No. 08-2257

United States Court of Appeals for the Fourth Circuit

Holly Lynn Koerber and
Committee for Truth in Politics, Inc., *Plaintiffs-Appellants*

v.

Federal Election Commission, *Defendant-Appellee*

Appeal from the United States District Court for the
Eastern District of North Carolina, Northern Division

Appellants' Brief

James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile
Counsel for Appellants

RESET FORM

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 08-2257 Caption: Koerber and Committee for Truth in Politics v. FEC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Koerber and CTP (name of party/amicus) who is Appellants (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)
☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?
☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

/s/ James Bopp, Jr (signature) 03-16-09 (date)

Table of Contents

Table of Authorities

Cases

Constitution, Statutes & Rules

Other Authorities

Jurisdiction

The district court had jurisdiction in this case arising under the First and Fifth Amendments to the federal Constitution, the Federal Election Campaign Act ("**FECA**"), the judicial review provisions of the Administrative Procedure Act ("**APA**") (5 U.S.C. §§ 702-06), and the Declaratory Judgment Act (28 U.S.C. §§ 2201-02). 28 U.S.C. § 1331. This Court has jurisdiction over the October 29, 2008 denial of preliminary injunction (JA–27). 28 U.S.C. § 1292(a)(1). Appeal was noticed October 31 (JA–45).

Issues

By way of context, *Buckley v. Valeo* held that communications subject to compelled disclosure are those "unambiguously related to the campaign of a particular candidate for federal office." 424 U.S. 1, 80 (1976). *North Carolina Right to Life v. Leake* held that "campaign finance laws may constitutionally regulate only . . . actions . . . 'unambiguously related to the campaign of a particular . . . candidate.'" 525 F.3d 274, 281 (4th Cir. 2008) (citation omitted). *Leake* held that the appeal-to-vote test in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007),[1] implements the unambiguously-campaign-related principle in the

[1] The principal opinion ("***WRTL-II***") by Chief Justice Roberts, joined by Justice Alito, states the holding. *See Marks v. United States*, 430 U.S. 188, 193 (1977) (holding is position on narrowest grounds).

electioneering-communication ("**EC**")[2] context. 525 F.3d at 283 (identifying unambiguously-campaign-related communications). *WRTL-II* held that ECs are "functional[ly] equivalent [to] express advocacy" if "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667.[3] *Leake* held that the unambiguously-campaign-related principle is implemented for political-committee ("**PAC**") status by the major-purpose test, "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," 525 F.3d at 287.

The general issue is whether the district court abused its discretion by applying the wrong legal standards in denying a preliminary injunction to protect Committee for Truth in Politics, Inc. ("CTP") from an FEC investigation and enforcement action for not complying with BCRA's[4] Disclosure Requirements[5] after it broad

---

[2] Using "**EC**" follows FEC convention below. ECs are essentially targeted, broadcast ads referencing candidates within 30- and 60-day periods before primary and general elections. *See* 2 U.S.C. § 434(f)(3).

[3] Those not functionally equivalent ("***WRTL-II*-ads**") are protected "issue advocacy," i.e., ordinary "political speech." *Id.* at 2659, 2673.

[4] "**BCRA**" refers to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[5] "**Disclosure Requirements**" refers collectively to **BCRA § 201** ("**Reporting Requirement**"), 116 Stat. 88-89 (titled "Disclosure of Electioneering Communications" and which added a new subsection "(f)" to § 304 of FECA that requires reporting of ECs,) and **BCRA § 311** ("**Disclaimer Requirement**"), 116 Stat. 105 (requiring that ECs carry "disclaimers"). *See* 11 C.F.R. § 110.11 (disclaimer regulations). The Reporting Requirement is codified at 2 U.S.C. § 434(f). The Dis-

cast *WRTL-II*-ads. The underlying issues are:

1. Whether speech-protective preliminary-injunction standards are required in First Amendment cases.

2. Whether the Disclosure Requirements are unconstitutional as applied to *WRTL-II*-ads.

3. Whether the FEC's PAC-enforcement policy[6] is unconstitutional (facially and as applied), beyond statutory authority, and void under APA.

Case

On October 3, 2008, Appellants filed their complaint (JA–6) and moved for a preliminary injunction (Dkt. 3). A hearing was held October 16 (Dkt. 32). On October 29, the district court denied a preliminary injunction. JA–27. Appeal was noticed October 31. JA–45. Proceedings below are stayed pending the U.S. Supreme Court's decision in *Citizens United v. FEC* (No. 08-205) (dealing with whether the Disclosure Requirements are constitutional as applied to *WRTL-II*-ads) (Dkt. 43). The present appeal continues because CTP is in violation of the Disclosure Requirements and at any moment could be subjected to the burden of defending itself against an unconstitutional investigation and enforcement action. Appellants also believe that wrong preliminary injunction standards were em-

---

claimer Requirement is codified at 2 U.S.C. § 441d(a).

[6] *See infra* at 6, 42-45 (policy).

ployed in this First Amendment context and seek to establish proper ones for when CTP needs to speak again near an election. This need is capable of repetition, yet evades timely review.

Facts

The FEC is the federal agency with FECA enforcement authority. JA–11.

Holly Lynn Koerber is a resident of Elizabeth City, North Carolina, where she was able to receive CTP's Ads. She wants to continue exercising the First Amendment right to receive CTP's speech, but reasonably fears that CTP will be silenced. JA–11-12.

CTP is a nonstock, nonprofit, North Carolina corporation (incorporated in September 2008) and is tax-exempt under 26 U.S.C. § 501(c)(4). CTP meets the criteria for an *MCFL*-corporation so that it may not be prohibited from making ECs. JA–11-12.

CTP is not a PAC because it does not have "*the* major purpose" of "primarily engag[ing] in regulable, election-related speech," *Leake*, 525 at 274, so its major purpose is not the "nomination or election of a candidate," *Buckley*, 424 U.S. at 79. The majority of CTP's activities will be nonpolitical-intervention, social welfare activities, including lobbying. Although its Ads are not "regulable election-related speech," *Leake*, 525 F.3d at 287, on which a determination of PAC status

may be based, they will not be the primary activity of CTP. Expenditures for solicitations to CTP will be insubstantial. JA–12-13.

CTP's Articles of Incorporation set out its purpose as "promoting the social welfare . . . by: (a) Advocating honesty in government; (b) Advocating limited government; and (c) Engaging in . . . lawful activities that are appropriate to carry out . . . the foregoing purposes." JA–13.

CTP's Articles prohibit, "except to an insubstantial degree, carry[ing] on any activities not permitted to be carried on by an organization exempt from Federal income tax under Section 501(c)(4) of the Internal Revenue Code . . . ." JA–13.

Before the 2008 general election, CTP broadcast an ad titled *Basic Rights* on television stations in Wilmington, North Carolina, that reached into Elizabeth City, North Carolina. *Basic Rights* was broadcast on stations in Pennsylvania, North Carolina, and Wisconsin on October 2, 2008, as well as other broadcasts after that. CTP also broadcast *Tragic, but True*. The scripts are in the *Verified Complaint* at ¶¶ 32-33. JA–13-14.

CTP did not coordinate the production and broadcast of the Ads with any candidate, campaign committee, political committee, or political party. JA–15. The Ads met the EC definition at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29. JA–15.

The Ads were subject to the Disclaimer Requirement. The Ads included prescribed disclaimers, but CTP challenges the constitutionality of the Disclaimer

Requirement, preferring to use a shorter self-identification to preserve valuable advertising time. JA–15-16.

Because CTP spent more than $10,000 in 2008 for the direct costs of producing and airing *Basic Rights*, CTP was subject to the Reporting Requirement. Once CTP reached the $10,000 trigger amount (the "disclosure date"), it was to have filed the required report within 24 hours, i.e., on October 3, 2008. CTP did not file the report and is currently in violation of the Reporting Requirement. CTP reasonably fears that the FEC will initiate an unconstitutional investigation and enforcement action, and that CTP may suffer penalties for noncompliance. JA–16.

CTP also reasonably fears that the FEC may deem it a political committee under the FEC's vague, overbroad, unauthorized PAC-enforcement policy. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC-Status 1*"); FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC-Status 2*"). The policy employs a totality-of-the-circumstances test for determining major purpose instead of the required "empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *Leake*, 525 F.3d at 287. CTP reasonably fears that the FEC will initiate an unconstitutional investigation and enforcement action for non-compliance with PAC requirements, and that CTP may suffer penalties for noncompliance. JA–16-17.

CTP intends to continue broadcasting materially-similar *WRTL-II*-ads that will

be within the "safe harbor" in 11 C.F.R. § 114.15. JA–17 (setting out elements).

CTP is at risk for the irreparable harm of a constitutionally-unjustified investigation and enforcement action and has no adequate remedy at law. JA–17.

Summary of Argument

In denying a preliminary injunction, the district court abused its discretion by applying improper legal standards. As to preliminary injunction standards, it failed to apply the speech-protective standards mandated by the First Amendment.

As to the Disclosure Requirements, it failed to follow precedent. In the communication-disclosure context, *Buckley* restricted compelled disclosure to communications that "[we]re unambiguously related to the campaign of a particular candidate for federal office" by restricting disclosure to express-advocacy communications. 424 U.S. at 80. *Leake* held that "campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate.'" 525 F.3d at 281 (citation omitted). *Leake* held that *WRTL-II*'s appeal-to-vote test, 127 S. Ct. at 2667, applies this principle in the EC context: "[t]he Supreme Court has identified two categories of communication as being unambiguously campaign related," i.e., "'express advocacy' . . . . [and] 'the functional equivalent of express advocacy,' defined as an 'electioneering communication' that 'is susceptible of no reasonable interpretation other than

as an appeal to vote for or against a specific candidate.'" 525 F.3d at 283. So *WRTL-II*'s appeal-to-vote test is to ECs what the express-advocacy test was to the communications in *Buckley*, i.e., both implement the unambiguously-campaign-related principle—only ads captured by these tests are subject to compelled disclosure. CTP's ads are *WRTL-II*-ads because they contain no such "appeal to vote." They are not unambiguously campaign related and so not subject to compelled disclosure.

