12-2904

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

VERMONT RIGHT TO LIFE COMMITTEE, INC.; and Vermont Right to Life Committee – Fund for Independent Political Expenditures,
Plaintiffs-Appellants

v.

WILLIAM H. SORRELL, in his official capacity as Vermont Attorney General; David R. Fenster, Erica Marthage, Lisa Warren, T.J. Donovan, Vincent Illuzzi, James Hughes, David Miller, Joel Page, William Porter, Alan Franklin, Marc Brierre, Thomas Kelly, Tracy Shriver, and Robert Sand, in their official capacities as Vermont state's attorneys; and James C. Condos in his official capacity as Vermont Secretary of State,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF OF AMICI STATES CONNECTICUT, NEW YORK, HAWAII, IOWA, KENTUCKY, MINNESOTA, MONTANA, NEW MEXICO AND WASHINGTON IN SUPPORT OF THE DEFENDANTS-APPELLEES WITH APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Codes

Statutes

Other Authorities

Rules

IDENTITY AND INTEREST OF AMICUS

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the States of Connecticut, New York, Hawaii, Iowa, Kentucky, Minnesota, Montana, New Mexico, and Washington ("the Amici States") file this amicus brief in support of the positions of the defendants-appellees in this matter. Because the Amici are States, they are permitted to file this brief without the consent of the parties or leave of the Court. Fed. R. App. P. 29(a).

The Amici States have a significant interest in the outcome of this case. The Vermont statutes challenged in this appeal establish reasonable limits on contributions to political committees, including those political committees which make only independent expenditures. The challenged statutes also require reporting and disclosure of election related expenditures and contributions. Like Vermont, the Amici States also seek to protect the integrity of their electoral process and government through reasonable campaign finance regulations that prevent corruption, the appearance of corruption and circumvention.

SUMMARY OF ARGUMENT

This amicus brief focuses on a single issue of great concern to all the Amici States: whether a State may impose reasonable limits on contributions to political committees that make only independent expenditures. Neither the Supreme Court nor this Court has resolved this specific question. And as defendants have demonstrated in their brief, the Court need not resolve the question in this case because, as the lower court held, evidence shows that plaintiffs do not make independent expenditures only; they also make direct contributions to candidates. If the Court does address the question, the Court should hold that Vermont's uniform single source contribution limit on contributions to political committees is facially constitutional, regardless of whether the political committee engages in independent expenditures only.

Vermont's limits on contributions to all political committees — even those that make only independent expenditures — should be upheld because they do not impede political speech and are closely drawn to achieve Vermont's compelling governmental interests in

preventing corruption and the appearance of corruption. This argument is set out in four parts below.

First, as the Supreme Court has held, the act of contributing money to another is of only "marginal" First Amendment value. A contribution is at best a symbolic gesture of associational support for the speech of another. A limit on contributions does not prevent this symbolic gesture of association; nor does it prevent the person from speaking on his or her own to disseminate any message of his or her choice. Because contribution limits do not regulate speech and only marginally burden associational interests, a State need not meet the same standard applied to limits on expenditures. The State need only show that its limits are "closely drawn" to satisfy important government interests.

Second, this Court should decline plaintiffs' invitation to expand the holding of *Citizens United* to apply to contribution limits. This Court has applied the "closely drawn" standard to contribution limits in two decisions decided since *Citizens United*, — *Green Party* and *Ognibene* — and thus declined to extend *Citizens United* beyond its actual holding. As this Court recognized in *Ognibene*, the States'

interests in preventing corruption or the appearance of corruption are important interests, sufficient to sustain Vermont's contribution limits in this case.

Third, contribution limits serve important state interests in preventing corruption and the appearance of corruption. Unlimited contributions to political committees cause corruption and the appearance of corruption. They also provide little First Amendment value because they are not speech by the donor but simply empower an "independent" third party entity to speak. These independent political committees are frequently allied with particular candidates and political parties and unlimited contributions to them will undoubtedly create political debts and the public perception of such debts and a corrupting influence.

