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, in his official capacity as Vermont Attorney General, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE UNITED STATES CONSTITUTIONAL RIGHTS LEGAL DEFENSE FUND AND THE NATIONAL RIGHT TO WORK COMMITTEE IN SUPPORT OF PETITIONERS

HEIDI K. ABEGG
Counsel of Record
ALAN P. DYE
WEBSTER, CHAMBERLAIN & BEAN, LLP
1747 Pennsylvania Ave., NW
Suite 1000
Washington, DC 20006
(202) 785-9500
habegg@wc-b.com

Counsel for Amici Curiae
November 3, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE[1]

The National Right to Work Committee is a non-profit social welfare organization described in § 501(c)(4) of the Internal Revenue Code and dedicated to advocating for the Right to Work cause, i.e., opposing compulsory unionism, through various activities (e.g., newsletters, mailings, telephone calls, and advertisements) through various media in any state (including Vermont) where it deems it appropriate at the time. The Committee participated as an amicus curiae in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), and it was a party in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), challenging parts of the Bipartisan Campaign Reform Act of 2002, 2 U.S.C. § 431 ("BCRA").

The United States Constitutional Rights Legal Defense Fund, Inc. is a § 501(c)(3) charitable organization dedicated, *inter alia*, to defending the freedoms of expression and association protected by the First Amendment to the Constitution of the United States. It has participated as amicus curiae in a number of other campaign finance cases, most notably *Citizens*

[1] Pursuant to Rule 37.6, counsel for amici certifies that no party or counsel for a party authored or paid for this brief in whole or in part, and that no person other than amici, their members or donors, or their counsel have made a monetary contribution to fund the brief's preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of amici to file this brief. All parties have consented to the filing of this brief.

United and *Center for Individual Freedom v. Van Hollen and Federal Election Commission*, 694 F.3d 108 (D.C. Cir. 2012), which reversed a district court decision that threatened to compel public disclosure to the FEC of lists of donors who contributed, during certain time periods, more than $1,000 to nonprofit corporations and other entities that made "electioneering communications," without regard to whether the contributions were earmarked for such communications.

Amici have defended First Amendment rights in the courts and have a strong interest in whether citizens may associate and speak freely. They believe this case is an important opportunity for the Court to protect the First Amendment rights of all Americans.

Amici support Petitioners and urge the Court to grant the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

This case is part of an alarming and growing trend. Citing *Citizens United v. FEC*, 558 U.S. 310 (2010), states are extending both disclosure requirements and political committee (PAC) burdens to issue speech. Lower courts, when reviewing these laws, are disregarding this Court's precedents prohibiting regulation of issue speech:

> [E]ven if [the plaintiff's] proposed communications constitute unadulterated issue advocacy, its argument has been foreclosed by

> the Supreme Court[ ]. . . . Given the Court's analysis in *Citizens United*, . . . the position that disclosure requirements cannot constitutionally reach issue advocacy is unsupportable.

Human Life of Washington, Inc. v. Brumsickle, 624 F.3d 990, 1016 (9th Cir. 2010) (analyzing disclosure requirements as applied to ballot initiatives). Another court noted that "*Citizens United* has effectively disposed of *any* attack on Maine's attribution and disclaimer requirements. . . . According to the Supreme Court, . . . [t]hey are justified by the governmental interest in providing information to the electorate to make informed choices." *National Organization for Marriage v. McKee*, 723 F. Supp. 2d 245, 267 (D. Me. 2010) (emphasis added). Clearly, issue speech is in jeopardy.

Starting in *Buckley*, this Court's decisions have preserved the role of issue advocacy in our democracy by protecting it from regulation. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (drawing a bright line between protected issue advocacy and express advocacy). Three years before *Citizens United*, the Court refused to accept "the notion that a ban on campaign speech could also embrace issue advocacy." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 480 (2007).

Despite this Court's long history of vigorously guarding issue advocacy, states and courts have cited *Citizen United*'s informational interest in disclosure of candidate-related speech to justify regulation of

issue speech. They cite *Citizens United* again to bolster their argument, claiming that these regulations are "only" disclosure and reporting requirements. *Citizens United*, 558 U.S. at 369 (citations omitted) ("disclosure is a less restrictive alternative to more comprehensive regulations of speech").