As to the FEC's PAC-enforcement policy, the district court failed to follow *Leake*, which recognized that the unambiguously-campaign-related principle controls PAC status through the major-purpose test, *id.* at 287, and that major-purpose determination is "an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *id.* (emphasis added). The FEC's contrary policy is a vague "'we'll know it when we see it approach,'" *id.* at 290 (citation omitted), so it is unconstitutional and beyond FEC authority.

Argument

I. Standards: First Amendment Versions Are Required.

This Court needs to clarify to the lower courts that ordinary standards are inadequate in the highly-protected context of what *WRTL-II* called "issue advocacy" or "political speech." 127 S. Ct. at 2659, 2667, 2673. Speech-protective standards

apply. *See id.* at 2666 & n.5 (all doubts resolved for free speech; streamlined, low-cost litigation requirements mandated to avoid "severe burden on political speech" and chilling same).

A. Appellate Standard of Review.

This Court reviews preliminary injunction denials for abuse of discretion, *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002), accepting "findings of fact absent clear error, but review[ing] . . . legal conclusions *de novo*," *id*. (citation omitted). "[A] mistake of law . . . is per se an abuse of discretion." *Dixon v. Edwards*, 290 F.3d 699, 718 (4th Cir. 2002). In this First Amendment context, these standards must be applied in a speech-protective manner. The district court abused its discretion by mistakes of law as to preliminary injunction standards (inadequately protecting First Amendment rights) and precedent (not even mentioning *Leake*, 525 F.3d 274).

B. Preliminary Injunction Standard.

1. General Standard.

CTP meets the preliminary injunction criteria—likely success on the merits, irreparable harm, favorable balance of harms, and public interest, *Blackwelder Furniture Company of Statesville v. Seilig Manufacturing Company*, 550 F.2d 189, 196 (4th Cir. 1999).[7] "[F]actors do not weigh equally . . . ; the first two domi

[7] *Blackwelder* recited the factors: "1) Has the petitioner made a strong showing

nate." *Virginia Carolina Tools v. International Tool Supply*, 984 F.2d 113,120 (4th Cir. 1993). In First Amendment cases, irreparable harm is "'inseparably linked'" to the likelihood of merits success, *Bason*, 303 F.3d at 511 (citation omitted), which must be considered first, *id.*

2. *WRTL-II* Standard.

This case should be considered in light of *WRTL-II,* in which WRTL was denied a preliminary injunction allowing it to run its 2004 anti-filibuster grassroots lobbying ads. *See WRTL-II*, 127 S. Ct. at 2661. The four-Justice *WRTL-II* dissent argued that the availability of preliminary injunctions preserved *McConnell* from being overturned as to ECs:

> Although WRTL contends that the as-applied remedy has proven to be "[i]nadequate" because such challenges cannot be litigated quickly enough to avoid being mooted, . . . nothing prevents an advertiser from obtaining a preliminary injunction if it can qualify for one, and WRTL does not point to any evidence that district courts have been unable to rule on any such matters in a timely way.

Id. at 2704 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). So unless *McConnell* is to be overturned, there must be a *real* possibility of preliminary injunctions in as-applied challenges. All elements must be *capable* of being met or else the "as-applied remedy [*is*] '[i]nadequate,'" *id.* So the FEC may not trump a

---

that it is likely to prevail upon the merits? 2) Has the petitioner shown that without such relief it will suffer irreparable injury? 3) Would the issuance of the injunction substantially harm other interested parties? 4) Wherein lies the public interest?" *Blackwelder*, 550 F.2d at 193 (citation omitted).

preliminary injunction by asserting, e.g., that it is injured if it can't investigate or that a challenge must be rejected because some imagined "wild west" election scenario might occur. *WRTL-II* mandated speedy resolution, without litigation burden, of as-applied challenges arising near elections, *id.* at 2667, that doubts about protecting issue advocacy should be resolved in favor of speech, not censorship, *id.* at 2659, 2667, 2669 n.7, 2674, that "political speech" have "breathing room," *id.* at 2666, all of which mandates speech-protective, preliminary-injunction standards.

3. First Amendment Context: Standards & Interests.

Some district courts *do* issue preliminary injunctions in this context.[8] But until courts *uniformly* issue preliminary injunctions based on speech-protective standards, expressive association will be unconstitutionally burdened. This Court should clarify that political-speech cases require speech-protective standards. *WRTL-II*'s mandate for streamlined procedures and speech-protective rules must be reflected in standards and interests for issuing preliminary injunctions in cases involving issue-advocacy communications.

[8] One restricted regulation of political speech to (1) magic-words express advocacy and (2) ECs defined as the federal model. *See Center for Individual Freedom v. Ireland*, Nos. 08-190 & 08-1133, 2008 WL 4642268 (S.D. W. Va. Oct. 17, 2008) ("*CFIF*") (relying on *Leake* and unambiguously-campaign-related principle). Another restricted an EC definition to *WRTL-II*'s appeal-to-vote test. *Ohio Right to Life Society v. Ohio Elections Comm'n*, No. 08-492, 2008 WL 4186312 (S.D. Oh. Sep. 5, 2008).

First, the standards must reflect that "the people are sovereign" and "'debate on public issues should be uninhibited, robust, and wide-open,'" *Buckley*, 424 U.S. at 14 (citation omitted). *WRTL-II* requires heeding the mandate that "'Congress shall make no law . . . abridging the freedom of speech,'" 127 S. Ct. at 2674—saying that "[t]he Framers' actual words put these cases in proper perspective," *id.*—so "freedom of speech" is the *constitutional presumption*. The district court recognized no such presumption, either in its statement of standard nor its analysis.

Second, this presumption means that the status quo in a "prohibitory" injunction[9] is "freedom of speech," the condition *before* a speech regulation was created. "[T]he status quo is 'the last peaceable uncontested status between the parties which preceded the controversy . . . .'" *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.,* 269 F.3d 1149, 1155 (10th Cir. 2001) (citation omitted). "The purpose of a preliminary injunction is to preserve the status quo as it exists or *previously existed* before the acts complained of. . . ." *Slott v. Plastic Fabricators, Inc*., 167 A.2d 306 (Pa. 1961) (emphasis added). Government must not be permitted to

[9] In contrast to a "prohibitory" injunction, a "mandatory" injunction "affirmatively require[s] the nonmovant to act in a particular way, and as a result . . . court[s] . . . may have to provide ongoing supervision . . . ." *SCFC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096,1099 (10th Cir.1991). Mandatory injunctions usually alter the status quo and movants must show a heightened likelihood of success. *Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Cir.1999) (per curiam).

bootstrap a "status quo" and enforcement interest by creating questionable speech regulations and then arguing that a preliminary injunction must be denied because of the newly-minted "status quo" and "enforcement interest." The district court spoke of maintaining the status quo, JA–31, but failed to recognize that the proper status quo in this context is the "no law," "free speech" presumption of the First Amendment.

Third, the free-speech presumption means that speech protections are incorporated into preliminary injunction standards, not limited to merits consideration: "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). The district court erroneously placed the burden on Plaintiffs. JA–31.

Fourth, the free-speech presumption means that the government always has the *threshold burden* of proving that the unambiguously-campaign-related principle is met (as implemented by the appropriate test) before meeting the burden imposed by the required level of scrutiny. *Leake*, 525 F.3d at 281 ("campaign finance laws may constitutionally regulate only those actions that are 'unambiguously related to the campaign of a particular . . . candidate'" (citation omitted)); *National Right to Work Legal Def. & Educ. Found. v. Herbert*, 581 F. Supp. 2d 1132, 1146 (D. Utah 2008) ("before applying exacting scrutiny . . . the court must first determine whether the activities being regulated are unambiguously campaign related"). The

district court neither recognized this threshold burden nor required the FEC to meet it.

Fifth, the free-speech presumption means that because "exacting scrutiny"[10] is the antithesis of deference or a presumption of constitutionality for speech regulations, no such deference or presumption is permitted. The regulation of ECs, "in particular, has the potential to trammel vital political speech, and thus regulation of speech as 'the functional equivalent of express advocacy' warrants *careful judicial scrutiny*." *Leake*, 525 F.3d at 283 (emphasis added). "[T]he *Government* must prove that applying [the challenged provision to the communication at issue] furthers a compelling interest and is narrowly tailored to achieve that interest. *WRTL-II*, 127 S. Ct at 2664 (emphasis in original). Agencies charged with regulating free speech require "extra-careful scrutiny from the court," *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) ("*Machinists*"), because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," *id.*[11] Deference to an agency applies only where there is a "'reasonable

[10] *See infra* at 33 ("exacting scrutiny").

[11] *See also FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982) ("[T]he activities that the FEC seeks to investigate differ profoundly in terms of constitutional significance from the activities that are generally the subject of investigation by other federal administrative agencies. The sole purpose of the FEC is to regulate activities involving political expression, the same activities

choice within a gap left open by Congress.'" *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986) (*quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)). There is no deference where "the Supreme Court has spoken on the issue. . . . It is not the role of the FEC to second-guess the wisdom of the Supreme Court." *Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir.1991). *See also Right to Life of Dutchess County v. FEC*, 6 F. Supp. 2d 248, 254 (S.D. N.Y. 1998) (same). The district court erroneously declared that the FEC is entitled to deference to its discretion and to a presumption that it will act lawfully. JA–15-16.