Uniform contribution limits, such as Vermont's, also prevent corruption and the appearance of corruption by deterring circumvention of limits on direct contributions to candidates. As this case demonstrates, one group of individuals may establish and control multiple political committees. Where a few people control multiple political committees, and their related organizations, a contribution to a

nominally independent political committee may find its way to a committee that makes direct contributions to candidates by, for example, paying the administrative expenses for both organizations, or by an even more direct route. Given the fluidity of these organizations, States cannot easily monitor their independence to prevent circumvention; permitting unlimited contributions in these circumstances will almost assuredly result in circumvention and the inevitable damaging political corruption scandals.

Fourth, a state legislature's judgment that particular contribution limits are necessary to serve important state interests is entitled to judicial deference. The States are in the best position to evaluate the effects of contributions on their local elections and elected officials, and to set reasonable limits that curtail the corrupting influence of contributions without unduly restricting a person's right to offer symbolic support to a group or candidate. Legislatures have particular expertise in the area of electoral politics and their judgments in this area are entitled to special deference.

ARGUMENT

A. Vermont's Limit on Contributions to Political Committees Need Only be Closely Drawn to Its Compelling Governmental Interest in Electoral Integrity.

Vermont limits the amount a political committee may receive from any single contributor to $2,000 in any two-year general election cycle. Vt. Stat. Ann. tit. 17, § 2805(a), (the "single source contribution limit"). This single source contribution limit applies to all political committees that engage in political expenditures in Vermont, even those political committees established to make only independent expenditures. Vermont's single source contribution limit is constitutional, both facially and as applied to these plaintiffs, because it is "closely drawn" to achieve its compelling interests in protecting its electoral process. *See Burson v. Freeman,* 504 U.S. 191, 199 (1992) ("a state indisputably has a compelling interest in preserving the integrity of its election process.") (internal quotation omitted).

The history of the Supreme Court's jurisprudence on *contribution* limits — from *Buckley v. Valeo*, 424 U.S. 1 (1976) to the present day — demonstrates that contributions are entitled to much less First Amendment protection than expenditures. While the Court has

recognized an element of symbolic speech in the act of making a political contribution, *see Buckley*, 424 U.S. at 20-21, it has repeatedly held that First Amendment interests at stake in making political contributions are "limited" and "marginal." *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 135, 137 (2003); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 385-87 (2000); *Buckley*, 424 U.S. at 20-21.

Since the First Amendment interests at stake in making campaign contributions are "marginal," the Supreme Court has repeatedly upheld restrictions on campaign contributions even when those restrictions involve significant interference with a person's ability to make contributions. *Buckley*, 424 U.S. at 25. This is because contribution limits are analyzed primarily as burdens on associational interests and not speech interests. *Id.*, ("Even a significant interference with protected rights of political association may be sustained if the State demonstrates sufficiently important interests and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.")(internal quotations omitted). The Court has not engaged in a separate "speech" analysis when considering contribution limits: "a

contribution limitation surviving a claim of associational abridgement would survive a speech challenge as well…" *Shrink Missouri,* 528 U.S. at 388. Regulations that do not directly affect speech or associational rights, such as contribution limits, "require less compelling justifications than restrictions on independent spending." *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259-60 (1986) ("MCFL").

Contribution limits "[do] not in any way infringe the contributor's freedom to discuss candidates and issues," *Buckley*, 424 U.S. at 21, and leave "communication significantly unimpaired." *Shrink Missouri*, 528 U.S. at 387; *accord McConnell*, 540 U.S. at 134-37. They also "leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates" *Shrink Missouri,* 528 U.S. 377, 387 *(quoting Buckley*, 424 U.S. at 28). As evidence of the lesser protection afforded political contributions, this Court has noted the absence of any clearly established right of a candidate to receive contributions. *See Dean v. Blumenthal*, 577 F.3d 60, 69 (2d Cir. 2009) (noting that the Supreme Court has not found a

per se right to receive contributions, "*Randall* did not recognize a First Amendment right to receive campaign contributions").

Vermont's single source contribution limit need only satisfy the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest.'" *McConnell*, 540 U.S. at 135, 136 (internal citations omitted); *accord Buckley*, 424 U.S. at 25; *Federal Election Comm'n v. Beaumont*, 539 U.S. 146, 161-62 (2003)("restrictions on political contributions . . . [are] subject to relatively complaisant review under the First Amendment"); *Shrink Missouri*, 528 U.S. at 387 ("contribution limits would more readily clear the hurdles before them"); MCFL, 479 U.S. at 259-60 ("restrictions on contributions require less compelling justification than restrictions on independent spending").