Because campaign finance laws "operate in an area of the most fundamental First Amendment activities," the Court should grant the petition to prevent further chilling and erosion of issue speech and freedom of association. *Buckley*, 424 U.S. at 14, 41 n.47.

ARGUMENT

I. *Buckley* and its Progeny, Most Recently *Citizens United*, Held That the Public has an Informational Interest Sufficient to Justify Some Compelled Disclosure.

Disclosure has been at the core of campaign finance law since the regulation of political campaigns began in the early twentieth century. Bradley A. Smith, *Disclosure in a Post-Citizens United Real World*, 6 St. Thomas J.L. & Policy 257 (2012) http://www.ncsl.org/documents/summit/summit2013/onlineresources/2013_smith_disclosure.pdf at 4 (citing Paul Baker, *Curbing Campaign Cash: Henry Ford, Truman Newberry, and the Politics of Progressive Reform* 59-61 (2012)). This Court's first detailed discussion of compelled campaign speech disclosure came in *Buckley*,

424 U.S. 1. Mindful that compelled disclosure "can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *id*. at 64, the Court required a sufficiently important government interest and a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. (footnotes omitted) (citation omitted). The Court found three governmental interests that met "exacting scrutiny": informational interest; prevention of corruption and its appearance; and an enforcement interest. *Id*. at 64-68. Compelled disclosure advanced the government's interest because:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Buckley, 424 U.S. at 66-67 (footnote omitted). However, the *Buckley* Court did not uphold all disclosure. The informational interest was not sufficient to justify compelled disclosure of issue discussion.

In addressing the requirement that organizations and individuals disclose contributions or expenditures of $100 or more made for the purpose of influencing federal elections, the Court narrowly construed it to apply only to "contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee" and "expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id*. at 80.

When addressing the definition of political committee, the Court was concerned that requiring registration and reporting as a political committee by any group that made expenditures or contributions "for the purpose of influencing" a candidate election would reach organizations involved "purely in issue discussion." *Id*. at 79, 145. Compelled disclosure of issue speech funding did not meet any of the three interests sufficient to burden First Amendment rights, *id*. at 79-80, even though "[u]nlike the overall limitations on contributions and expenditures, the disclosure requirements impose no ceiling on campaign-related activities." *Buckley*, 424 U.S. at 64. Therefore, the Court rejected the compelled disclosure of speech of organizations that are not under the control of a candidate or the major purpose of which is not the nomination or election of a candidate, or funds used for communications that do not expressly advocate. *Id*. at 79-80.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, the Court reiterated its concern

over compelling groups to assume PAC burdens for only incidental political activity. The Court found that "the concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL," a nonprofit corporation. 479 U.S. 238, 263-64 (1986). MCFL had a "central organizational purpose . . . [of] issue advocacy," and while it "occasionally engage[d] in activities on behalf of political candidates," this was not its major purpose. *Id*. at 252 n.6. The Court noted that for a small grassroots organization, the burdens of PAC status and its attendant disclosure requirements might be overwhelming. *Id*. at 253-54.

Prior to *McConnell v. FEC*, the Court recognized disclosure requirements outside of candidate elections. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 223 (1999) (O'Connor, J., concurring in part and dissenting in part) ("[T]otal disclosure has been recognized as the essential cornerstone to effective campaign finance reform and fundamental to the political system." (alteration in original) (citations omitted) (internal quotation marks omitted)); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 795 n.32 (1978) ("Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected."). However, while these disclosure laws did not relate to candidate elections, they did relate to elections *i.e.*, initiatives and referendums placed on the ballot.

In *McConnell*, the Court upheld new disclosure requirements on individuals or organizations spending more than $10,000 a year on electioneering communications. *McConnell v. FEC*, 540 U.S. 93, 196 (2003). In doing so, the Court said that *Buckley*'s express advocacy test was "an endpoint of statutory interpretation, not a first principle of constitutional law." *Id*. at 190. The Court found that "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements – providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions – apply in full to [the disclosure requirements in] BCRA." *Id*. at 196.