Sixth, the free-speech presumption means that in determining the balance of harms and the public interest, courts must apply *WRTL-II*'s requirement that "'[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor.'" *CFIF*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *27 (*quoting WRTL-II*, 127 S. Ct. at 2669) (applying principle to consideration of public harm). In this case, the district did not afford the respect to the First Amendment on which this rule is based.

Seventh, the free-speech presumption means that agencies have no per se interest in restricting or regulating speech. Their first loyalty is to the First Amendment. Their interest is in enforcing the laws *as they exist*, with the *content* of those laws being beyond agency interest for preliminary-injunction consideration: "It is

---

that are the primary object of the first amendment's protection.").

difficult to fathom any harm to [enforcement officials] as it is simply their responsibility to enforce the law, whatever it says." *Id.* Even where an agency's regulation is at issue, the agency's only interests are in faithfully implementing the substantive law and following the Constitution. While the FEC has the duty to defend campaign laws and regulations, it does so as a statutory mandate, not as a party having any ownership interest in the substantive content or the per se ability to enforce them.[12] The risks inherent in an agency charged with overseeing our most precious liberties apply here, too. As a consequence, courts should expect from the FEC good-faith arguments on the merits, not scorched-earth litigation tactics in disregard of the fundamental liberties at issue. *See FEC v. Christian Action Network*, 110 F.3d 1049, 1064 (4th Cir. 1997) (assessing fees because FEC position not "in good faith . . . , much less with 'substantial justification'"); *WRTL-II*, 127 S. Ct. at 2666 n.5 ("extensive discovery" was "severe burden on political speech"). In this case, the district court recognized an enforcement interest despite the questionability of the provisions under this Court's precedents.

Eighth, the free-speech presumption means that the fact that an issue-advocacy

[12] Any "right to enforce" must be viewed as an instrumental, statutory interest, not as some property right. It should never be weighed equally with free speech. In a balancing, free speech must always win unless there is some *other* interest that is weighty enough to warrant denial of a preliminary injunction. Even if free speech and an enforcement interest were considered equal, "'the tie goes to the speaker, not the censor.'" *CFIF*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *27 (*quoting WRTL-II*, 127 S. Ct. at 2669).

case may be filed near an election favors the plaintiff, not the defendant, in the preliminary-injunction balancing because issue advocacy is most important when public interest in an issue is highest, which may fall near an election. "[A] group can certainly choose to run an issue ad to coincide with public interest" without proximity to an election meaning that it is "electioneering." *WRTL-II*, 127 S. Ct. at 2668. *WRTL-II* expressly rejected the use of timing to determine whether an ad is regulable: "That the ads were run close to an election is unremarkable in a challenge like this. Every ad covered by BCRA § 203 will by definition air just before a primary or general election." *Id.* at 2667. *WRTL-II* also specifically envisioned eve-of-election litigation in its rules for as-applied challenges involving ECs. *Id.* at 2666. To penalize people who suddenly see a need to exercise their First Amendment right to associate to amplify their speech, *Buckley*, 424 U.S. at 22, is to ignore the free-speech presumption. Under the First Amendment, there is no reason why citizens can't just suddenly associate and speak—whenever they want. There is no prescience requirement, mandating people to know months in advance that they will want to speak. Nor are First Amendment protections limited to long-established groups. Nor do First Amendment rights diminish near the peak of the election cycle. Speech in temporal and topical proximity to an election enjoys the highest protection. *Buckley*, 424 U.S. at 14 ("'constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political

office'" (citation omitted)). Any delay in filing a challenge may not be held against the would-be speaker because it "could . . . have delayed because it did not arrive at a plan to exercise its rights to speak until relatively recently." *CFIF*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *26.

Ninth, the free-speech presumption means that where a law is likely unconstitutional there is no authority for it to operate just because an election is near. In fact, proximity to a time of high public interest argues against allowing a law restricting issue advocacy to remain in effect. *See supra*. So any trial court denying a preliminary injunction on the basis of a "wild west" scenario and confusion would be wrong. "[F]inding these laws unconstitutional will not likely result in the type of chaotic 'wild west' scenario Defendants . . . foretell. Rather, it will simply result in the dissemination of more information of precisely the kind the First Amendment was designed to protect." *CFIF*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *26.

Tenth, the free-speech presumption means that when an agency argues that there will be a "wild west" scenario if a law of questionable constitutionality is preliminarily enjoined, the agency must provide proof. *Id.* at *27. Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate

these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 664 (1994) (citation omitted).[13]

In sum, where issue advocacy is involved, our most cherished constitutional rights to free association and speech are involved, as is the fundamental right of the sovereign people to participate in self-governance. The high constitutional protections for issue advocacy reflect that fact. The preliminary injunction standards and cognizable interests must reflect that protection. Courts may not employ the same standards applicable to property disputes. Those standards should be articulated by this Court so that when citizen groups do issue advocacy near elections when public interest is high, they will get the protection the First Amendment mandates. The district court did not apply these speech-protective, preliminary-injunction standards. Under proper standards, CTP was entitled to a preliminary injunction.

---

[13] *See also Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 803 n. 22 (1984) ("may not . . . assume . . . ordinance will . . . advance . . . state interests sufficiently to justify . . . abridgement of expressive activity"). *FEC v. NRA*, 254 F.3d 173, 191 (D.C. Cir. 2001) (same); *see also id.* at 192 (FEC may not *speculate* that NRA received more because it did not record corporate contributions of under $500). Agencies asserting voter confusion bear a heavy proof burden. *See*, *e.g.*, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 n.13 (1997); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 221 (1986).

II. CTP Has Likely Success on the Merits.

CTP has likely success on the merits because *Leake* held that (**A**) campaign-finance laws may *only* regulate unambiguously-campaign-related activity, 525 F.3d at 281, 282-83, 287; (**B**) *WRTL-II*-ads are *not* unambiguously campaign related, *id.* at 282, 283; and (**C**) PAC status is governed by the major-purpose test, which is "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *id.* at 287.[14] The Disclosure Requirements (as applied to *WRTL-II*-ads) and the FEC's PAC-enforcement policy are unconstitutional under *Leake*.

A. Campaign-Finance Laws May Only Regulate Unambiguously-Campaign-Related Activity.

Leake held that the unambiguously-campaign-related principle is a threshold requirement for all campaign-finance laws. *Id.* at 282-83, 287-88. Since this case may be decided on this threshold requirement, it is unnecessary to establish what is required by "exacting scrutiny," which governs compelled disclosure for com-

[14] The FEC's memorandum below only mentioned *Leake* once, attempting to distinguish it as not addressing EC disclosure and as emphasizing the reasonability of federal EC provisions. Opp'n Prelim. Inj. 18 n.8 (Dkt.24). But *Leake*'s constitutional *analysis* is binding. It was the foundation of *Leake*, not obiter dictum. *Leake* compared the federal EC *definition* to a state provision to prove the latter overbroad, not to endorse all applications of federal EC regulation. The FEC instead relied (Opp'n Prelim. Inj. 15, 20-21) on non-controlling cases, such as *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006), which lacks viability after *WRTL-II* and *Leake*.

munications, *Buckley*, 424 U.S. at 64.

Buckley required "exacting scrutiny" and "*also*" required a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *id.* at 64 (emphasis added). This *additional* relevant-correlation requirement is not the same as intermediate scrutiny, which was applied to *contribution limits* because they were indirect speech, unlike the speech at issue here, and required "a sufficiently important interest and . . . means closely drawn to avoid unnecessary abridgment of associational freedoms," *id.* at 25.

As to compelled disclosure for communications, the relevant-correlation requirement examines the nexus between the communication and "[t]he constitutional power of Congress to regulate federal elections," *id.* at 13. This is evident from *Buckley*'s application of the relevant-correlation requirement to compelled disclosure to prevent it from being "impermissibly broad" because "the relation of the information sought to the purposes of the Act may be too remote," *id.* at 80. "[P]urposes of the Act" refers to "regulat[ing] election campaigns," *id.* at 13, which is also clear from *Buckley*'s description of why it was employing the express-advocacy construction, i.e., to insure that the compelled disclosure is "directed precisely to that spending that is unambiguously related to the *campaign* of a particular federal candidate," *id.* at 80 (emphasis added), or "unambiguously

campaign related," *id.* at 81 (emphasis added). *See also id.* at 66 (interest in providing disclosure information to public is only as to "political *campaign* money" (emphasis added)).

So whatever scrutiny is required, *Buckley* held that the interests that justified compelled disclosure did not extend to communications that were not "unambiguously campaign related," *id.* at 81. This is clear from *Buckley*'s holding that "*as construed*" (to restrict disclosure to unambiguously-campaign-related communications), the compelled disclosure provision "bears a sufficient relationship to a substantial governmental interest" and passed whatever exacting scrutiny required, *id.* at 80 (emphasis added). So compelled disclosure as to communications *beyond* that construction failed exacting scrutiny. For present purposes, the interests justifying compelled disclosure do not justify compelled disclosure for *WRTL-II*-ads, which are not unambiguously campaign related.

