No.14-380

In the

Supreme Court of the United States

VERMONT RIGHT TO LIFE COMMITTEE, INC. AND VERMONT RIGHT TO LIFE COMMITTEE—FUND FOR INDEPENDENT POLITICAL EXPENDITURES,

Petitioners,

v.

WILLIAM H. SORRELL, ET AL.,

Respondents.

On Petition for Writ of *Certiorari* from the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* CENTER FOR COMPETITIVE POLITICS AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20036
ishapiro@cato.org
(202) 842-0200

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Ste. 201
Alexandria, VA 22314
adickerson@campaignfreedom.org
(703) 894-6800
Counsel for Amici Curiae

November 3, 2014

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Regulations

Other Authority

INTEREST OF *AMICI CURIAE*[1]

Founded in 2005 by former Federal Election Commission Chairman Bradley A. Smith, the Center for Competitive Politics ("CCP") is a 501(c)(3) organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. CCP was co-counsel in *SpeechNow.org v.* FEC, 599 F.3d 686 (D.C. Cir. 2010), and has filed *amicus curiae* briefs in many of the notable cases concerning campaign finance laws and restrictions on political speech, including *Citizens United v. FEC,* 558 U.S. 310 (2010) and *McCutcheon v. FEC,* 572 U.S. ___, 134 S. Ct. 1434 (2014).

Amicus curiae Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files *amicus* briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*. This case is of central concern to Cato because it addresses the further collapse of constitutional protections for political activity, which lies at the very heart of the First Amendment.

---

[1] No party has contributed, monetarily or otherwise, to the preparation or filing of this brief, which was authored entirely by counsel for *amici*. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court has clearly stated that the government may not, consistent with the First Amendment, require groups that only incidentally speak about political candidates to register, file regular reports, or publicly disclose their membership and donors. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (*per curiam*). Similarly, the government may not limit contributions to groups absent a sufficiently compelling anticorruption purpose. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1462 (2014); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*). In deciding this case below, the Second Circuit did significant damage to these two foundational principles. This Court's intervention is necessary to repair that harm and prevent future rulings of the same character.

The Court of Appeals first erred in failing to apply the major purpose test mandated by *Buckley* and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). The major purpose test protects unsophisticated issue speakers and citizens' groups from being forced to assume the burdensome form of a political action committee ("PAC") for merely incidental political speech.

By declining to apply this Court's *Buckley* ruling, the Court of Appeals has green-lit the application of PAC status to virtually any group that engages in any political activity, no matter how slight or unintentional. This will stifle public debate and squelch grassroots speakers. Unfortunately, it will also continue a trend, in both the courts and the state legislatures, of imposing PAC status upon groups with minimal electoral involvement.

Second, the Court of Appeals imposed a new test for determining whether affiliated groups have impermissibly coordinated to the extent that they become a single entity. But the Second Circuit's novel five-factor standard goes well beyond what is necessary, and will impose significant burdens upon speakers, with those burdens increasing the smaller and less sophisticated the organization.

Applying this test will require, as it did here, incredibly invasive and expansive discovery. Future potential litigants seeking to oppose state laws applying contribution limits to independent expenditure organizations—laws that are almost certainly unconstitutional—will inevitably be chilled. This is contrary to this Court's guidance in *FEC v. Wisconsin Right to Life*, 551 U.S. 449, 469 (2007) ("*WRTL II*") ("The proper standard for an as-applied challenge…must entail minimal, if any, discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation").

Furthermore, the Second Circuit's coordination requirements will threaten the ability of organizations to maintain and operate affiliated entities (such as both a § 501(c)(3) and a § 501(c)(4)). A number of such organizations, especially smaller entities, will likely flunk the Second Circuit's test. This result would frustrate the goals of *Regan v. Taxation with Representation*, 461 U.S. 540 (1983), which encouraged the use of such affiliations as a means of fully and robustly exercising First Amendment freedoms.

Accordingly, this Court should grant Petitioners' request for a writ of *certiorari*.