Following *McConnell*, the *Citizens United* Court affirmed *Buckley*'s finding that disclosure requirements are subject to "exacting scrutiny," and that the government's interest in providing voters with information "about the sources of election-related spending" is sufficiently compelling. *Citizens United*, 558 U.S. at 366-67. The Court noted that *McConnell* affirmed the facial constitutionality of the Bipartisan Campaign Reform Act's disclosure and disclaimer requirements because "they would help citizens 'make informed choices in the political marketplace.'" *Id*. at 367 (quoting *McConnell*, 540 U.S. at 197). Additionally, the Court found that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id*. at 369 (citations omitted).

While these cases upheld disclosure requirements, the disclosure related to candidate and ballot initiative elections, and campaign-related spending. However, after *Citizens United*, lower courts began applying the same informational interest to uphold disclosure of issue speech and the speech of organizations only incidentally involved in candidate elections.[2]

II. The Public Interest in Transparency and Electoral Information has Constitutional Limits and the Court Should Take This Opportunity to Clarify the Permissible Bounds of Compelled Disclosure, Reporting, and PAC Registration.

After *Citizens United*, there has been a push for new laws requiring disclosure of contributions and spending by so-called "shadow" groups. *See, e.g.,*

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[2] Prior to *Citizens United*, lower courts routinely applied *Buckley*'s major purpose test. *See, e.g., Cal. Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 n.21 (9th Cir. 2003) (holding overly burdensome disclosure laws could not be imposed on groups whose major purpose is not campaign advocacy, but who occasionally make independent expenditures); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1311 (S.D. Ala. 2000) (holding that organizations whose major purpose was not election activity could only be required to disclose expenditures for express advocacy); *Federal Election Commission v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981) (finding that unless a group is under the control of a candidate, or its major purpose is the nomination or election of a candidate, it cannot be a "political committee").

Tarini Parti, *DISCLOSE Act Fails Again in Senate*, Politico (July 16, 2012) (http://www.politico.com/news/stories/0712/78576.html); David Callahan, *Bring Donors Out of the Shadows*, New York Times (April 3, 2011) (http://www.nytimes.com/2011/04/04/opinion/04Callahan.html?_r=0). These laws and regulations reach not just express advocacy and other candidate-related speech, but often include both issue and non-electoral related speech. *See, e.g.*, Letter from Laura Murphy, Michael W. Macleod-Ball, and Gabriel Rottman on behalf of the American Civil Liberties Union to Senators Schumer and Roberts, Senate Committee on Rules and Administration at 2-3 (July 22, 2014) (https://www.aclu.org/sites/default/files/assets/7-22-14_–_aclu_opposes_the_disclose_act_final.pdf) (discussing extension of electioneering communication period to January 1 of an election year and how much issue speech it would reach).

Legislatures, and courts upholding these laws, invoke the informational interest, or the public's right to know, as affirmed in *Citizens United*, to justify these overreaching laws. Courts and state regulators cite *Buckley*'s informational interest, or the public's right to know, to justify registration, reporting, disclosure, and disclaimer requirements on any speech that *might* touch on an election, and then impose fines and penalties for failure to comply. *See, e.g., Citizens United v. Gessler*, No. 14-1387 at 20 (10th Cir. Oct. 27, 2014) (http://www.ca10.uscourts.gov/opinions/14/14-1387.pdf) ("Colorado can rely on [*Citizens United*] for its disclosure scheme."); *National*

Organization for Marriage v. McKee, 649 F.3d 34, 55-56 (1st Cir. 2011) (citing *Citizens United* as support for provision requiring registration and reporting by groups that receive contributions or spend more than $5,000 annually "for the purpose of promoting, defeating or influencing [a candidate's election] *in any way*" (emphasis added)); *Bailey v. Maine Commission on Governmental Ethics*, 900 F. Supp. 2d 75 (D. Me. 2012) (citing the public's right to know and imposing $200 fine against blogger who spent $91.38 on blog poking fun at a candidate for governor). Lower courts also rely upon the low reporting threshold for contributions to candidates (justified by the threat of *quid pro quo* corruption) to impose reporting burdens on independent speech. *See, e.g., Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 92, 93 n.29 (1st Cir. 1993).