The unambiguously-campaign-related principle must be satisfied *before* turning to "exacting scrutiny." That is precisely what *Buckley* did in this expenditure-disclosure context, *id.* at 79-81 (construing "expenditure" to reach only unambiguously-campaign-related communications before applying exacting scrutiny), just as it has done earlier in the expenditure-limitation context, *id.* at 44-51. And *Leake* recognized this threshold requirement by holding that *Buckley* "cabin[ed] legislative authority over elections" by requiring that "campaign finance laws may con-

stitutionally regulate only those actions that are "'unambiguously related to the campaign of a particular . . . candidate.'" 525 F.3d at 281 (*quoting Buckley*, 424 U.S. at 80).

This unambiguously-campaign-related principle is necessary to protect "issue advocacy" because "the distinction between campaign advocacy and issue advocacy 'may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions.'" *WRTL-II*, 127 S. Ct. at 2659 (*quoting Buckley*, 424 U.S. at 42). CTP did not engage in what *WRTL-II* called "campaign speech, or 'express advocacy,' but [rather] speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office," *id.* at 2659. *WRTL-II* also called issue advocacy "political speech." *id.* at 2659, 2665-66, 2673-74; *see also Leake*, 525 F.3d at 277, 282-84, 288-89 ("ordinary political speech"). *WRTL-II* held that in drawing lines in the First Amendment area courts must "err on the side of protecting *political speech* rather than suppressing it." *WRTL-II*, 127 S. Ct. at 2659 (emphasis added). *WRTL-II* defined ordinary political speech or issue advocacy: "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions," *id.* at 2667.

WRTL-II's broad definition of issue advocacy and equating of it to ordinary political speech, which is protected despite its "political" nature, requires a rejection of the FEC's notion that Congress may still require compelled disclosure of ads protected under *WRTL-II*'s appeal-to-vote test ("*WRTL-II*-ads") because they are "mixed messages," as the FEC asserted at the hearing below. Tr. 39. A "*mixed*" message is not *unambiguously campaign* related, as both *Buckley* and *Leake* require before disclosure may be compelled. "The danger in this area—when dealing with a broadly empowered bureaucracy—is not that speakers may disguise electoral messages as issue advocacy, but rather that simple issue advocacy will be suppressed by some regulator who fears it may bear conceivably on some campaign." *Leake*, 525 F.3d at 302. The perceived mixed-message problem is precisely the dissolving-distinction problem for which *Buckley* created the express-advocacy test to implement the unambiguously-campaign-related principle[15] and

[15] *See* 424 U.S. at 42 ("distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application"), 43 ("the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers. . . . 'Such a distinction offers no security for free discussion.'" (citation omitted)), 43 ("The constitutional deficiencies described . . . can be avoided only by reading [the expenditure limitation statute] as limited to communications that include explicit words of advocacy of election or defeat of a candidate."), 80 ("we construe 'expenditure' [in the compelled-disclosure context] in the same way we construed [it in the expenditure-limitation context]" to require express advocacy to reach only unambiguously-campaign-related communications). *See infra*.

which *WRTL-II* cited as compelling the appeal-to-vote test to protect *WRTL-II*-ads, 127 S. Ct. at 2659 (dissolving-distinction problem), 2669 (same), which are not unambiguously campaign related, *Leake*, 525 F.3d at 281-83.

The unambiguously-campaign-related principle is implemented through tests, so it is not stated in cases as a free-standing requirement. The principle protects issue advocacy and issue-advocacy groups through three strict tests that restrict government regulation of communications and expressive associations: (1) the express-advocacy test (applying to general communications), (2) the major-purpose test (applying to determination of PAC status), and (3) the appeal-to-vote test (applying to ECs). *Leake*, 525 F.3d at 281-83, 287.

The first two of these tests originated in *Buckley*, which employed its unambiguously-campaign-related principle, 424 U.S. at 79-81, to create (1) the express-advocacy test, which determines when independent expenditures for communications may be subjected to compelled disclosure, *id.* at 80, and (2) the major-purpose test, which determines which groups may be treated as "political committees," *id.* at 79 ("under the control of a candidate or the major purpose of which is the nomination or election of a candidate").[16]

[16] *Buckley* applied the unambiguously-campaign-related principle to (1) expenditure limitations, *id.* at 42-44 (express-advocacy test); (2) PAC status and disclosure, *id.* at 79 (major-purpose test); (3) non-PAC disclosure of contributions and independent expenditures, *id.* at 79-81 (express-advocacy test); and (4) contributions, *id.* at 23 n.24, 78 (contribution-definition test) ("So defined, 'contributions'

WRTL-II's appeal-to-vote test implements the unambiguously-campaign-related principle by distinguishing ECs that are the functional equivalent of express advocacy (and so unambiguously campaign related) from those that are not (*WRTL-II*-ads). 127 S. Ct. at 2667. This was confirmed by *Leake*'s holding that "[t]he Supreme Court has identified two categories of communication as being unambiguously campaign related," i.e., "'express advocacy,'" and "'the functional equivalent of express advocacy,' defined as an 'electioneering communication' that 'is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate,'" 525 F.3d at 283.

The reason for the unambiguously-campaign-related principle and its derivative tests is twofold. First, since the only authority to regulate core political speech in this context is the authority to regulate elections, *see id.* at 13 ("constitutional power of Congress to regulate . . . elections is well established"), any restriction must be "unambiguously campaign related," *id.* at 81. *See also id.* at 66 (interest in providing disclosure information to the public is only as to "political *campaign* money" (emphasis added).

Second, the people's core political speech, in their sovereign, self-government role, must not be burdened. *Buckley* noted a dissolving-distinction problem as re-

---

have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

quiring a bright, speech-protective line between (1) "discussion of issues and candidates" and (2) "advocacy of election or defeat of candidates." *Id.* at 42. The Court elaborated further on the necessity of the bright line—between (1) "discussion, laudation, [and] general advocacy" and (2) "solicitation"—to protect issue advocacy. *Id.* at 43 (emphasis added). When the Court reiterated the express-advocacy test in imposing it on the prohibition (at 2 U.S.C. § 441b) on corporate "independent expenditures"[17] in *MCFL*, it reaffirmed the need for a bright line "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," 479 U.S. at 249.

The district court misunderstood the unambiguously-campaign-related principle and derivative tests that control this case, stating that "Plaintiffs do not address whether a relevant correlation or substantial relation exists, but instead argue that CTP's advertisements are not 'unambiguously campaign related' and therefore may not be constitutionally regulated." JA–34. *Buckley* stated that in addition to exacting scrutiny it "also" mandated the relevant-correlation requirement and specifically applied the latter in the compelled-disclosure context to require that regulation only reach unambiguously-campaign-related communications. *See supra*. But the district court did not need to go beyond *Leake* to see that the unambigu-

[17] "Independent expenditures" are for communications "expressly advocating the election or defeat of a clearly identified candidate." 2 U.S.C. § 431(17).

ously-campaign-related principle controlled its analysis.

The district court erroneously insisted that the unambiguously-campaign-related argument was "made and rejected . . . in *McConnell*." JA–34-35. Again, *Leake* was ignored, although it was post-*McConnell*, discussed *McConnell*, and declared the unambiguously-campaign-related principle a threshold requirement for all campaign-finance laws. *Leake* controlled the district court's analysis concerning what *McConnell* did, but the court ignored it. The court's analysis of *McConnell* was flawed because, while *McConnell* said that the express-advocacy line was not constitutionally mandated for all campaign-finance regulation, it acknowledged the need for narrowing where a statute was "overbroad," 540 U.S. at 192. It cited *Buckley* for implementing the express-advocacy test in the compelled disclosure context "'[t]o insure that the reach' of the disclosure requirement was 'not impermissibly broad,'" *id.* at 192 (citation omitted), quoting the very passage where the unambiguously-campaign-related principle was stated. *McConnell* did not overturn this first principle of constitutional analysis, but merely upheld an EC regulation *facially*, while recognizing that "the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," 540 U.S. at 207 n.88. As *Leake* recognized, *WRTL-II* cured the overbreadth in the EC definition with the appeal-to-vote test, 127 S. Ct. at 2667, which is the application of the first principle to ECs.

The district court evidenced further misunderstanding by asserting that "*WRTL-II* did not, as plaintiffs argue, overturn *McConnell*," JA–36. Appellants never argued that *WRTL-II* overturned *McConnell*, only that *WRTL-II*'s application of the unambiguously-campaign-related principle with the appeal-to-vote test meant that *WRTL-II*-ads must be free from both prohibition and compelled disclosure.

The district court also demonstrated misunderstanding by applying to the compelled-disclosure context, JA-33, a citation from *McConnell*, 540 U.S. at 136 (*quoting Buckley*, 424 U.S. at 25), about the standard of review for *contribution limits*. *Buckley* plainly applied an intermediate standard of scrutiny to contribution limits, on the basis that indirect speech was involved. 424 U.S. at 21, 25.[18] But contribution limits have nothing to do with the "exacting scrutiny" that *Buckley* mandated for compelled disclosure, *id.* at 64. And the speech involved here is CTP's own, not indirect speech. Had the district court followed *Leake*, it could have avoided all these mistakes of law.

Finally, a brief response will be made to the FEC's attempted refutation of the

[18] The district court was likely led astray by the FEC's argument that this Court's decision in *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 440 (4th Cir. 2008) required intermediate scrutiny for compelled disclosure, Opp'n Prel. Inj. 15, even though this Court clearly said that it employed intermediate scrutiny because *campaign contributions* were at issue, 524 F.3d at 440.

unambiguously-campaign-related principle below. The FEC argued that (1) "the [Supreme] Court has often upheld disclosure requirements *even when striking down substantive restrictions of the funds to be disclosed*," Opp'n Prelim. Inj. 16 (emphasis in original); (2) "*Buckley* did not enshrine the phrase 'unambiguously campaign related' as a stand-alone constitutional 'requirement,'" *id.* at 17; and (3) "courts are nearly unanimous in upholding mandatory disclosure of lobbying expenditures," *id.* at 18.

