STATE OF VERMONT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 759-10-10 Wncv

State of Vermont
Plaintiff

v.

Republican Governors Association
Defendant

ORDER RE: ENFORCEMENT OF $2,000 CONTRIBUTION LIMIT

In this case, the State of Vermont seeks to enforce Vermont's campaign disclosure and contribution limits against the Republican Governors Association (RGA), a political committee that promotes the election of Republican gubernatorial candidates nationwide. The background facts are set out in detail in this court's October 3, 2011 Decision on Cross-Motions for Summary Judgment. In that decision, this court ruled that the State could enforce Vermont's registration and disclosure requirements and the $2,000 contribution limit set forth in 17 V.S.A. § 2805 against RGA. Prior to final judgment, however, the court decided to reconsider its decision regarding the $2,000 contribution limit in light of Judge Sessions' decision in a similar case, *Vermont Right to Life Committee, Inc. v. Sorrell*. A hearing was held on this matter on October 16, 2012.

Under Vermont law, "[a] political committee . . . shall not accept contributions totaling more than $2,000.00 from a single source, political committee or political party in any two-year general election cycle." 17 V.S.A. § 2805(a). In *Vermont Right to Life Committee, Inc., v. Sorrell*, No. 2:09-CV-188, 2012 WL 2370445 (D. Vt. June 21, 2012), the U.S. District Court for the District of Vermont considered whether § 2805(a) could constitutionally be applied to a political committee that made only independent expenditures—as RGA claims to do. The decision is worth examining in detail, as similar principles will govern this case.

Vermont Right to Life Committee (VRLC) was a pro-life non-profit organization that engaged in educational and political activities. VRLC formed the Vermont Right to Life Committee Fund for Independent Political Expenditures (FIPE) in 1999. The formation documents indicated that FIPE would not make contributions to or coordinate with candidates for political office. VRLC also formed the Vermont Right to Life Committee Inc. Political Committee (PC) to engage in federal and state campaign activities, including making direct contributions to pro-life candidates. VRLC argued that it was unconstitutional to apply § 2805(a)'s $2,000 contribution limit to FIPE because the State had no valid interest in limiting contributions to an organization that made only independent expenditures.[1]

[1] VRLC apparently conceded that PC was subject to the $2,000 contribution limit because it made direct contributions to candidates.

In order to survive a First Amendment challenge, contribution limits must be "closely drawn to achieve a sufficiently important interest." *Id.* at *22 (quoting *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010)). The Supreme Court has identified only two state interests that justify contribution limits: the appearance or reality of quid-pro-quo corruption in the relationship between a contributor and a candidate, and preventing the circumvention of valid contribution limits. *Id.* at *22–23. The court noted that "[t]he Supreme Court has found that independent expenditures do not raise concerns of the reality or appearance of corruption, since their very separation from the candidates ensures '[t]he candidate-funding circuit is broken.'" *Id.* at *23 (citing *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 132 S. Ct. 2806, 2826–27 (2011)). Moreover, every federal court of appeals to consider the matter has ruled that because independent expenditures cannot corrupt, states have no valid interest in limiting contributions to independent-expenditure-only groups. *Id.* at *23 (listing cases). Thus, the State had a heavy burden to justify applying Vermont's $2,000 contribution limit to FIPE if FIPE only engaged in independent spending. *Id.*

The first justification offered by the State—Vermont's record of minimal public corruption or its appearance—was found to be insufficient in light of the Supreme Court's stay of a ruling by the Montana Supreme Court based on the same reasoning. *Id.* at *24; see *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307 (2012).[2] The court also rejected the State's other argument, that the contribution limits facilitated transparency of the activities of wealthy donors; it found that Vermont's disclosure requirements adequately addressed this concern. *VRLC*, 2012 WL 2370445 at *24. The asserted state interests could not justify imposing a contribution limit on FIPE if FIPE only made independent expenditures. *Id.*

The State argued in the alternative that FIPE was not really an independent-expenditure-only political committee, because it was impermissibly intertwined with PC, the direct-contribution arm of VRLC. The court held that an examination of the factual record was required to determine whether FIPE in fact made only independent expenditures:

> To sum up, the character of FIPE's political involvement is the hinge on which its claim pivots. To rely solely on a PAC's assertions as to that decisive point, even when challenged by state parties' uncontested facts at summary judgment, would grant an explicit green light to circumvent campaign finance regulation.