This case plainly raises a question that has vexed lower courts – how much disclosure can be compelled of organizations whose major purpose is not the nomination or election of a candidate, or whose speech is issue advocacy? Although the Court has upheld disclosure requirements connected to candidate elections, it has consistently protected issue speech from compelled disclosure. *See Buckley*, 424 U.S. at 78-79 (adopting express advocacy test to narrow the definition of "expenditure" which "encompass[ed] both issue discussion and advocacy of a political result"); *id*. at 79 (requiring major purpose test because statutory definition of political committee could "reach groups engaged purely in issue discussion"). As *Buckley* recognized:

> For the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Buckley, 424 U.S. at 42. Disclosure requirements for non-candidate speech cannot be justified merely because they do not prevent anyone from speaking.

The public's right to know does not always outweigh an individual's right to associate or speak anonymously. The Court has not upheld the public's right to know everything. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (refusing to require names of those responsible for political handbills advocating the passage or defeat of a ballot issue); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 98-99 (1982) (finding minority party could keep the names of its members and donors private to avoid "governmental and private hostility"); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd*, 393 U.S. 14 (1968) (per curiam) (refusing to permit prosecutor to subpoena bank records to see amounts given by Republican Party donors); *DeGregory v. Attorney General of the State of New Hampshire*, 383 U.S. 825, 829 (1966) (finding that citizens may refuse to answer questions from

government officials about their political involvement); *Talley v. California*, 362 U.S. 60 (1960) (finding that government could not require identity of the publisher of the names of individuals causing handbill to be published); *NAACP v. Alabama*, 357 U.S. 449 (1958) (refusing to compel disclosure of members and donors); *United States v. Rumely*, 345 U.S. 41 (1953) (disallowing congressional committee from compelling information on customers who bought certain books). These cases, along with *Buckley* and its progeny, demonstrate that this Court has upheld compelled disclosure only in limited circumstances, *e.g.*, where election-related speech is involved.

For these reasons, this Court should grant the petition to clarify that *Buckley*'s informational interest cannot justify blanket approval of the imposition of registration, disclosure, and disclaimer requirements, which are often onerous, on issue speech and incidental candidate speech of organizations.

A. The Second Circuit Found the Constitution Does Not Require PACs to Have the Major Purpose of Nominating or Electing a Candidate, in Conflict With *Buckley* and *MCFL*.

The lower court found that the Constitution does not require application of the major purpose test to Vermont's political committee definition. App. 35a. The court rejected *Buckley*'s construction, as a statutory one. App. 35a-36a (citing *McConnell*, 540 U.S. at 191-93).

1. The Court's Rationale for Permitting Event-Based Reporting is Insufficient to Justify a State's Imposition of Real and Onerous PAC Burdens on Organizations Only Incidentally Engaged in Electoral Speech.

The Court has consistently permitted greater regulation of campaign-related advocacy. *See McConnell*, 540 U.S. at 231-32; *MCFL*, 479 U.S. at 249; *Buckley*, 424 U.S. at 66. At the same time, the Court has recognized that PAC requirements can impose a heavy burden, calling them "onerous." *Citizens United*, 558 U.S. at 336-37.

Ignoring the distinction between one-time event-based disclosure requirements and ongoing onerous PAC requirements, lower courts have upheld these onerous PAC burdens on groups which have a mixed-purpose, *i.e.*, engage in both issue and campaign-related speech, and whose major purpose is not the election or defeat of a candidate, citing *Citizens United*'s upholding of event-based disclosure. *See Citizens United*, 558 U.S. at 366-71. The onerous PAC burden cannot be analogized to the burden placed on speakers by the event-based disclosure requirements upheld in *Citizens United*: "The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id*. at 369 (citing *MCFL*, 479 U.S. at 262). Therefore, *Citizens United* reaffirmed *MCFL*'s finding that limited disclosure is necessary for small groups which are not political committees. *MCFL*, 479 U.S. at 262 ("The state interest in disclosure . . . can be met in a

manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act."). As a result, the rationale for requiring reporting of small PAC contributions does not apply to independent and/or incidental candidate related speech.