Vermont's single source contribution limit satisfies the "closely drawn" standard because it is similar to limits previously upheld by the Supreme Court and is supported by the same governmental interests that the Court has found sufficiently important, and even compelling, in other cases. Vermont's single source contribution limit applies to all political committees — even those that make only independent expenditures — because its legislature reasonably anticipated that

unlimited contributions to "independent" political committees also pose a risk of *quid pro quo* corruption or the public perception of such corruption.

Experience and common sense support this reasoned legislative judgment because it is widely known in Vermont and elsewhere that contributors often give to "independent" political committees as a way to further contribute financially to promote candidates once a donor has contributed the maximum allowable directly to the candidate. (A-906, ¶ 43). These donors know that the independent political committee will use their money to make expenditures that benefit their preferred candidate in much the same way as the candidate would with a direct contribution, and thus the political committee becomes a ready means of circumventing limits on contributions to candidates. (A-906, ¶ 43).

The Vermont legislature's policy choice recognizes that candidates are aware of who makes these contributions to "independent" political committees because in many cases the contributors are the same people who have contributed to them directly. (A-907 ¶ 45). Such contributions to "independent" political committees engender the same sense of indebtedness and obligation that elected officials feel toward their

direct contributors. (A-907 ¶ 45). These realities are not lost on the citizens of Vermont, or the Amici States, many of whom perceive, correctly, that those donors who bankroll large independent expenditures to help a candidate often do so not out of benevolent civic mindedness but because they expect something from a candidate. (A-907-908 ¶ 47). As is discussed further below, the Vermont legislature enacted a "closely drawn" statute because it appropriately balanced the marginal First Amendment symbolic interests at stake in the making of political contributions with its important, and even compelling, governmental interest in avoiding corruption and the appearance of corruption.

B. This Court Should Continue to Apply the Closely Drawn Standard of Review and Decline to Extend the Holding of *Citizens United* to Contribution Limits.

The Supreme Court's recent decision in *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 909 (2010), did not alter the standard of review applicable to contribution limits and plaintiffs' arguments to the contrary are unavailing and should be rejected by this Court. This Court has already held that *Citizens United* had no effect on the constitutionality of contribution limits and it should, once again,

decline to extend *Citizens United* as plaintiffs suggest. *See Ognibene v. Parkes*, 671 F.3d 174, 184 (2d Cir. 2011). ("*Citizens United* applies only to independent corporate expenditures."); *see also Cao v. Federal Election Comm'n*, 619 F.3d 410, 422-23 (5th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1718 (2011).

Citizens United was a case about a ban on speech by corporations shortly before an election; it did not concern contributions to a political committee. As this Court has noted, *Citizens United* did not present the question of whether sufficient interests exist to support contribution limits: "Citizens United … explicitly declined to reconsider its precedents involving campaign *contributions*…" *Green Party v. Garfield,* 616 F.3d 189, 199 (2d Cir. 2010).[1]

> *Citizens United* confirms, yet again, that eliminating corruption or the appearance thereof is a sufficiently important governmental interest to justify the use of closely drawn restrictions on campaign contributions. This interest exists even where there is no actual corruption, because the perception of corruption, or of opportunities for corruption, threatens the public's faith in democracy.

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[1] Plaintiffs inaccurately argue in their brief that this Court applied *Citizens United* to contributions in *Green Party*. See VRLC Br. pp. 95-96 citing *Green Party,* 616 F.3d at 207, n. 16. In footnote 16, this Court applied the "closely drawn" standard and made no mention of *Citizens United*.

Ognibene, 671 F.3d at 186. Until the Supreme Court explicitly requires otherwise, this Court should decline to extend the holding and reasoning of *Citizens United* to anything other than independent expenditures.[2] Thus, this Court should analyze the constitutionality of Vermont's single source contribution limit under the "closely drawn" standard as it has in other cases decided since *Citizens United*.

C. Vermont, As Do All States, Has an Important Governmental Interest in Combating Corruption and the Appearance of Corruption.