ARGUMENT

I. Without This Court's Intervention, the Major Purpose Test Is Poised to Become a Dead Letter.

This Court has long limited the imposition of federal political action committee ("PAC") status only to those entities that are "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79 (1976); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n. 6 (1986) ("*MCFL*") (Brennan, J.) (plurality opinion); *see also McConnell v. FEC*, 540 U.S. 93, 170 n. 64 (2003) (citing same). Yet, this straightforward rule—that the registration and disclosure burdens of PAC status may only be imposed on unambiguously political organizations—has been inconsistently applied in the courts of appeals. This Court ought to grant *certiorari* to save this vital limit on state regulatory power.

The *Buckley* Court devised the major purpose test as a means of protecting issue speakers from the thicket of regulation, registration, filing, contribution limits, and disclosure requirements imposed by PAC status. While various governmental interests—such as fighting corruption or the public's interest in knowing the financial constituencies of candidates for office—justified imposing such regulations on advocates for and against candidates, the *Buckley* Court acted to shield issue speakers from these same burdens. *Buckley*, 424 U.S. at 83 ("We are mindful that disclosure serves informational functions, as well as the prevention of

corruption and the enforcement of the contribution limitations").

The Federal Election Campaign Act ("FECA") imposed PAC status on groups receiving contributions or making "expenditures." *Buckley* limited the definition of "expenditure" to communications "containing express words of advocacy of election or defeat, such as 'vote for', 'elect', 'support,' 'cast your ballot for,' 'Smith for Congress,'" *etc.* *Id.* at 44, n. 52. *Buckley* also narrowed FECA's definition of "political committee," and found that the government interests in regulating political speakers extended only to groups that were "under the control of a candidate or [that had] the major purpose" of expressly advocating the election or defeat of candidates. *Id.* at 79.

Ten years later, the major purpose test was re-affirmed in *MCFL*. 479 U.S. at 252 n. 6 (determining that Massachusetts Citizens for Life had a "central organizational purpose…[of] issue advocacy" even though it "occasionally engage[d] in activities on behalf of political candidates"). Indeed, the application of PAC status to speakers such as MCFL was discussed at length in both Justice Brennan's plurality opinion and Justice O'Connor's separate concurrence. The plurality feared that disclosure burdens would overwhelm and stifle grassroots organizations. *MCFL* at 253-54. Justice O'Connor wrote separately to state that forcing speakers such as MCFL to, for instance, "assume a more formalized organizational form" did not further any appropriate governmental interest. *Id.* at 266.

The major purpose test prevents states from treating civil society groups as political committees merely because they have some incremental

involvement with elections. Under *Buckley* and its progeny, this protects vital First Amendment interests. 424 U.S. at 14 ("Although First Amendment protections are not confined to the exposition of ideas, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, of course including discussions of candidates") (internal punctuation and citations omitted).

Nonetheless, the Second Circuit here quickly dispatched VRLC's major purpose objection to the Vermont statute. This was not because the Vermont statute is more precise than the federal statute reviewed in *Buckley* and *MCFL,* but merely because "since *Citizens United* and its approval of extensive disclosure regimes, two Circuits have concluded that the major purpose test is not a constitutional requirement." 34a (citing *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011)). Applying similar reasoning to that of the First and Seventh Circuits, the Court of Appeals found that "[w]hen the *Buckley* Court construed the relevant federal statute to reach only groups having 'the major purpose' of electing a candidate, it was drawing a statutory line." 35a-36a.

This argument originates not from *Citizens United*, but rather from *McConnell*. There, this Court determined that "the express advocacy restriction was an endpoint of statutory interpretation, not a first principle of constitutional law." *McConnell*, 540 U.S. at 190. But this determination came in the context of a different, clearer, statute, and one which imposed a

substantially lighter burden than did FECA. *Compare* Federal Election Campaign Act Amendments of 1974 ("FECA"), Pub. L. No. 93-443 § 204, 88 Stat. 1276-78 (1974) (codified at 52 U.S.C. §§ 30104(a),(b), and (e)) *with* Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155 § 201, 116 Stat. 81, 88 (2002) (codified at 52 U.S.C. § 30104(f)). BCRA's precision voided the necessity for this Court to adopt a narrowing construction to cure vagueness and potential overbreadth. *McConnell*, 540 U.S. at 194 ("Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here")[2].