There are different types of compelled speech; they are different in kind, rather than by degree. Disclaimer requirements, *e.g.*, "paid for by" or "stand by your ad" language, mandate disclosure of name and address of the person who pays for the communication and apply to the communication itself. Reporting requirements include short reports filed upon the occurrence of an event, such as the making of an independent expenditure or electioneering communication, to more detailed, periodic, continuous reporting of itemized contributions (including name, address, employer and occupation of contributors) and expenditures by PACs. Organizational requirements, *e.g.*, appointing a treasurer, opening a bank account in a specific jurisdiction, segregating funds, contribution limits to and from the PAC, were traditionally imposed only upon candidate committees, party committees, and groups whose major purpose is the nomination or election of a candidate.

The PAC organizational requirements are "just the beginning." *Citizens United*, 130 S. Ct. at 897; *see also id*. at 898 (noting onerous restrictions may prevent PAC formation and that "PACs, furthermore, must exist before they can speak"). PACs must also comply with an entirely different and much more

complex and confusing reporting scheme than that used by event-based filers. The difficulties of being regulated as a PAC are demonstrated in an experiment conducted by Dr. Milyo. In 2007, 255 subjects attempted to comply with PAC reporting laws from 3 states. Jeffrey Milyo, Ph.D., *Campaign Finance Red Tape: Strangling Free Speech & Political Debate*, at 27, Institute for Justice (Oct. 2007; last visited October 29, 2014) <http://www.ij.org/images/pdf_folder/other_pubs/CampaignFinanceRedTape.pdf>. The difficulties of complying with PAC reporting laws were evident: not one subject completed all of the tasks correctly. *Id*. at 8. This is problematic because for "even a very small group with just a few contributors and expenditures, missing one filing deadline might generate hundreds of thousands of dollars in fines, or more." *Id*. at 3. Almost 89% of the participants agreed that when the specter of fines and punishment for incorrect compliance was raised, many people would be deterred from engaging in political activity altogether. *Id*. at 14-16.

Post-*Citizens United*, citizens now face the unhappy choice of remaining quiet or becoming burdened by the PAC regulatory scheme. Imposing this scheme on non-corrupting, mixed-purpose organizations cannot be squared with this Court's precedents. *See Citizens United*, 130 S. Ct. at 908, 910. The Court should take this opportunity to reiterate that the PAC regulatory scheme is not only burdensome, but that it may not be imposed unless *the* major purpose of an

organization is the nomination or election of one or more candidates.

2. There is a Split in the Circuits Regarding Whether the States May Impose PAC Burdens on Organizations Whose Major Purpose is Not the Nomination or Election of Candidates.

Some have argued that *Buckley*'s major purpose test has permitted large organizations with big budgets to avoid registering as PACs as long as they keep their major purpose as something other than the nomination or election of candidates. *National Organization for Marriage v. McKee*, 773 F. Supp. 2d 245, 264 (D. Me. 2010) (pointing out that the major purpose test "would yield perverse results, totally at odds with the interest in 'transparency' recognized in *Citizens United*" because it would have the effect of covering a small organization with just a few thousand dollars that spends most of its money on candidate-related speech while excluding a "megagroup" that could spend over a million dollars if that was not its major purpose; *Human Life of Washington*, 624 F.3d at 1012 (explaining that allowing states to regulate only entities with "the" major purpose of influencing elections would invite multiple purpose groups to circumvent the definition); Ciara Torres-Spelliscy, *The $500 Million Question: Are the Democratic and Republican Governors Associations Really State PACS Under Buckley's Major Purpose Test?*, 15

NYU J. of Legislation & Public Policy 485, 520 (Spring 2012) (major purpose test excuses the biggest groups). To avoid this result, states have either abandoned the major purpose test or broadened its reach. *See Human Life of Washington*, 624 F.3d at 1011 (finding candidate-related speech could be "a major purpose" because the operative part of *Buckley*'s major purpose test is "the word 'major,' and not the article before it"). Confusion abounds about whether the informational interest justifies placing PAC burdens on groups whose major (or a major) purpose is not the election or nomination of candidates.