Vermont limits contributions to political committees from single contributors to $2,000 per general election cycle because of the risk of corruption and the appearance of corruption posed by contributions to political committees that engage in electoral spending. *See Landell v. Sorrell*, 382 F.3d 91, 141 (2d Cir. 2004), *rev'd on other grounds, Randall v. Sorrell*, 548 U.S. 230 (2006)(upholding Vermont's $2000 limits on contributions to political committees). Appellants do not question the constitutionality of contribution limits to political committees that contribute directly to candidates, nor could they. *See California Medical*

[2] Several Circuit Court decisions extend *Citizens United* beyond its holding. As the Appellees explain, (Vermont's Br. at 60-63), these decisions are not persuasive and should not be followed by this Court.

Association v. Federal Election Comm'n, 453 U.S. 182 (1981) ("*Cal-Med*") (upholding limitations on contributions to a political committee that contributed directly to candidates).

The Supreme Court has never questioned "the importance of the interests that underlie contribution limits – interests in preventing 'both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.'" *McConnell*, 540 U.S. at 136 (quoting *Federal Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208 (1982)). These interests "directly implicate 'the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process.'" *McConnell*, 540 U.S. at 136-37 (citation omitted). The States' interests at stake here extend beyond *quid pro quo* corruption and include "curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.'" *Id.* at 150 (quoting *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)). The Court explained in *McConnell*:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will

> decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and remove the temptation.

540 U.S. at 153. States must be ever vigilant to avoid the "subversion of the political process" through political corruption. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). The damage inflicted by scandal arising out of political corruption cannot always be neatly calculated or quickly repaired, particularly where the public's faith in government has been eroded. *See Shrink Missouri,* 528 U.S. at 395. ("there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.").

As this Court well knows, the risk of political corruption in states in this circuit is real. *Green Party,* 616 F.3d at 200 (noting Connecticut's political corruption scandals involving campaign contributions, "kickbacks" and bribes). There is no question that removing the limits

on contributions to "independent" political committees will result in those committees be used as conduits for otherwise prohibited contributions — the only questions are when and to what degree. *See, e.g., McConnell*, 540 U.S. at 144; see also id. at 165 ("the entire history of campaign finance regulation" has "taught the hard lesson of circumvention," i.e., that donors will always "scrambl[e] to find another way to purchase influence"). This risk is especially high in states, such as Connecticut, that restrict political contributions by certain entities and individuals precisely because of the known risk of corruption involving these contributors.

In Connecticut, state contractors, their principals (and immediate family members of principals) are completely banned from making contributions to candidates. Conn. Gen. Stat. § 9-612(g)-(i). These individuals, some of whom used political contributions to obtain state contracts in the past, *Green Party,* 616 F.3d at 200 (Connecticut's "[political corruption] scandals reached the highest state offices"), may be tempted to resume contributing, this time through large contributions to "independent" political committees. Similarly, lobbyists in Connecticut are restricted to contributing only $100 to

candidates, legislative leaders and political parties; they also can no longer bundle contributions from their clients to the extent that was permitted in the past. Conn. Gen. Stat. § 9-610(g)-(h). Lobbyists would now have the ability to almost effortlessly circumvent these limits by redirecting solicitations and contributions to the "independent" political committees that would undoubtedly proliferate. This could prove to be an especially influential tool for their corporate clients who are now free to give unlimited amounts for their own "independent" expenditures since *Citizens United* and it may be the case that those unlimited corporate expenditures could be funneled through anonymous political committees.

Invalidating limits on contributions to political committees would effectively roll back many of Connecticut's hard fought political reforms. As a consequence, Connecticut's ability to recover from a regrettable, decade-long history of political corruption at the highest levels of government and its efforts to rebuild its citizens' faith in the integrity of their government will be impeded.

Removal of all contribution limits on "independent" political committees would result in an increase in not only actual corruption but

an increase in the public's perception of such corruption. The public often perceives seemingly "independent" political committees to be just another wing of a candidate's campaign. (A-907-908 ¶ 47). The 2012 election cycle provided numerous examples of circumstances where contribution limits were, or appear to have been, circumvented through the use of "independent" political committees. Even if all of these instances are not conclusively shown to have been illegal circumvention (after an investigation and civil or criminal prosecution), the public likely perceives them as such.