The first argument is beside the point because the question is not whether activity that may not be prohibited may be subject to disclosure. The question is whether activity that is not unambiguously campaign related may be subjected to compelled disclosure, which question *Leake* already answered in the negative. The FEC cites *MCFL*, 479 U.S. 238, for the proposition that, even though *MCFL*-corporations cannot be prohibited from making "independent expenditures," MCFL was required to report them. But the prohibition on independent expenditures was construed in *MCFL* to reach only express advocacy, *id.* at 249 ("to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons"), so they *were* unambiguously campaign related. The same is true as to the FEC's argument from the ballot-initiative context, where compelled disclosure may only be applied to independent expenditures that expressly advocate for or against the ballot initiative. *See*, *e.g.*, *California Pro-Life Council v. Getman*,

328 F.3d 1088, 1098 (9th Cir. 2003) ("express advocacy" construction saved independent-expenditure definition from "overreach[ing]"). These cited contexts are actually consistent with *Buckley*'s and *Leake*'s requirement that only unambiguously-campaign-related communications are subject to compelled disclosure.

The FEC's second argument knocks down its own straw man because the unambiguously-campaign-related principle is not a stand-alone test. It has consistently been mandated through tests applicable to specific contexts, such as the express-advocacy test, the major-purpose test, and the appeal-to-vote test. *Leake* recognized this. 525 F.3d at 281-83, 287.

The FEC's argument about lobbying has nothing to do with the regulation of *elections* and so would require some authority other than the authority to regulate *elections* that *Buckley* recognized as permitting regulation of unambiguously campaign related activity, 424 U.S. at 13. Under the Federal *Election Campaign* Act and the Bipartisan *Campaign* Reform Act, the Federal *Election* Commission may not rely on *lobbying* law to define the scope of communications subject to compelled disclosure in the *election* context. *Leake* made it clear that "[p]ursuant to their *power to regulate elections*, legislatures may establish *campaign finance* laws, so long as those laws are addressed to communications that are unambiguously *campaign* related." 525 F.3d at 282-83 (emphasis added). And even com-

pelled disclosure as to lobbying communications is restricted to unambiguously-lobbying-related communications.

B. The Disclosure Requirements Are Unconstitutional as Applied.

The FEC "agrees that CTP's Ads are neither express advocacy nor 'the functional equivalent of express advocacy.'" Opp'n Prelim. Inj. 8. They are *WRTL-II*-ads. *Id. Leake* said that *WRTL-II*-ads are not unambiguously-campaign-related communications and cannot be regulated. 525 F.3d at 283. So the Disclosure Requirements are unconstitutional as applied to *WRTL-II*-ads for failing to meet the unambiguously-campaign-related principle as implemented through *WRTL-II*'s appeal-to-vote test.

The Disclosure Requirements also fail "exacting scrutiny" because *Buckley* applied exacting scrutiny after restricting the scope of the regulated communication with the express-advocacy test to implement the unambiguously-campaign-related principle. *See supra*. So whatever exacting scrutiny requires, the interests that justify compelled disclosure do not justify disclosure as to ads that are not unambiguously campaign related under the applicable test, and the Disclosure Requirements thus fail exacting scrutiny for lack of any justifying interest.

Although there is no need to reach "exacting scrutiny" for the reasons just set out, the level of scrutiny will be examined. The Supreme Court recently reaffirmed that the level of "exacting scrutiny" to be applied depends on the "seriousness of

the actual burden imposed." *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008). *Davis* reaffirmed that "'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Id.* at 2774-75 (2008) (*quoting Buckley*, 424 U.S. at 64). Consequently, the Court said "we have *closely scrutinized* disclosure requirements." *Id.* at 2775 (emphasis added).[19]

As to the "seriousness of the actual burden imposed" by the Reporting Requirements, there is a severe burden where disclosure is required for communications that are not unambiguously campaign related because the government is acting without constitutional authority in the face of the First Amendment's free-speech presumption. There is also a severe burden because the Disclosure Requirements include the disclosure of donors. *Buckley* 424 U.S. at 64-66, 68 (identifying per se burdens), 237 (Burger, C.J., concurring in part and dissenting in part) (stating examples of burdens).[20] And whenever disclosure is a condition of

[19] Since the unambiguously-campaign-related principle constitutionally eliminates the FEC's subject-matter jurisdiction over activities not within the principle, this case is analogous to *Machinists*, 655 F.2d 380, which applied "extra-careful scrutiny," *id.* at 387, under a compelling-interest standard, *id.* at 389, in determining that the FEC lacked jurisdiction to investigate a draft committee, *id.* at 396.

[20] Evidence of such burdens was put in *McConnell*'s record by NRA, Associated Builders and Contractors, Associated General Contractors of America, U.S. Chamber, and ACLU. *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-29 (D.D.C. 2003) (per curiam). Evidence ranged from large numbers of contributions just below the disclosure trigger, to vandalism after disclosure, to non-contribution because of concerns about ability to retain confidentiality, to concerns about employers, neighbors, businesses, and others knowing of support for causes not popular

freely engaging in core political speech, that burden is a per se weighty burden requiring that "exacting scrutiny" be strict. *WRTL-II* recognized this per se severe burden when it held that if a provision "*burdens political speech* it is subject to strict scrutiny." *WRTL-II*, 127 S. Ct. at 2664 (emphasis added). *WRTL-II*-ads are "political speech." *Id.* at 2659, 2665-66, 2673-74. *See also Leake*, 525 F.3d at 277, 282-84, 288-89 ("ordinary political speech"), 283 ("regulation of speech as 'the functional equivalent of express advocacy' warrants careful judicial scrutiny"). So although *WRTL-II*'s statement that *Buckley*'s use of "exacting scrutiny" was "strict scrutiny" referred to an expenditure-limitation context, 127 S. Ct. at 2669 n.7, under *WRTL-II*'s formulation the context didn't matter. *Buckley* prescribed no lower standard in the compelled-disclosure context as it had for contribution limits.[21] In

---

everywhere and the results of such disclosure. *Id. See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (disclosing volunteers, employees, and members would make it hard to recruit personnel) (applying strict scrutiny to strike FEC rule releasing investigation materials after investigation); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at http://www.ij.org/publications/other/disclosurecosts. html).

[21] While *Buckley* employed intermediate scrutiny for limits on contributions that were not the donor's own speech, 424 U.S. at 21, 25, the Ads *are* CTP's speech and not subject to intermediate scrutiny. The "intermediate scrutiny" formulation of the court below, JA–34, was the unambiguously-campaign-related requirement that *Buckley* "*also*" required *in addition* to "exacting scrutiny," 424 U.S. at 64. True intermediate scrutiny "requires the government to produce evidence that a challenged regulation 'materially advances an important or substantial interest by redressing past harms or preventing future ones. These harms must be

McIntyre v. Ohio Elections Commission, 514 U.S. 334, 347 (1995), the Supreme Court cited *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), as equating "exacting scrutiny" with "strict scrutiny." *McIntyre* held that "exacting scrutiny" requires "narrow tailoring." 514 U.S. at 347. *Bellotti* held that "exacting scrutiny" requires a "'compelling' interest." 435 U.S. at 795.

As to the Disclaimer Requirement, the Supreme Court required strict scrutiny for a disclaimer in *McIntyre*, affirming that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and . . . uphold [it] only if . . . narrowly tailored to serve an overriding state interest." 514 U.S. at 347.

So the "exacting scrutiny" applicable to the Disclosure Requirements is strict scrutiny.[22] In applying strict scrutiny, the FEC has the burden of proving that the Disclosure Requirements are narrowly tailored to a compelling interest. *See WRTL-II*, 127 S. Ct at 2664. It has that burden at the preliminary injunction stage.

"real, not merely conjectural," and the regulation must "alleviate these harms in a direct and material way."'" *Bason*, 303 F.3d at 515 (citations omitted).

[22] "Exacting" means "unremittingly severe," while "strict" means "stringent in requirement" and "exact." *Merriam-Webster's Collegiate Dictionary* 402, 1161 (10th ed. 2001). "Exacting" is synonymous with "strict." *Random House Roget's College Thesaurus* 24 (2000). Lower court have equated exacting and strict scrutiny. *See McConnell*, 251 F. Supp. 2d 176, 358 n.139 (D.D.C. 2003) (opinion of Henderson, J.) ("In no case of which I am aware does the [Supreme] Court hold that exacting scrutiny is any *less* rigorous than strict scrutiny"), *id.* n. 140 (courts "apply exacting (i.e., strict) scrutiny to disclosure and reporting requirements"); *Nat'l Ass'n Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 51 (D.D.C. 2008) (reviewing Supreme Court authority).

See supra at 18-19. And the Disclosure Requirements fail "exacting scrutiny" because the interests supporting compelled disclosure do not extend to *WRTL-II*-ads, which are not unambiguously campaign related under *WRTL-II*'s appeal-to-vote test. *See supra* at 8.

Although the three interests that *Buckley* recognized to justify disclosure don't apply to communications that are not unambiguously campaign related, it is instructive to consider them in light of *WRTL-II*-ads. "First, disclosure 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." *Buckley*, 424 U.S. at 66-67 (emphasis added) (footnote omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67.[23] "Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above." *Id.* at 67-68.