BCRA's electioneering communication regulations, and the attendant one-time, event-driven filing and disclosure requirements are incomparable to FECA's—and, importantly, Vermont's—PAC requirements. 11 C.F.R. 104.20 (2014); 7a-10a; 205a-208a. Vermont has not narrowly regulated speech in order to avoid the need for a major purpose construction. Instead, Vermont has chosen to ignore the constitutional concerns of vagueness and overbreadth that lead the *Buckley* Court to adopt the major purpose test.

The Second Circuit, like some of its sister circuits, thus misapplied *McConnell*—a case that is *not* about PAC status—and ignored *Buckley v. Valeo,* a case which squarely and extensively addressed PAC status. This approach is improper.

---

[2] This is not to suggest that BCRA's electioneering communication definition is completely devoid of constitutional infirmities. *See WRTL II*, 551 U.S. at 469-470 (finding statute unconstitutionally overbroad as-applied to certain communications which do not function as express advocacy).

See Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions").

Moreover, several state governments, including Vermont, have taken this Court's silence as an invitation to do away with the major purpose requirement entirely. *Corsi v. Ohio Elections Commission*, 981 N.E.2d 919 (Ohio App. 2012), *cert. denied* 984 N.E.2d 29 (Ohio 2013), *cert. denied* 134 S. Ct. 163 (2013) (upholding state agency determination that an organization could have more than one major purpose); *Independence Institute v. Coffman*, 209 P.3d 1130, 1134 (Colo. App. 2008); *cert. denied sub nom., Independence Institute v. Buescher*, 2009 SC 26 (Colo. 2009), *cert. denied* 558 U.S. 1024 (same). Some states have chosen to impose PAC status merely upon spending an arbitrary, and often low, amount. ARIZ. REV. STAT. §16-901(19) (2014) ($250 trigger). Others go further. ALA. CODE § 17-5-2(a)(12) (2014) (regulating organizations which merely anticipate receiving contributions or expenditures).

Finally, it is worth noting that the Second Circuit chose to only consider cases decided after *Citizens United v. FEC*, 558 U.S. 310 (2010). As a result, it discounted other circuit precedent that *did* require the imposition of a major purpose requirement. *See New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2008) ("Under…the major purpose test, the organizations here do not qualify as political committees"); *Nat'l*

Right to Work Legal Defense and Ed. Found., Inc. v. Herbert, 581 F. Supp. 2d 1132, 1154 (D. Utah 2008) ("*Buckley* did indeed mean exactly what it said") (quoting *N.C. Right to Life v. Leake*, 525 F.3d 274, 288 (4th Cir. 2008)). The Second Circuit's decision to ignore other precedent is curious, for "[w]hile the Supreme Court did have occasion to note the burdensome nature of the federal political action committee regulations in *Citizens United*, the Court did not squarely address the requirements for imposing committee status on organizations." *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 720 (D.S.C. 2010). In short, *Citizens United* is neither the alpha nor the omega of campaign-finance jurisprudence.

Unless this Court weighs in, the major purpose test will become a dead letter in many states. Without its protections, many organizations, including small groups lacking counsel or sophisticated internal procedures, will inadvertently become PACs on the basis of relatively small, perhaps incidental, expenditures. As a result, they will have to register with the states, disclose their donors, and publish their expenditures with a high degree of detail. Because these groups will, in many cases, have failed to register in the first instance, they will invite prosecution and substantial penalties. *See Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010). In such circumstances, many organizations will simply choose not to speak.

II. The Second Circuit's Five-Factor Test for Coordination Will Make It Impossible for Many Small Organizations to Exercise Their First Amendment Rights.

"[T]he governmental interest in preventing corruption and the appearance of corruption is inadequate to justify" limitations on independent expenditures. *Buckley*, 424 U.S. at 45, *see also Citizens United*, 558 U.S. at 357 ("[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption"). This is true for the states as well. *Am. Tradition P'ship v. Bullock*, 567 U.S. ___, 132 S. Ct. 2490, 2491 (2012) (*per curiam*) (applying U.S. CONST., art. VI, cl. 2 against Montana law similar to the expenditure ban struck down by *Citizens United*); *cf. Cooper v. Aaron*, 358 U.S. 1 (1958).

