there was no
15 genuine dispute of material fact as to VRFC-FIPE’s organizational
16 separation from VRFC-PC.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 VRLC-PC is registered with the Federal Election Commission
2 as a federal PAC and was created by VRLC to engage in federal and
3 state campaign activities, including making direct contributions to
4 candidates. It is clearly not an independent-expenditure-only
5 group. VRLC-FIPE offers only two facts to demonstrate that it must
6 be treated as separate from VRLC-PC. One, the organizational
7 documents show that VRLC created two committees, VRLC-PC and
8 VRLC-FIPE. Two, VRLC-FIPE maintains a separate bank account.
9 For the reasons discussed above, these facts alone are not enough to
10 hold that VRLC-FIPE is an independent-expenditure-only group
11 when, based on the State's undisputed evidence, it is otherwise
12 indistinguishable from the non-independent-expenditure-only
13 group, VRLC-PC.

14 First, the fact that there are two separate bank accounts does
15 not mean the funds were actually treated as separate. An
16 accountant who examined VLRC's, VRLC-FIPE's, and VRLC-PC's

No. 12-2904-cv

Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 structure and finances for the State described “a fluidity of funds
2 between VLRC-FIPE and VRLC-PC.” He found that VRLC
3 transferred funds from VRLC-PC to VRLC-FIPE if VRLC-FIPE
4 lacked the resources to engage in a certain activity. VRLC-FIPE’s
5 treasurer testified that the groups use VRLC-PC’s money to fund
6 VRLC-FIPE’s primary activity of producing voter guides when
7 VRLC-FIPE lacks the funding. Meeting minutes also show that the
8 two groups do not consider their funding streams as distinct. In a
9 2008 VRLC-PC committee meeting, for example, those present
10 described a joint fundraising goal in combined VRLC-FIPE and
11 VRLC-PC funds. Taken as a whole, the groups’ financial history and
12 related documents do not support a finding that there is any
13 operational barrier between VRLC-FIPE and VRLC-PC.²³

²³ We acknowledge that the record does not show that funds from VRLC-FIPE were used for candidate contributions. Nonetheless, the “fluidity of funds” is enough to show that the accounts were not kept sufficiently separate to establish that VRLC-FIPE is an independent group capable of succeeding with an as-applied challenge to contribution limits.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Next is the organizational structure of the groups; here again
2 there is no evidence that VRLC-FIPE is segregated at all from VRLC-
3 PC. Both are committees of the umbrella organization VRLC, which,
4 by itself, would not show coordination, but the State's accountant
5 represented that VRLC has complete control over VRLC-FIPE's and
6 VRLC-PC's structure and finances. The members of both
7 committees are appointed by the president of VRLC with the
8 approval of VRLC's board. The committees share a substantial
9 overlap in membership. They meet at the same time and same place
10 and often discuss important tactical campaign issues with no regard
11 for the separation of the two committees. The Executive Director of
12 VRLC (and its principal official), Mary Hahn Beerworth, is also an *ex*
13 *officio* member of VRLC-FIPE's committee; she attends VRLC-FIPE
14 and VRLC-PC committee meetings and advises both. The Chair of
15 VRLC-PC, Michelle Morin, is also a member of VRLC's Board of
16 Directors and a member of VRLC-FIPE.

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 Then there are VRLC-FIPE's actual activities. It appears that
2 VRLC-FIPE's primary purpose is the production of voter guides
3 describing the pro-life positions of candidates in each county in
4 Vermont. This activity, however, is done in concert with VRLC-PC.
5 Together the two groups produce and pay for the guides, which
6 often list both groups as sponsors. VRLC-PC in turn bases its
7 endorsement decisions on these voter guides. Beerworth and Morin
8 then decide whether to provide the candidates that VRLC-PC
9 endorses with access to the organization's support phone mailing
10 list. There is no point at which VRLC-FIPE separates itself from the
11 lines of communication between the candidate, VRLC, and VRLC-
12 PC. At every step of the campaign process, it is completely
13 enmeshed with VRLC-PC.

14 The 2010 campaign exemplifies the groups' structural melding
15 and absence of any informational or activities wall. In 2010,
16 Beerworth advised Brian Dubie (VRLC-PC has endorsed Dubie in

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 every election in which he has run), the Republican candidate for
2 Governor, and members of his campaign staff on issues. This same
3 year, the Dubie campaign accepted more than \$900 worth of VRLC's
4 support phone lists as an in-kind contribution.