Buckley's first interest by its terms deals with "*campaign*" funds and "*candidate*" spending, "to aid the *voters* in evaluating those who seek federal office," 424 U.S. at 66-67 (emphasis added), so it has an inherent unambiguously-*cam-*

[23] "Contributions" and "expenditures" were terms of art that *Buckley* construed in keeping with the unambiguously-campaign-related principle. *Id.* at 23 n.24 ("contribution"), 44 ("expenditure"), 78 ("contribution"), 80 ("expenditure").

paign-related limitation to which it should be restricted. As applied here, the Disclosure Requirements reach independent, issue-advocacy communications lacking the relevant-correlation nexus to federal election "campaigns," so they are unsupported by this interest.

The second and third of these interests deal with preventing corruption. For independent expenditures any corruption interest is non-cognizable because *Buckley* held that "[t]he absence of prearrangement and coordination . . . with the candidate . . . undermines the value of the expenditure to the candidate . . . [and] alleviates the danger [of] quid pro quo," so that restrictions on independent expenditures do not "prevent[] circumvention of the contribution limitations . . . ," *id.* at 47. If this is true of independent express advocacy, then *a fortiori* it is true of *WRTL-II*-ads, which are independent "issue advocacy," 127 S. Ct. at 2667, i.e., ordinary "political speech," *id.* at 2659, 2673. Moreover, *WRTL-II* questioned whether a corruption interest even could apply to independent expenditures, *id.* at 2672, but held that, in any event, it did not apply to speech that is not the functional equivalent of express advocacy:

> [T]o justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them.

Id. at 2672 (emphasis in original). No corruption interest applies to *WRTL-II*-ads.

WRTL's identification of preventing *quid-pro-quo* corruption as the government's compelling interest in regulating in the campaign-finance area is consistent with *Davis*. 128 S. Ct. 2759. In *Davis*, the Supreme Court considered possible compelling interests for burdening (not restricting) a self-funding candidate's ability to make expenditures for his own speech. *Id.* at 2773. The Court reaffirmed that the only compelling interest in this area is preventing corruption and its appearance. *Id. See also Leake*, 525 F.3d at 281 ("[O]nly unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable."). So in the present context, where the Disclosure Requirements burden Appellants' right to make and receive political speech, those requirements must be narrowly-tailored to preventing corruption, which is nonexistent for *WRTL-II*-ads.

Since no interest supports applying the Disclosure Requirements to *WRTL-II*-ads, the Disclosure Requirements fail any level of scrutiny. Looked at another way, regulating activity that is *not* unambiguously campaign related or corrupting cannot be narrowly (or even closely) tailored to an interest in regulating activity that *is* unambiguously campaign related and potentially corrupting. And because Congress constitutionally lacks subject-matter jurisdiction to regulate *WRTL-II*-ads, no interest justifies the Disclosure Provisions. *Cf. Machinists*, 655 F.2d at 389 ("[I]f . . . the FEC lacks jurisdiction to enforce [an underlying statute] . . . , then no

compelling interest for the subpoenaed information can possibly exist.").

C. The FEC's PAC-Enforcement Policy Is Unconstitutional and Void.

FECA defines "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).[24, 25]

Applying the unambiguously-campaign-related principle, *Buckley* narrowed the potential for a group to be saddled with PAC burdens that *WRTL-II* declared "onerous", 127 S. Ct. at 2671 n.9 ("PACs impose well-documented and onerous burdens, particularly on small nonprofits."). *Buckley* narrowly construed "contribution," 424 U.S. at 23 n.24, 78, and "expenditure," *id.* at 44, 80, and limited PAC-status with the major-purpose test, *id.* at 79.

After *Buckley*, the only "expenditures" triggering PAC status are express-advocacy "independent expenditures," 2 U.S.C. § 431(17). The only "contributions" triggering PAC status are "[f]unds provided to a candidate or political party or campaign committee" or "dollars given to another person . . . earmarked for politi-

[24] A "separate segregated fund" may also be a PAC. 2 U.S.C. § 431(4)(B).

[25] Imposition of PAC burdens is subject to strict scrutiny. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990) ("Although [PAC] requirements do not stifle corporate speech entirely, they do burden expressive activity. See MCFL, 479 U.S., at 252 (plurality opinion); id., at 266 (O'CONNOR, J.). Thus, they must be justified by a compelling state interest.").

cal purposes." 424 U.S. at 23 n.24.[26] And the only groups subject to imposed PAC status are those under candidate control or with the "major purpose of nominating or electing candidates." *Id.* at 79. *Leake* held that the test for "*the* major purpose" (not *a* major purpose) of a group, 525 F.3d at 287, is determined as "an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *id.* at 287 (emphasis added).

Under these PAC criteria, intrusive and burdensome investigations were unnecessary to determine PAC status because a few bright-line facts could readily determine major purpose. PAC status may be determined by either an entity's independent expenditures, *MCFL*, 479 U.S. at 262,[27] or its central purpose revealed in its organic documents, *id.* at 252 n.6 ("[O]n this record . . . MCFL['s] . . . central organizational purpose is issue advocacy."). The first test requires a simple comparison of the entity's total disbursements for a year for regulable expenditures, i.e., true "contributions" and "expenditures," compared to its total expenditures to

[26] As *Buckley* construed regulated activity narrowly with its unambiguously-campaign-related analysis, "political purposes" here refers to the unambiguously-campaign-related activities that *Buckley* discussed, i.e., making "contributions" or "expenditures," or as *Leake* put it,"actions that are 'unambiguously related to the campaign of a particular . . . candidate,'" 525 F.3d at 281, i.e., "regulable, election-related speech," *id.* at 287.

[27] "[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.*

see if more than 50% ("*major* purpose") of its disbursements are for regulable, election-related activity. The nominator and denominator can be quickly determined with minimal effort and evidence (e.g., by affidavit and typically by reference to an IRS Form 990 showing annual receipts and expenditures). The second test requires simply an examination of the entity's organic documents to determine if there was an express intention to operate as a political committee, e.g., by being designated as a "separate segregated fund" (an internal "PAC") under 2 U.S.C. § 441b(2)(c). The First Amendment requires such bright-line tests to prevent burdensome, intrusive investigations and litigation that can "constitute[] a severe burden on political speech," *WRTL-II*, 127 at 2666 n.5.

The FEC's contrary PAC-enforcement policy is set out in *PAC-Status 1* and *PAC-Status 2*. *See supra* at 6. As stated in the *Verified Complaint*, the policy "goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity received a 'contribution' or made an 'expenditure,' is unconstitutionally vague and overbroad, and 'in excess of the statutory . . . authority . . .' of the FEC, so as to be void under 5 U.S.C. § 706." JA–22.[28]

[28] The invalid regulations on "expenditure" and "contribution" are 11 C.F.R. §§ 100.22(b) (secondary express-advocacy definition based on vague and overbroad standards) and 100.57 (converting donations to "contributions" if made in response to a solicitation to "support or oppose" candidates). Section § 100.22(b) is unconstitutional because express advocacy requires so-called magic words,

The FEC's version of the major-purpose test is a central element of its enforcement policy. In *PAC-Status 2*, the FEC explained that, after having initiated a rulemaking proceeding, it declined to adopt a rule for the major-purpose test because "the major purpose doctrine . . . requires the flexibility of a case-by-case analysis of an organization's conduct." 72 Fed. Reg. at 5601. Instead, it set out its vague and overbroad enforcement policy. The policy requires the FEC to engage in "a fact intensive inquiry" in order to weigh various vague and overbroad factors with undisclosed weight. It requires "investigations into the conduct of specific organizations that may reach well beyond publicly available statements," including such things as an investigation into all an organization's "spending on Federal campaign activity" (not limited to "regulable, election-related speech," as required by *Leake*, 525 F.3d at 287) and other spending, as well non-public statements, including statements to potential donors. 72 Fed. Reg. at 5601.[29]

Leake, 525 F.3d at 182-83, but it is not at issue here unless someone claims that CTP's Ads are express advocacy. Section 100.57 is unconstitutional, but it should not be at issue, although the FEC sometimes uses it as a pretext to conduct fishing expeditions, *see infra*, which would place it at issue if done here. The *Verified Complaint*, at ¶ 28, affirms that "[e]xpenditures for solicitations to CTP will be insubstantial," so § 100.57 is inapplicable here, either in triggering the $1,000 PAC-status threshold or establishing major purpose test. If the FEC asserts that § 100.57 may be applicable, CTP challenges it as unconstitutionally vague and overbroad.

[29] *PAC-Status 2* identified the "major purpose" at issue in its major-purpose test as being "*Federal campaign activity*," *id.* at 5605 (emphasis added), not the narrower "*nomination or election of a candidate*," which *Buckley* required as "the major purpose," *Buckley*, 424 U.S. at 79 (emphasis added). While *MCFL* used

PAC-Status 2 indicated that the FEC would consider other factors when it discussed its application of the policy to some 527 organizations in previous investigations. 72 Fed. Reg. at 5603-04. These included the fact that an entity spent much of its money "on advertisements directed to Presidential *battleground States* and direct mail *attacking* or expressly advocating," *id.* at 5605 (emphasis added), the fact that groups ceased activity after an election, *id.*, and the fact that they did not make disbursements in state and local races, *id.* In addition, the FEC thought it permissible to divine major purpose from internal planning documents and budgets, *id.*, which would normally be protected by First Amendment privacy rights and were only obtained because the organization was subjected to a burdensome, intrusive investigation (sometimes absent evidence of triggering contributions or expenditures, *see infra*). Major purpose was even based on a private thank-you letter to a donor, *after* the donation had already been made. *Id.*

In sum, the enforcement policy is based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-

---

"campaign *advocacy*," 479 U.S. at 252 (plurality opinion) (emphasis added), to "further the *election* of candidates," *id.* at 253 (plurality opinion) (emphasis added), and "campaign activity," *id.* at 262 (majority opinion), when speaking of the purpose at issue in the major-purpose test, it did so solely as *synonyms* for *Buckley*'s "nomination or election" requirement, which it cited and quoted, *MCFL*, 479 U.S. at 252 n.6 (*citing Buckley*, 424 U.S. at 79). There is no authority for the FEC's reformulation of the major-purpose test to focus on "Federal campaign *activity*, and it clearly is beyond *Leake*'s mandated focus on "*regulable, election-related speech*," 525 F.3d at 287 (emphasis added).

ranging, intrusive, and burdensome investigations (usually begun when a complaint is filed by a political or ideological rival) without adequate bright lines to protect issue advocacy in this core First Amendment area. In the words of *Leake*, the policy is a forbidden "'we'll know it when we see it approach'" that "is essentially handing out speeding tickets without 'telling anyone . . . the speed limit.'" 525 F.3d at 290 (citations omitted). It "simply does not provide sufficient direction to either regulators or potentially regulated entities. Unguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject." *Id.* Moreover, the policy encourages investigations, which can, in themselves, shut down an organization.