Like the Second Circuit, post-*Citizens United*, other circuits have refused to read the major purpose into state statutes citing various reasons. *See Ctr. For Individual Freedom v. Madigan*, 697 F.3d 464, 490 (7th Cir. 2012) ("[T]he line-drawing concerns that led the Court to adopt the major purpose limitation for contribution expenditure limits in *Buckley* do not control our overbreadth analysis of the disclosure requirements. . . ."); *Nat'l Organization for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) ("We find no reason to believe that this so called 'major purpose' test, like the other narrowing constructions adopted in *Buckley*, is anything more than an artifact of the court's construction of a federal statute."); *Human Life of Washington*, 624 F.3d at 1009-11 (concluding that *Buckley* did not require a bright-line test, and finding that PAC registration and reporting requirements can be constitutionally

applied to an organization that has as "one of its primary purposes" supporting or opposing political campaigns); *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 786-94 (9th Cir. 2006), *cert. denied*, 549 U.S. 886 (2006) (Alaska law requiring "nongroup entity" to register, report and disclose upheld); *see also Corsi v. Ohio Elections Commission*, 981 N.E.2d 919 (Ohio App. 2012), *appeal not allowed*, 134 Ohio St.3d 1485, *cert. denied*, 134 S. Ct. 163 (2013) (finding "a major purpose" was sufficient to trigger PAC status); *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 (2009) (upholding "a major purpose" requirement).

Other circuits have struck down disclosure laws, finding they exceeded the bounds of what this Court approved in *Citizens United*. *See, e.g., Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 877 (8th Cir. 2012) (en banc) (invalidating requirement that groups making independent expenditures over $100 do so through a "political fund" which had ongoing reporting requirements); *Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 596-601 (8th Cir. 2013) (striking down disclosure and ongoing reporting requirements on independent speakers); *Sampson v. Buescher*, 625 F.3d 1247, 1249 (10th Cir. 2010) (striking down disclosure requirements as applied to small neighborhood group that had raised less than $1,000); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 679 (10th Cir. 2010) (finding

unconstitutional political committee disclosure law that applied to any group that made a contribution of over $500 "for political purposes" because it made non-major purpose groups subject to comprehensive PAC burdens); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 287 (2008) (striking down political committee definition that had "a major purpose" rather than "the major purpose"); *Colorado Right to Life Committee, Inc. v. Coffman*, 498 F.3d 1137, 1153-54 (10th Cir. 2007) (striking down political committee definition because PAC status imposed contribution requirements); *see also South Carolina Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010); *Nat'l Right to Work Legal Defense and Ed. Foundation, Inc. v. Herbert*, 581 F. Supp. 2d 1132, 1154 (D. Utah 2008) (striking down political committee definition saying that *Buckley*'s major purpose test was mandatory). One lower court has also refused to impose disclosure burdens on certain groups. *See Citizens United v. Gessler*, No. 14-1387 at 30 ("Because Colorado has determined that it does not have a sufficient informational interest to impose disclosure burdens on media entities, it does not have a sufficient interest to impose those requirements on Citizens United.").

The Court should grant the petition to resolve the conflict among the circuits.

B. Vermont's Electioneering Communication Statute is Overbroad Because it Requires Reporting of Non-Electoral Related Speech in Violation of the First Amendment.

The lower court found that the electioneering communication definition did not reach "*pure* issue advocacy" because it must refer to a "clearly identified candidate" and promote, support, attack or oppose a candidate. App. 26a n.11 (emphasis in original). This finding fails to take into account year-round campaigning and the reach of the PASO standard to grassroots lobbying and efforts to hold government officials accountable.

First, the electioneering communication statute encompasses non-candidate speech because it fails to include a time limit. The disclaimer requirements thus apply year round. The requirement that the speech refer to a "clearly identified candidate" does not necessarily remove issue speech from the jaws of disclosure because officeholders are increasingly candidates year round. Therefore, unless an officeholder has announced his/her retirement, he or she is likely to be a candidate.

Second, the PASO standard does not limit the reach of the electioneering communications statute to only election-related speech. While it is true that the *McConnell* Court found the PASO standard was not vague, the PASO test at issue applied to political parties. *McConnell*, 540 U.S. at 170 n.64, 184 (quotation

omitted). It is not difficult to see that communications by political parties that do not contain express advocacy may nonetheless be candidate-related if they promote, attack, support, or oppose a candidate. However, this Court has not upheld application of the PASO standard outside of political parties. *See id*. at 170 n.64 (PASO not vague as to political parties); and *id*. at 184 (PASO not vague as to incumbent state or local politicians or candidates). While speech undertaken by political parties or candidates can be presumed to be in connection with an election, *see id*. at 170 n.64, speech by others cannot be.