It appears that, in 2012, wealthy donors circumvented contributions limits through the use of various tax exempt organizations and "independent" political committees. Tax exempt organizations such as social welfare organizations, established under 26 USC 501(c)(4); labor, agricultural, or horticultural organizations, established under 26 USC 501(c)(5); business leagues, established under 26 USC 501(c)(6); and organizations established under 26 USC 527 that claim to not have a major purpose of electing candidates are increasingly being used to make millions of dollars in campaign related

expenditures.[3] In addition to the above organizations, which are established under the Internal Revenue Code, there is the newly prominent "Super PAC" which is a political committee that registers with the FEC but claims to engage only in expenditures independent of candidates or and political parties.[4]

These organizations are often not truly independent of candidates and contributors give to them for precisely this reason, assured in the knowledge that reports of their contributions will ultimately be received by the candidate. (A-906, ¶ 43). Average citizens recognize the circumvention and see these sham political committees for what they are: just another conduit for buying influence with a candidate. A recent story out of Montana is one example of what appears to be the use of a tax exempt "social welfare" organization to circumvent contribution limits or disclosure requirements. It is just one of many such stories reported that, even if never definitively proved, shapes the

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[3] *See,* http://www.fec.gov/ans/answers_general.shtml#527 "Quick Answers to General Questions: What is a 527 organization?" (last viewed November 30, 2012).

[4] *See,* http://www.fec.gov/ans/answers_pac.shtml#super_hybrid, "Quick Answers to PAC Questions: How do I start a Super PAC or Hybrid PAC?" (last viewed November 30, 2012)

public's view about the integrity of the electoral process. *See*, Mike McIntire and Nicholas Confessore, *Tax-Exempt Groups Shield Political Gifts of Businesses*, NEW YORK TIMES, July 7, 2012, attached at Amici App. 1-5).

In the Montana case, a trove of documents unearthed in a house in Colorado appear to indicate that American Tradition Partnership (ATP), was coordinating with the candidates it was seeking to "independently" promote in a Montana election. In the opinion of former Federal Election Commission commissioner Trevor Potter, a prominent and long-time campaign finance advocate, the documents showed American Traditions Partnership and the candidates it supported were exchanging campaign information, campaign strategy and campaign plans – in other words – coordinating with each other. *See*, Kim Barker, PROPUBLICA, and Rick Young and Emma Schwartz, FRONTLINE, *Documents Found in Meth House Bare Inner Workings of Dark Money Group*, October 31, 2012, attached at Amici App.-6-16,

p.6).[5] Conduct like ATP's has not been confined to tax exempt "social welfare" organizations.

Family members of candidates have also created political committees of questionable "independence" to funnel financial support to their family-member candidates. In Washington State, the mother of a candidate for Congress funded negative ads against her daughter's opponent, ostensibly without the knowledge of or coordination with the daughter. *See,* Sean Sullivan, *When Your Mom Runs Your Super PAC,* NATIONAL JOURNAL, Hotline On Call, July 16, 2012, attached at Amici App. A-20; *see also*, Jonathan Martin, *Ruderman's Mother Funds Group's Ads Attacking DelBene*, SEATTLE TIMES, Local News, July 15, 2012, attached at Amici App. A-21-22. A similar family-run "independent" committee was established for a candidate in North Carolina. (Id.)

Tacit coordination also seemed to surround the use of "independent" Super PACs in the presidential race. Super PACs supporting President Obama, (Priorities USA) and Governor Romney

[5] *See also*, "Big Sky, Big Money," *Frontline*, broadcast October 30,2012. available at http://www.pbs.org/wgbh/pages/frontline /government-elections-politics/big-sky-big-money/dark-money-groups-donors-revealed/. (last viewed November 30, 2012).

(Restore Our Future) were run by people formerly employed by the candidates and both candidates employed political consultants who contemporaneously worked for their respective Super PAC. (Amici App. A-8, A-20). Jon Huntsman and Rick Santorum, both candidates for the Republican Party presidential nomination, had close ties to and interactions with individuals funding supposedly "independent" expenditures on their behalf during the time when the expenditures were being made. *See* Letter from Fred Wertheimer, President of Democracy 21, to Attorney General Eric Holder, dated January 13, 2012, attached at Amici App. A-23-24. Santorum went so far as to have his "independent" backer accompany him to campaign events and travel with him. *See,* Shushannah Walshe, *Santorum and His Super Pac: Just Friends, Not Coordination,* ABC NEWS, The Note, Feb. 6, 2012, attached at Amici App. A-25-27); also available at: http://abcnews.go.com/blogs/politics/2012/02/santorum-and-his-super-pac-just-friends-not-coordination/. (last viewed November 30, 2012).