"As the *Buckley* Court explained when it struck down a limit on independent expenditures, "'[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent…alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.'" *SpeechNow.org*, 599 F.3d at 693 (quoting *Citizens United*, 558 U.S. at 345) (citation omitted, ellipses in original). Because the government's interest in deterring corruption dissolves when there "is no corrupting *quid* for which might in exchange offer a corrupt *quo*," the federal courts have, thus far, refused to apply contribution limits against political committees which only engage in independent expenditures. *SpeechNow.org*, 599 F.3d at 694-95;

Thalheimer v. City of San Diego, 645 F.3d 1109, 1119 (9th Cir. 2011); *Leake*, 525 F.3d at 291-293 (4th Cir. 2008).

The Second Circuit held that Vermont's contribution limits could be constitutionally applied to an independent expenditure committee, VRLC-FIPE, affiliated with Vermont Right to Life. 56a. It did so on the grounds that "VRLC-FIPE cannot be functionally distinguished from, VRLC-PC [Vermont Right to Life's political committee]." 56a.[3]

But the criteria by which the Second Circuit determined that VRLC-FIPE had impermissibly coordinated with VRLC-PC pose significant practical and constitutional concerns. The Second Circuit's ruling creates a highly ambiguous five-factor test for determining whether two entities "functionally indistinguishable" for purposes of independent expenditure limits. 55a.

The five factors are:

(1) Do the organizations share financial resources? 51a (describing the "'fluidity of funds between VRLC-FIPE and VRLC-PC'").
(2) Do the organizations share employees or membership? 53a (VRLC-FIPE is "comprised of the same people—including VRLC-PC's own chairwoman").
(3) Do the organizations coordinate together on projects? 52a (discussing VRLC-PC and VRLC-FIPE's role in the "production of

[3] *Amici* take no position on the actual independence of VRLC-FIPE from VRLC-PC, only on the standard used by the Second Circuit in reaching its decision.

voter guides" which constituted "VRLC-FIPE's primary purpose").

(4) Do organizations receive "information and advice from the same sources"? 53a.

(5) Do the organizations meet "at the same time and place"? 53a.

The Court of Appeals applied these (ambiguous) factors to VRLC-FIPE, its sister organization VRLC-PC, and their umbrella entity, VRLC. Discovery was permitted and evidence introduced on all five points. Accordingly, the Second Circuit deemed the record below "sufficient to conclude that VRLC-PC [was] not meaningfully distinct from VRLC-PC." 53a.

a. The Second Circuit's coordination test will discourage litigation against unconstitutional campaign finance regulations, particularly for small organizations.

No federal court has upheld a state law applying contribution limits to political committees that only seek to make independent expenditures. But several states and the federal government have tried to impose such restrictions. Future challenges to similar laws will, under the Second Circuit's test, require litigants to submit to invasive discovery concerning their records, communications, and finances. These burdens are substantial enough for larger organizations, but for smaller organizations they can be crushing. Inevitably, some meritorious cases will not go forward, and some unconstitutional laws will stand.

Consider the instant case. Vermont sought, and obtained extensive discovery, including meeting minutes, email correspondence, depositions of organizational officers, and "an accountant who examined VRLC's, FIPE's, and PC's structure and finances for the State." 121a-122a.

Such extensive discovery is *necessary* under the Second Circuit's broad understanding of improper coordination. There is no other way to determine how entities, their staffs, and their outside advisors operate. But this approach to constitutional litigation is contrary to this Court's clear guidance: "the proper standard for an as-applied [campaign finance] challenge…must be objective…[and] entail minimal, if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." *WRTL II*, 551 U.S. at 469 (Roberts, C.J., controlling opinion). This harm is magnified where, as here, the challenged law is almost certainly unconstitutional.

b. The Second Circuit's coordination test threatens the ability of other affiliated organizations to operate in the public sphere.

The Second Circuit's test has wide-ranging applications that extend well beyond the context of this litigation. Affiliated entities are not unusual, and imposing the burden of complete segregation will do great harm to associational freedom. At a minimum, this Court should limit the Second Circuit's coordination requirements to VRLC's specific context.

"Charities who find Section 501(c)(3)'s restrictions hamper their advocacy often create a (c)(4) affiliate to pursue their lobbying agenda." Rosemary Fei, *A Unique and Useful Purpose*, N. Y. TIMES, May 15, 2013.[4] Similarly, § 501(c)(4) social welfare groups, which may advocate for issues, but only minimally for candidates, often create PACs in order to explicitly advocate for candidates who support their agenda. Similarly, federal PACs may create independent expenditure funds to raise unlimited contributions for non-coordinated candidate advocacy. *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011); *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *but see Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10, 15 (D.C. Cir. 2014) (finding corporate separate segregated fund not entitled to unlimited expenditure account, because it was "not a 'hybrid' political action committee" susceptible to disclosure laws).