The FEC's policy is unconstitutionally vague for employing indeterminate, ad hoc factors. "If the First Amendment protects anything, it is the right of political speakers to express their beliefs without having to fear subsequent civil and criminal reprisals from regulators authorized to employ broad and vague definitions as they see fit." *Leake*, 525 F.3d at 302. The FEC's policy is overbroad because it determines major purpose based on activity that is not unambiguously campaign related and is inconsistent with *Leake*'s holding that the major purpose is determined "as an empirical judgment as to whether an organization primarily engages in *regulable, election-related speech*," *id.* at 287 (emphasis added). And because *Buckley*'s, *MCFL*'s, and *Leake*'s major-purpose test is an authoritative construc-

tion of the definition of "political committee," and a constitutional limit on the application of FECA political committee requirements, the FEC's contrary policy is beyond statutory authority and void. 5 U.S.C. § 706 (APA).

In briefing below, the FEC questioned whether CTP has Article III standing to challenge the policy because CTP did not allege that it had reached the $1,000 trigger in contributions or expenditures and because CTP said in its *Verified Complaint* that it lacked the requisite major purpose. Opp'n Prel. Inj. 23 n.11. CTP no more thinks that it is a PAC than did the organizations deemed PACs by the FEC, as set out in *PAC-Status 2*. The problem is knowing what the *FEC* thinks about CTP's status, which is based on an uncertain policy that requires investigations. The FEC has not said that it does not believe CTP is a PAC or that the FEC will not investigate and enforce its policy. CTP reasonably fears that the FEC will investigate as a means to deciding whether it thinks that CTP is a PAC under its policy because the FEC says it can't know absent an investigation.

The FEC has launched investigations even absent evidence of a "contribution," "expenditure," or "major purpose." For example, the FEC *General Counsel's Report #2* in MUR 5751 (The Leadership Forum) (available at www.fec.gov) noted that "TLF argued that the Complaint cited *no evidence* that it had participated or intended to participate in any federal election," but said that "TLF's response . . . did not answer or foreclose questions about whether it *may* have re-

ceived more than $1,000 in contributions or made more than $1,000 in expenditures." *Id.* at 1-2 (emphasis added). So even *without evidence* of the statutory $1,000 threshold being met, the FEC launched a fishing expedition based on its PAC-enforcement policy. It found insufficient evidence and closed the file, but an intrusive, burdensome investigation had already occurred, all without any evidence at the outset. MUR 5751 is no mere aberration because in *PAC-Status 2* the FEC cites it as a case supporting its policy. 72 Fed. Reg. 5605.

All that stands between CTP and a constitutionally-unwarranted investigation and enforcement action (since the FEC disagrees with the constitutional claims herein) is the FEC's decision to act regarding a *known* violation of the Disclosure Requirements. The nature and past application of the FEC's enforcement policy gives Appellants standing to challenge the policy.

In sum, Appellants have likely success on the merits of their constitutional challenges to the Disclosure Requirements and the PAC-enforcement policy. If there is no constitutional basis on which Congress and the FEC could regulate CTP's activities, then there is no foundation for an investigation or enforcement action. *Sublato fundamento cadit opus*, "the foundation being removed, the superstructure falls." Black's Law Dict.1278 (5th ed. 1979).

III. CTP Has Irreparable Harm.

Bason demonstrates that once likeloihood of success on the merits is established in First Amendment cases the remaining preliminary-injunction analysis is succinct and settled. 303 F.3d at 520-21.

In First Amendment cases, irreparable harm is "'inseparably linked'" to the likelihood of success on the merits. *Id.* at 511 (citation omitted).[30] Once that is established, there is automatic "'irreparable injury'" because "'loss of First Amendment rights, for even minimal periods of time, constitutes irreparable injury,'" *id.* at 520-21 (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted)). *Bason* also noted the irreparable harm of the "threat of a substantial fine . . . on the basis of past conduct." *Id.* at 521. Both irreparable injuries are present here.

Appellants have established a high likelihood of success on the merits, i.e., (1) that the Disclosure Requirements are unconstitutional as applied to *WRTL-II*-ads and (2) that the PAC-enforcement policy is unconstitutional and beyond statutory authority. So *any* investigation or enforcement action for failure to comply with the Disclosure Requirements or to determine if CTP is a PAC under the policy would be unlawful. Unlawful investigations of, and enforcement actions against, citizens by federal agencies for the citizens' expressive association constitute ir-

[30] Highly likely merits success reduces the need to demonstrate irreparable harm. *See Blackwelder*, 550 F.2d at 196 ("flexible interplay" among factors).

reparable harm per se. U.S. Const. amend. I. An agency barred by the First Amendment from compelling disclosure in the *McIntyre* case, could not lawfully have used Mrs. McIntyre's free-speech activities as a pretext to investigate her finances and activities because she *might* have done something regulable. *Cf. McIntyre*, 514 U.S. 334. If CTP is subjected to a foundationless investigation and enforcement action it will lose its right to First Amendment privacy because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," *Davis*, 128 S. Ct. at at 2774-75 (2008) (*quoting Buckley*, 424 U.S. at 64).[31]

And because there is a *known* violation of the Disclosure Requirements (and because the FEC still enforces them and its PAC-enforcement policy) there is a threat of a substantial fine. This could arise from an enforcement action (because the FEC disagrees with Appellants' constitutional challenge) or come in the sort of coercive conciliation agreement that the FEC points to in *PAC-Status 2*. Small advocacy groups commonly acquiesce in such agreements to avoid burdensome, in-

[31] At the preliminary injunction hearing, the FEC argued that *during* an investigation courts could be called upon to protect rights through protective orders, Tr. 41-42, and that *Machinists* showed how a wrongful investigation could be shut down. Tr. 42. But *Machinists* recognized that there should not even *be* an investigation if there is no authority for one. 655 F.2d at 396-97 (absent subject-matter jurisdiction there should not have been any investigation). *Machinists* confirms that a constitutionally-unwarranted investigation is a cognizable burden that may not be imposed absent jurisdiction and constitutional justification. *Id.* at 389, 396 & n.32.

trusive, costly investigations and enforcement actions.

An investigation of, and enforcement action against, CTP is likely and imminent because CTP has by this lawsuit notified the FEC that it is not in compliance with the Disclosure Requirements. The FEC has held off initiating any investigation or enforcement action for its own reasons (which it has not explained), but it could initiate such action at any time.[32] And as noted above, it has launched investigations to determine PAC status under its enforcement policy when there was no evidence that the statutory trigger had been met because evidence *might* be found. So the absence of a current investigation or enforcement action does not eliminate the risk of irreparable harm absent the requested preliminary injunction. A preliminary injunction to stop demolition of a house need not await demolition before it may issue. The injunction is to stop the imminent threat before it happens.

Moreover, as argued to the district court, Tr. 51, the present Court has recognized that the threat of prosecution is inherent in the statute, regardless of whether an election board plans to initiate enforcement pursuant to a challenged provision. *See North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000). The threat of harm to expressive association

[32] The FEC lacks the "roving" investigatory powers of other federal agencies (its "'random' auditing authority" was removed), so it normally investigates on the basis of complaints, but it may investigate based on "'information ascertained in the normal course of carrying out its supervisory responsibilities.'" *Machinists*, 655 F.2d at 387-88 & n.15 (citations omitted).

that was recognized as sufficient for standing in *Bartlett* is just as harmful in the preliminary injunction context. And loss of First Amendment rights is always irreparable. *See infra*.

An investigation, in and of itself, is a First Amendment burden that must be constitutionally and statutorily justified. Unique among federal administrative agencies, the FEC has as its sole purpose the regulation of core constitutionally protected activity—"the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Machinists*, 655 F.2d at 387. As a result, FEC investigations into alleged campaign-finance law violations frequently involve subpoenaing materials of a "delicate nature . . . representing the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and office holding." *Id.* at 388; *see id.* at 387 ("extra-careful scrutiny" is warranted where political activities and association are subject to investigation). When investigations impinge on freedom of speech, that power must be "carefully circumscribed" if it is to avoid violating First Amendment rights. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *see also AFL-CIO v. FEC*, 333 F.3d 168, 176-178 (D.C. Cir. 2003) (describing the chilling effect governmental investigations and forced disclosures have on protected First Amendment activities). "'The Supreme Court has long recognized that compelled disclosure of political affiliations and activities

can impose just as substantial a burden on First Amendment rights as can direct regulation.'" *Id.* at 175-76 (*citing Buckley*, 424 U.S. at 64-68, (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958)).