5 Because VRLC-FIPE chose not to contest the Defendants'
6 Statement of Undisputed Material Facts or its evidence in support of
7 its motion for summary judgment, we – like the district court – are
8 limited to the State's evidence. There is nothing in the record that
9 raises a genuine dispute as to whether VRLC-FIPE operated as an
10 entity apart from VRLC-PC. It relied on funding from VRLC and
11 VRLC-PC when necessary. It was comprised of the same people –
12 including VRLC-PC's own chairwoman. It worked with VRLC-PC
13 on its primary, if not only, project, voter guides. It received its
14 information and advice from the same sources. It met at the same
15 time and place. Uncontroverted, this evidence is sufficient to
16 conclude that VRLC-FIPE is not meaningfully distinct from VRLC-

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 PC, and affirm the district court’s grant of Defendants’ summary
2 judgment motion on this issue.

3 In *Colorado Republican Federal Campaign Committee v. Federal*
4 *Election Commission*, the Supreme Court rejected the argument that a
5 party’s expenditure is coordinated “because a party and its
6 candidate are identical,” saying “[w]e cannot assume . . . that this is
7 so.” 518 U.S. 604, 622 (1996). Plaintiffs-Appellants ask this Court to
8 follow *Colorado Republican*. Here, however, we do not *assume* that
9 VRLC-FIPE and VRLC-PC are identical; we, like the district court,
10 have examined the undisputed facts and conclude that VRLC-FIPE
11 has presented no evidence to raise a genuine dispute of material fact
12 about its independence from VRLC’s non-independent-expenditure-
13 only entity, VRLC-PC.

14 **IV. Contribution Limits as Applied to VRLC-FIPE**

15 Those courts that have found contribution limits
16 unconstitutional as applied to independent-expenditure-only groups

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 have done so on the basis of the holding in *Citizens United* that
2 independent expenditures do not carry the danger that the
3 expenditure will be given as *quid pro quo* for commitments from the
4 candidate. *See, e.g., WRLC I*, 664 F.3d at 143; *NCRL III*, 525 F.3d at
5 293-95. Such expenditures are not prearranged or coordinated with
6 the candidate. Separate bank accounts alone, however, do not
7 always eliminate coordinated expenditures. Some organizational
8 divide must exist to ensure that the two are separate – that the
9 independent expenditures are truly spent independent of any
10 coordination with a candidate.

11 VRLC-FIPE is indistinguishable from VRLC-PC, a non-
12 independent-expenditure-only group. As discussed above, this is
13 clear from the total overlap of staff and resources, the fluidity of
14 funds, and the lack of any informational barrier between the entities.
15 We acknowledge, though, that especially with committees that
16 operate with low funding levels, small staff, and few resources, it

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 will be difficult at times to maintain separation among those
2 committees. Nevertheless, in the absence of any opposing evidence
3 here, we have no basis to find that VRLC-FIPE is distinct from the
4 non-independent-expenditure-only organization VRLC-PC.

5 We have held that the state may impose contribution limits on
6 some groups – groups such as VRLC-PC that directly contribute or
7 coordinate expenditures with campaigns. Where VRLC-FIPE is
8 functionally indistinguishable from VRLC-PC, the same limits may
9 constitutionally apply to it. “The Supreme Court has upheld
10 limitations on contributions to entities whose relationships with
11 candidates are sufficiently close to justify concerns about corruption
12 or the appearance thereof.” *Long Beach Area Chamber of Commerce v.*
13 *City of Long Beach*, 603 F.3d 684, 696 (9th Cir. 2010); accord *McConnell*,
14 540 U.S. at 154-55 (upholding limitations on contributions to
15 national parties because “the close relationship between federal
16 officeholders and the national parties, as well as the means by which

No. 12-2904-cv
Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 parties have traded on that relationship, . . . have made all large soft-
2 money contributions to national parties suspect”); *Cal. Med.*, 453 U.S.
3 at 203 (Blackmun, J., concurring in part and concurring in the
4 judgment) (upholding limitations on contributions to
5 “multicandidate political committees” because their close
6 relationship with candidates and office holders made them
7 “conduits for contributions to candidates, and as such they pose[d] a
8 perceived threat of actual or potential corruption”). It is the
9 requirement of independence – the absence of “prearrangement and
10 coordination” – that alleviates the danger that expenditures will be
11 spent as *quid pro quo* for improper commitments from the candidate.
12 VRLC-PC participates in federal and state elections, makes direct
13 contributions to candidates, and works with campaigns. It is an
14 organization with the type of close relationship to candidates that
15 allows for state disclosure requirements and financial limitations.
16 Where VRLC-FIPE cannot be functionally distinguished from

No. 12-2904-cv

Vermont Right to Life Committee, Inc., et al. v. Sorrell, et al.

1 VRLC-PC, the same concerns apply. Therefore, we agree with the
2 district court that Vermont's contribution limits as applied to VRLC-
3 FIPE are permitted.

4 **CONCLUSION**

5 For the reasons given above, we AFFIRM the judgment of the
6 district court in all respects.