Affiliations between non-political organizations and politically active entities are a simple way for organizations to efficiently promote their message, even as these multiple avenues are each separately regulated and subject to separate restrictions. Indeed, this Court has specifically blessed the practice. *Taxation with Representation*, 461 U.S. at 544 ("It also appears that TWR can obtain tax-deductible contributions for its nonlobbying activity by returning to the dual

---

[4] *Available at*: http://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/501c4s-serve-a-unique-and-useful-purpose-18.

structure it used in the past, with a § 501(c)(3) organization for nonlobbying activities and a § 501(c)(4) organization for lobbying").

Affiliated entities may demonstrate independence merely by preventing money from moving from a § 501(c)(4) to a § 501(c)(3), ensuring that "public funds…[are not] spent on an activity Congress chose not to subsidize." *Id.* Similarly, a PAC might keep separate accounts for its independent spending and its candidate-coordinated activities, ensuring that there is "no cross-over between soft and hard money." *Carey*, 791 F. Supp. 2d at 132. Perhaps this rule against commingled funds is what the first prong of the Second Circuit's coordination test is intended to reach. But VRLC-FIPE did provide the Second Circuit with evidence that the two entities were separately created organizations, and that VRLC-FIPE "maintained a separate bank account" from its sister entity. 50a-51a; 51a, n. 23 ("We acknowledge that the record does not show that funds from VRLC-FIPE were used for candidate contributions"). Unsatisfied, the Second Circuit demanded more.

Even if the first prong of its test is justified, the application of the remaining four elements will impose a grave burden on Americans' associational liberties. This is especially true for small organizations. The Second Circuit admitted as much, observing that "especially with committees that operate with low funding levels, small staff, and few resources, it will be difficult at times to maintain separation among those committees." 55a.

Affiliated organizations often share staff and board members, coordinate together on projects appropriate for their missions, collocate, and

certainly consult the same informational and advisory sources.[5]

The level of separation and segregation that the Second Circuit demanded below is both excessive and harmful. Small organizations should not be forced to find completely separate boards, hire two separate staffs, or find multiple locations in which to house them. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1958) (freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference") (internal citations omitted); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("[t]he threat of sanctions may deter the[] exercise" of constitutional rights "almost as potently as the actual application of sanctions").

---

[5] For example, every board member of the American Civil Liberties Union's (ACLU) § 501(c)(4) arm also sits on the board of the ACLU's § 501(c)(3) affiliate. *Officers & Board of Directors*, American Civil Liberties Union, https://www.aclu.org/officers-board-directors; *Donating to the American Civil Liberties Union and the ACLU Foundation: What is the Difference?*, American Civil Liberties Union, https://www.aclu.org/donating-american-civil-liberties-union-and-aclu-foundation-what-difference.

Indeed, "[t]he IRS countenances colocation and office sharing, employee sharing, and coordination between affiliated organizations so long as each organization maintains separate finances, funds permissible activities, and pays its fair share of overhead." STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSON, FEDERAL ELECTION COMMISSION, In the Matter of Crossroads Grassroots Policy Strategies (MUR 6396) at 12, n. 51 (Jan. 8, 2014), *available at http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf.*

Put simply, unless substantially clarified and cabined, the Second Circuit's coordination test will price a great many speakers out of the marketplace of ideas.

CONCLUSION

The court below has taken it upon itself to radically reshape campaign-finance jurisprudence, to the detriment of civic organizations and private citizens who wish to speak on political issues. Such a fundamental transformation of First Amendment doctrine, even were it appropriate, can only be undertaken by this Court. Accordingly, this Court should grant the petition for a writ of *certiorari*.

Dated: November 3, 2014

Respectfully Submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20036
ishapiro@cato.org
(202)842-0200

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
CENTER FOR COMPETITIVE POLITICS
124 S. West St., Suite 201
Alexandria, Virginia 22314
adickerson@campaignfreedom.org
(703) 894-6800