Groups that do not have the election or defeat of candidates as their major purpose, may engage in issue speech, *e.g.*, attacking or supporting a legislator's position on a particular bill, thanking a governor for signing legislation, criticizing a legislator for a lapse in ethics, that some would argue promotes, attacks, supports, or opposes. But, "[d]iscussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007).

Failing to include a time limit means that the law reaches many communications that no reasonable person could conclude have anything to do with an election. Vermont's electioneering communication law would apply to communications maintained on a website that may be years old and address topics that have nothing to do with any election. Vermont's law

reaches far beyond candidate-related activity to education, news gathering and reporting, government accountability efforts, and grassroots lobbying.

For example, assume that a § 501(c)(3) organization whose purpose is to improve the quality of life in a city schedules its annual fundraising banquet for mid-November, two weeks after the election. It invites the mayor, who is campaigning for state office that year, to speak at the banquet and be presented with an award for her efforts, and she accepts. Beginning in July and continuing through the week before the banquet, the organization publishes advertisements in the local paper and sends monthly newsletters and emails to all the residents of the city. All of these communications say that the Mayor will be the featured guest and will receive an award for her excellent service. None of the communications mention the election or that the mayor is a candidate for state office. While no reasonable person would conclude that these communications are intended to influence the election, it can be argued that the communications promote the mayor, who is running for state office.

Similarly, it cannot seriously be argued that any document which merely mentions an individual who is currently a candidate and attacks or opposes actions taken by him in his official capacity at any time, are candidate related. For example, an organization might have been heavily involved in grassroots efforts to get the governor to veto a bill. Some of these communications might be viewed as attacking the

governor for his failure to take action. If these grassroots lobbying communications are still on the organization's website 4 years later when the governor is running for reelection, they could be said to be attacking or opposing the governor. And given the lack of a time period, do organizations need to go through their websites and put disclaimers on every communication that mentions an officeholder (because he or she might be a candidate in the future)?

Because Vermont's statute does not require the PASO of candidates as candidates, it is quite easy to see how grassroots lobbying and efforts to ensure that governmental officials do not abuse the powers entrusted to them by the American people could be deemed to promote, attack, support, or oppose candidates. In upholding disclosure requirements, *Buckley* stated that "provid[ing] the electorate with information" is sufficiently important "because it increases the fund of information of those who *support* candidates." *Buckley*, 424 U.S. at 81 (emphasis added).

When legislatures compel disclosure of communications about policy issues or grassroots lobbying, the informational interest cannot be the justification. Lower courts have upheld electioneering definitions that include the regulation of nonbroadcast media and that expand the reporting window. *See, e.g., South Carolina Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010) (upholding electioneering statute that includes telephone banks, direct mail, and any paid advertisements, and a 45 day reporting period). This Court should grant the

petition and clarify that the informational interest cannot justify expansive definitions of "electioneering" communications.

III. Court Review of This Case is Needed to Prevent Further State Restriction on the Right of Association and the Freedom to Speak Anonymously.

Post-*Citizens United*, the broad disclosure and reporting requirements being imposed on individuals and groups whose major purpose is not the election or defeat of a candidate have effectively rendered anonymous speech a thing of the past.

Buckley's informational interest has been greatly expanded, with no apparent limit to its application. *See Doe v. Reed*, 130 S. Ct. 2811, 2829 (2010) (Sotomayor, Stevens and Ginsburg, JJ., concurring) ("[A]ny party attempting to challenge particular applications of the State's regulations will bear a heavy burden. . . . Case-specific relief may be available . . . in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling to control."). While the Court has said that disclosure does not limit spending, the Court has also found that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

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CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HEIDI K. ABEGG
Counsel of Record
ALAN P. DYE
WEBSTER, CHAMBERLAIN & BEAN, LLP
1747 Pennsylvania Ave., NW
Suite 1000
Washington, DC 20006
(202) 785-9500
habegg@wc-b.com

Counsel for Amici Curiae
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