A reasonable person could conclude from these reports that the line between "independence" and "coordination" is often muddy and opportunities for circumvention plentiful. Moreover, even if

circumvention was not actually occurring in the examples above, and the others like them reported recently, the public likely perceives these "independent" expenditures as akin to contributions to a candidate.

That "independent" political committees would become a conduit for evading contribution limits is hardly surprising and the Supreme Court long ago recognized this reality, *see McConnell*, 540 U.S. at 138-39, recognizing that "candidates, donors, and parties" will inevitably "test the limits" of the law. *Id*. at 174-75 (quoting *Colorado Republican Fed. Campaign Comm.*, 533 U.S. at 457); *see also Beaumont*, 539 U.S. at 155; *Cal-Med*, 453 U.S. at 197-98. This Court has also recognized the inevitability of circumvention and the need to permit the legislature to address it. *See Green Party,* 616 F.3d at 203 ("the legislature must be given room to anticipate and respond to concerns about the circumvention of regulations designed to protect the integrity of the political process.")(quoting *McConnell,* 540 U.S. at 137)(internal quotations omitted); *see also Beaumont*, 539 U.S. at 155.

Making contribution limits uniformly applicable to all political committees that engage in electoral speech in Vermont is a valid measure to avoid circumvention of the limit on direct contributions. *See*

Shrink Missouri, 528 U.S. at 390 (legislative purpose can seek to eliminate "opportunities for abuse," and is "not confined to bribery of public officials, but extends to the broader threat from politicians too compliant with the wishes of large contributors"); *McConnell*, 540 U.S. at 153 (same). In addition to discouraging circumvention, reasonable contribution limits also diminish the appearance of corruption that could quickly arise from very large contributions to political committees that make expenditures to benefit a specific candidate. Establishing reasonable contribution limits on political committees that make only "independent" expenditures advances a states interest in avoiding the inevitable corruption that will flow from unlimited giving to conduit "independent" political committees; and also prevents the perception of corruption among citizens as a result of unlimited giving to such committees.

D. Vermont's Policy of Reasonable, Uniformly-Applied, Contribution Limits Is Closely Drawn to Its State Interest and Is Entitled to Deference.

The Supreme Court has emphasized that courts should not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Shrink Missouri*, 528

U.S. at 393 n.5 (quoting *Nat'l Right to Work Comm.*, 459 U.S. at 210). This is because "the legislature is better equipped to make such empirical judgments, as legislators have 'particular expertise' in matters related to the costs and nature of running for office." *Randall*, 548 U.S. at 248 (Opinion of Breyer, J.).

The Supreme Court has cautioned that courts should accord "proper deference" to the legislature's "ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *McConnell,* 540 U.S. at 137. This is particularly true with respect to legislation "regulat[ing] campaign contributions, carrying as they do a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption…." *Beaumont*, 539 U.S. at 155.

In two recent decisions of this Court, both since *Citizens United,* the importance of judicial deference in this area was reaffirmed. This Court noted the need for deference when it recently upheld New York City's campaign finance regulations: "The judiciary owes special deference to legislative determinations regarding campaign contribution restrictions." *Ognibene,* 671 F.3d at 182. This Court has

also observed that judicial deference is especially appropriate in the context of contribution limits:

> [W]e are mindful of the teachings of the Supreme Court that we, as judges, cannot consider each possible permutation of a law limiting contributions, and thus we 'cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives'….we are reluctant to second-guess the judgment of the General Assembly when it defines which individuals associated with an artificial entity likely to attempt to exert improper influence over a state official.

Green Party, 616 F.3d at 203, (quoting *Randall v. Sorrell*, 548 U.S. 230, 248 (2006)).

Of course, judicial deference does not mean that the Amici States here assert boundless authority to regulate campaign contributions. However, as the facts of this case demonstrate, Vermont's legislature properly determined that "independent" political committees, particularly those connected to other entities, could easily be converted to a conduit for direct contributions to candidates.