The First Amendment requires bright-line express-advocacy, appeal-to-vote, and major-purpose tests to minimize the danger of constitutionally unjustified investigations and allow dismissal of complaints at an early stage. Without bright-line rules, election commissions are free to conduct incredibly burdensome and intrusive investigations. The investigation of the Christian Coalition in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), is a dramatic and tragic illustration of the burden and intrusion caused by an investigation. The FEC's investigation spanned six and a half years as it tried to ferret out any evidence of contacts between people associated with the Coalition and various candidates to support its opportunity-for-coordination standard.[33] The FEC took 81 separate depositions of 48 different individuals, from the former President and Vice President of the United States and staff members of various campaigns, to past and present Coalition employees and volunteers. The breadth of the probe into every aspect, past, present, and even future, of the deponents' political activities was mind-boggling. Irrelevant and personal questions were asked of the deponents, including

[33] James Bopp, Jr., counsel for CTP, was counsel for the Christian Coalition in the case discussed.

questions about their spouses', family members' (including children and in-laws), fellow volunteers', and other individuals' political and religious affiliations, campaign activities, political-party activities, candidacies, private business dealings, and legislative and lobbying activities "[*b*]*ecause its something that we need to know*." *See* Christian Coalition Summ. J. Mem. at 60, 52 F. Supp. 2d 45. This bone-chilling statement by an FEC attorney in *Christian Coalition* is a harbinger of future investigations absent adherence to the Supreme Court's mandated bright-line tests implementing the unambiguously-campaign-related principle.

The Coalition was also required to produce tens of thousands of pages of documents, many of them containing sensitive and proprietary information about finances and donor information. In all, the Coalition searched both its offices and warehouse, where millions of pages of documents were stored, in order to produce over 100,000 pages of documents. Third parties were also required to comply with burdensome FEC document requests and produce irrelevant yet confidential and proprietary information such as polls, surveys, and internal memoranda. The Bush Presidential archivists were required to search through two warehouses full of boxes without the benefit of a catalogue. Such investigations impose substantial burdens on third parties and can have serious adverse consequences. All in all, the investigation was exceedingly burdensome, costing the Coalition hundreds of thousands of dollars in attorneys fees and countless lost hours of work by Coali-

tion employees and volunteers. In Washington, it is often said that "the procedure is the punishment." *Christian Coalition* proves that statement correct. Although the Christian Coalition won every allegation about coordination, it was still punished by a burdensome and intrusive investigation. *Christian Coalition* demonstrates what happens when bright-line First Amendment rules are not followed.[34]

Such harm is irreparable. At the preliminary injunction hearing, the FEC argued that "[i]f they win, then we deserve to pay penalties. And that is not irreparable harm." TS 43. But they won't "pay penalties." Attorney fees and expenses incurred in complying with an unwarranted investigation are not available in cases against the FEC, except under the difficult "substantially-justified" standard. *See FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997). No one pays for all of the staff time required to respond to an FEC investigation or discovery. The FEC doesn't reimburse the organization for the lost opportunity to advocate its issues when it was immobilized by an FEC investigation. Loss of First Amendment rights is irreparable. Monetary damages, even if available, cannot compensate for the loss of First Amendment rights. And if an organization like the Christian Coalition is destroyed by an FEC fishing expedition, even though proven innocent of wrongdoing, the FEC won't, and can't, repair the harm.

[34] After Herman Clark lost a primary and spent four years embroiled in an FEC investigation, he lacked resources to litigate and wanted to put the matter behind him. *FEC v. Public Citizen*, 64 F. Supp.2d 1327, 1334 (N.D. Ga. 1999).

The FEC argues that a Federal *Trade* Commission case establishes that an investigation is not a cognizable irreparable injury. Tr. 41 (*citing FTC v. Standard Oil Co. Cal.*, 449 U.S. 232, 244 (1980). But that simply brings us full circle to the central problem of this case, i.e., failure to recognize that this is a *First Amendment* case and to apply speech-protective standards. *Machinists* rejected just the sort of argument that the FEC asserts, holding that the

> novel extension of the Commission's investigative authority warrants extra-careful scrutiny from the court because the activities which the FEC normally investigates differ in terms of their constitutional significance from those which are of concern to other federal administrative agencies whose authority relates to the regulation of corporate, commercial, or labor activities.

655 F.2d at 388. The D.C. Circuit quoted the Supreme Court's clear statement that "'a governmental investigation into corporate matters may be of such a sweeping nature and be so unrelated to the matter properly under inquiry as to exceed investigatory power.'" *Id.* at 385 (*quoting United States v. Morton Salt Co.*, 388 U.S. 632, 652 (1950). And it noted that the subject matter of the FEC's investigation "is of a fundamentally different character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations." *Id.* at 388. The Eleventh Circuit agreed with *Machinists* that an FEC investigation is a cognizable First Amendment burden that mandates careful scrutiny of the underlying authority for the investigation. *Florida for Kennedy*, 781 F.2d at 1284-85 (disallowing investi-

gation). In any event, even the Federal *Trade* Commission may not lawfully pursue investigations into unregulable activities, certainly not activities protected from regulation by the First Amendment.

IV. The Balance of Harms Favors Appellants.

Bason made short work of the balance of harms after finding a First Amendment violation likely: "With respect to the harm that would befall if the injunction is left in place, we agree with the district court that a state is 'in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional. If anything, the system is improved by such an injunction.'" 303 F.3d at 521 (citation omitted).

Here, the balance of harms also tips sharply in Appellants' favor. On the FEC's side is an asserted enforcement interest that is nonexistent or de minimis because of highly likely merits success. If the challenged provisions and policy are unconstitutional, Defendant has *no* cognizable interest in enforcing them.[35] To the extent the FEC has any remaining interest in investigating CTP, that interest is not jeopardized because the preliminary injunction would only protect CTP until a

[35] As another district court held recently in issuing a preliminary injunction, "'if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere to its enjoinment.'" *Ohio Right to Life*, No. 08-492, 2008 WL 4186312 at *11 (citation omitted); *see also CFIF*, No. 1:08-190, slip. op. at 13 (S.D. W. Va. April 22, 2008) (Dkt. 37; mem. granting prelim. inj.) ("carefully tailored injunction will not unduly restrict the defendants' power to regulate the election process in legitimate ways").

merits decision. If CTP wins, the FEC had no interest in investigating CTP anyway. If CTP loses, the FEC may proceed with an investigation and an enforcement action. The preliminary injunction only preserves the status quo—no investigation—until a merits decision.[36]

On CTP's side, an investigation would compel the very disclosure that CTP contests. CTP would lose the First Amendment privacy to which it is entitled absent a government showing that piercing that privacy is constitutionally justified. No compensation can make up for lost First Amendment rights, and CTP would not even receive compensation for attorneys fees and expenses, lost staff time, and lost opportunity for furthering its First Amendment activities.

The FEC has nothing to lose. CTP has much to lose of a highly-valued nature. The balance of harms tips sharply in CTP's favor.

V. The Public Interest Favors Appellants.

Bason also made short work of the public interest factor: "we agree . . . that upholding constitutional rights surely serves the public interest." 303 F.3d at 521. *See also CFIF*, Nos. 08-190 & 08-1133, 2008 WL 4642268, at *27 ("protection of First Amendment rights is very much in the public's interest"). Here, the public interest also follows the high likelihood of merits success shown and favors Appellants. The

[36] Numerous campaign-finance provisions remain in effect to protect the governmental interests the Supreme Court has identified in this area—to the extent that they regulate only unambiguously-campaign-related activity.

public has an interest in the government enacting constitutional laws and policies and enforcing them in a constitutionally-permissible manner. It has an interest in promoting core political speech. It has a First Amendment interest in receiving CTP's speech. An injunction serves these interests. "[I]ssuance of a preliminary injunction will serve the public interest because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Ohio Right to Life*, No. 08-492, 2008 WL 4186312 at *11 (citation omitted).

> Protection of freedom of speech in a democratic society is of critical public interest. In this case, it appears that several provisions . . . are vague, and consequently chill the public's right to speak on political matters. Accordingly, the court finds that the public has a strong interest in having the challenged laws enjoined or clarified.

CFIF, No. 1:08-190, slip. op. at 14 (S.D. W. Va. April 22, 2008) (internal citation omitted) (Dkt. 37; mem. granting prelim. inj.).

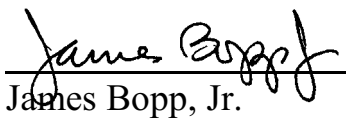
Conclusion

For the foregoing reasons, the district court's denial of a preliminary injunction should be reversed and this case remanded with instructions to issue a preliminary injunction and to require no security because Defendant has no monetary stake.

Oral Argument

Appellants request oral argument due to the complex nature of the issues.

Respectfully submitted,



James Bopp, Jr.
Richard E. Coleson
Clayton J. Callen
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434

Certificate of Service

I hereby certify that on March 16, 2009, I electronically filed the foregoing with the Clerk of Court using the CM\ECF System, which will send notice of such filing to the following registered CM\ECF users:

David Kolker
Harry J. Summers
Claire N. Rajan
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
202/694-1650
Counsel for Defendant-Appellee

I further certify that on March 16, 2009, I served upon the below listed non-CM/ECF participants copies of this document by First-Class Mail postage prepaid and by email at the listed addresses.

Thomasenia P. Duncan
tduncan@fec.gov
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
Counsel for Defendant-Appellee

/s/ James Bopp, Jr.
James Bopp, Jr.
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/235-3685 facsimile
Counsel for Appellants