Id. at *22. The court found that FIPE and PC (the political committee set up to make direct candidate contributions) had separate bank accounts, but were not separately incorporated organizations. In fact, the committees overseeing each organization overlapped almost entirely, met at the same times and places, and referred to FIPE and PC interchangeably. Moreover, the organizations worked together to produce voter guides. In sum, there was "no significant functional divide between" FIPE and PC.

Yet "even a complete overlap in staff and symmetry in spending" between the organizations would not necessarily make FIPE subject to the $2,000 contribution limit, under existing federal precedent. *Id.* at *29. In *Emily's List*, the D.C. Circuit Court of Appeals

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[2] The Montana decision has since been reversed by the Supreme Court, which held that it was in direct conflict with its decision in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2490 (June 25, 2012).

considered whether federal contribution limits applied to all donations to a nonprofit organization that made both independent expenditures and direct contributions to candidates. *Emily's List v. Fed. Election Comm'n*, 581 F.3d 1, 12 (D.C. Cir. 2009). That court held that a nonprofit organization "that makes expenditures to support federal candidates does not suddenly forfeit its First Amendment rights when it decides also to make direct contributions to parties or candidates." *Id.* "[I]t simply must ensure, to avoid circumvention of individual contribution limits by its donors, that its contributions to parties or candidates come from" an account containing funds raised in accordance with contribution limits. *Id.*; see also *Thalheimer v. City of San Diego*, No. 09-CV-2862-IEG, 2012 WL 177414, slip op. at *13 (S.D. Cal. 2012) (holding that political committees were subject to contribution limits on funds raised to make direct contributions to candidates, but limits could not be applied to funds raised for independent expenditures, as long as funds were kept in separate accounts); *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 131–32 (D.D.C. 2011) (ruling that maintaining separate bank accounts is sufficient to ensure "no cross-over between" funds contributed for independent expenditures and funds contributed for direct contributions to candidates). In short, if a political committee ensures that its contributions to parties or candidates come from an account containing funds raised in accordance with contribution limits, the "government cannot apply a blanket contribution limit to all of its fundraising." *VRLC*, 2012 WL 2370445 at *29.

However, Judge Sessions ruled that a blanket contribution limit was appropriate in VRLC's case because it had failed to carefully segregate its accounts. Unlike the political committees in *Emily's List* and *Carey*, "the functional similarity of PC and FIPE is coupled with a fluidity of funds." *Id.* at *30 (quotation omitted). The record showed that VRLC sometimes transferred funds from PC to FIPE if FIPE could not afford to engage in an activity on its own. FIPE and PC paid together for voter guides describing the pro-life positions of candidates in Vermont and both were listed as sponsors of the guides. "Without a clear accounting between dollars spent by each fund, it cannot be maintained that contributions to FIPE, intended for independent expenditures, are truly aimed at that purpose when spent." *Id.* The court held that for this reason, the state was justified under the "anti-circumvention rationale" to limit contributions to FIPE, the independent expenditure committee, in addition to PC, the candidate committee. *Id.* Otherwise PC could circumvent the limits by accessing FIPE funds.

Here, the State argues that like FIPE and PC, RGA and its Vermont political committee Green Mountain Prosperity (GMP) are indistinguishable because RGA directly controls GMP and GMP has no separate staff. The State argues further that it has a good faith basis to believe that RGA made direct contributions to candidates in the 2010 election. However, under the cases discussed above, neither of these circumstances is necessarily an adequate basis for imposing Vermont's contribution limits to all of RGA's fundraising. *Id.* at *29; *Emily's List*, 518 F.3d at 12. As explained in *VRLC*, the State has no valid justification for imposing contribution limits on an organization that is making only independent expenditures. Rather, contribution limits may only be applied to funds raised and spent on candidates and parties or, as in *VRLC*, where an independent-expenditure committee and its related direct-contribution committee are so intertwined that it is impossible to distinguish the source and use of funds raised by each. If evidence is brought forward to indicate that RGA and GMP have intermingled funds in addition to having overlapping management, or that RGA has been making direct contributions to candidates using funds collected for independent expenditures, then the State would be justified

in imposing contribution limits for the purpose of preventing circumvention of its rules. See *VRLC*, 2012 WL 2370445 at *30.

As the State correctly points out, the parties' motions for summary judgment did not focus on the issue of whether RGA made only independent expenditures. Thus, neither party had an opportunity to present evidence on this specific issue. The court finds that information to be material to the resolution of this case. The court will schedule a hearing after March 1, 2013. Discovery is to be completed by March 1. The case is to be set for a status conference after January 1, 2013.

Dated at Burlington, Vermont this 30 day of October, 2012.

Geoffrey Crawford,
Superior Court Judge