The record in this case supports this legislative judgment and demonstrates not only the constitutionality of Vermont's single source limit but, in fact, its wisdom. It is with no small degree of irony that the very plaintiffs who brought this action - alleging "as a matter of

law" no risk of corruption from their political activities - demonstrated just the opposite. VRLC and VRLC-FIPE commingled funds from their supposedly independent bank accounts, tacitly and, possibly expressly coordinated with each other and therefore candidates. *VRLC II,* at 2012 U.S. Dist. Lexis at *93-94; A926(¶108), A937-38(¶139), A939(¶144). VRLC even went so far as to have its candidate-giving PAC arm, VRLC-PC, distribute voter guides in VRLC-FIPE's name. A921(¶89), A945-46(¶171), A964(¶253).

In *Shrink Missouri,* the Supreme Court was satisfied by a state senator attesting to the corrupting influence of the contributions and some media reports about campaign contribution scandals. *Shrink Missouri*, 528 U.S. at 393-394. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny…will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The record established by Vermont in this case, after discovery was permitted, easily meets this requirement of "empirical evidence."

While Vermont was able to establish the interrelation of VRLC, VRLC-FIPE and VRLC-PC in this case, *VRLC II* at *96 (finding "no

clear accounting" between the connected organizations); A962-63(¶244-45), states may not always be in a position to dedicate the resources to investigate and uncover every sham "independent" political committee[6] operating within their jurisdictions. And even when states do allocate the resources to investigate unlawful coordination, the investigations and proceedings involving those enforcement actions can take months or years. The result is that the damage to the electoral process has long since been inflicted before any remedial measures can be taken; thereby rendering the statute ineffective in achieving its goal. *See* Nicholas Confessore and Derek Willis, *Super PACS Provide Last-Minute Rush of Campaign Spending*, NEW YORK TIMES, November 2, 2012, attached at Amici App. 17-19) (noting the creation of Super PAC after reporting deadlines has passed).

[6] This case also demonstrates why the Supreme Court disfavors facial challenges especially in the electoral context. *See United States v. Salerno*, 481 U.S. 739 (1987); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008); *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008). "Vermont is permitted to enforce Section 2805(a) to avert opening a loophole through which contributors may provide FIPE with unlimited sums to contribute to candidates through the flow of funds between FIPE and PC." *VRLC II*, at *95.

This case demonstrates the Vermont legislature was correct in its assessment of the political realities of contributions to political committees and the risks of circumvention, corruption and the appearance of corruption. The plaintiffs along with their connected contribution arm, VRLC-PC, which was not party to the case, are separate entities on paper only. The record evidence establishes that their independence from each other is a thinly veiled legal fiction barely observed by anyone involved. The members of the Vermont legislature likely knew of this practice and reasonably anticipated that reasonable contribution limits, which are uniformly applied to all political committees, were the appropriate legislative response to discourage corruption and its appearance.

Abolishing contributions limits on political committees like VRLC-FIPE would be "an explicit green light to circumvent campaign finance regulations," *VRLC II*, at 83-84 (quoting *N.C. Right to Life, Inc. v. Leake* ("*NCRL III*"), 525 F.3d 274, 318 (4th Cir. 2008) (Michael, J. dissenting), on a potentially massive scale. The Vermont legislature sought to prevent this harm and others and this Court should defer to its reasoned and well-supported legislative assessment.

All States have important interests in maintaining limits on contributions to all political committees, including committees that claim to make only independent expenditures. Vermont's limits at issue here are closely drawn to support its State's interests and this Court should uphold them.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this amicus brief complies with the type-volume limitations of Rules 32(a)(7)(B) and 29 of the Federal Rules of Appellate Procedure in that this brief contains 5,322 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportional typeface (century schoolbook) in 14-point type.

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CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were filed electronically and served by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 6th day of December, 2012, to the Clerk of this Court and the following counsel of record:

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12-2904

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

VERMONT RIGHT TO LIFE COMMITTEE, INC.; and Vermont Right to Life Committee – Fund for Independent Political Expenditures,

Plaintiffs-Appellants

v.

WILLIAM H. SORRELL, in his official capacity as Vermont Attorney General; David R. Fenster, Erica Marthage, Lisa Warren, T.J. Donovan, Vincent Illuzzi, James Hughes, David Miller, Joel Page, William Porter, Alan Franklin, Marc Brierre, Thomas Kelly, Tracy Shriver, and Robert Sand, in their official capacities as Vermont state's attorneys; and James C. Condos in his official capacity as Vermont Secretary of State,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

APPENDIX

APPENDIX TABLE OF CONTENTS