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

Reply Brief

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Argument[1]

I. Standards: First Amendment Versions Are Required.

Appellants established that First Amendment cases require speech-protective standards. CTP-Br. Part I. The FEC's responses illustrate the problems identified.

As to the appellate standard of review, the FEC tries to argue that *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006), requires deference to district court discretion. FEC-Br. 16. But *Purcell* addressed problems not at issue here and nowhere altered the applicable rules that questions of law are reviewed de novo and mistakes of law are per se abuses of discretion. *See* CTP-Br. 9.

As to preliminary-injunction standards, the FEC tries to alter the required analysis sequence. In *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507 (4th Cir. 2002), this Court established that where irreparable harm "is 'inseparably linked to [a] claim of violation of First Amendment rights,'" success on the merits must be resolved first, *id.* at 511 (citation omitted). The FEC claims that "CTP's . . . alleged harms are not inseparably linked to its First Amendment claims" and argues irreparable harm first. FEC-Br. 18, 24 n.7.

Appellants' claims of harm are inseparably linked to their First Amendment

[1] Appellants object to judicial notice of the amount allegedly spent to broadcast CTP's Ads and the purported locations. The truth of the facts alleged is unverified and they are immaterial and unnecessary for decision.

claims. The *Complaint* relies on First Amendment claims. *See*, *e.g.*, JA–19 ("the Disclosure Requirements are unconstitutional under the First Amendment guarantees of free expression and association"). And *North Carolina Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008), on which Appellants rely for the controlling analysis, CTP-Br. 20-32, anchors the unambiguously-campaign-related principle firmly in the First Amendment:

> The *Buckley*[2] Court therefore recognized the need to cabin legislative authority over elections in a manner that sufficiently safeguards vital First Amendment freedoms. It did so by demarcating a boundary between regulable election-related activity and constitutionally protected political speech: after *Buckley,* campaign finance laws may constitutionally regulate only those actions that are "unambiguously related to the campaign of a particular . . . candidate."

Id. at 281 (citation omitted).[3] As to the analysis sequence, if irreparable harm is based on a First Amendment violation, the logical place to start is with the First Amendment's protections. *See* CTP-Br. 16 ("courts should expect from the FEC good-faith arguments on the merits").

The FEC's arguments further illustrate the need for a clear explication of First

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[2] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[3] For Appellants' Disclosure-Requirements challenge, there is *only* the claim of a violation of First Amendment privacy and protection against compelled speech. CTP-Br. 32-39. For the PAC-enforcement-policy challenge, Appellants claim a violation of the First Amendment (on which *Leake* relied for the controlling analysis, 525 F.3d at 287-89) and that the policy is beyond statutory authority under controlling constructions (on First Amendment grounds). CTP-Br. 39-46.

Amendment protections in the preliminary injunction context, as set out in Part I of *Appellants' Brief*. The FEC nowhere acknowledges the constitutionally-mandated "freedom of speech" presumption, CTP-Br. 12, and tries to argue that this isn't a First Amendment case. *See supra*. It even cites *National Association of Manufacturers v. Taylor*, 549 F. Supp. 2d 68 (D.D.C. 2008) ("*NAM*")—which specifically recognizes that "in cases involving alleged burdens on core First Amendment rights, 'the normal presumption of statutory validity is reversed and the statute is deemed invalid until stringently justified,'" *id.* at 72 n.3 (citations omitted), FEC-Br. 17, which is the free speech presumption in operation—but refuses to acknowledge the presumption.

The FEC argues that in First Amendment cases the relevant status quo is after legislation is passed, not before (*see* CTP-Br. 12-13), and even argues that *prohibiting* the FEC from acting would not be a "prohibitory" injunction. FEC-Br. 16-17 & n.3. But given that primary allegiance is to the "freedom of speech" presumption, preliminary injunctions in cases involving expressive association cannot be trumped by the "status quo" of new legislation. CTP-Br. 12-13. In fact, the same *NAM* decision on which the FEC relies, *supra*, makes clear that the status quo it is dealing with is the situation of a motion for an injunction pending appeal to the same district court that had just "concluded that [the lobbyist disclosure provision]

survives strict scrutiny, i.e., that it is stringently justified in light of compelling government interests." 549 F. Supp. 2d at 72-73 & n.3. Likewise, the in-chambers opinions of individual Justices were in the context of denying injunctions pending appeals. There is no such "status quo" here because the district court was dealing with the issues initially under a preliminary injunction motion.

Although the Supreme Court clearly held that "'the burdens at the preliminary injunction stage track the burdens at trial,'" CTP-Br. 13 (citation omitted), the FEC predictably disputes this. FEC-Br. 17, 18 n.4. The FEC doesn't even mention the controlling Supreme Court decision, instead merely citing the *usual* preliminary injunction standards. *Id.* This attempted evasion illustrates again the FEC's failure to simply join issue on the merits and to acknowledge the unique First Amendment context. The FEC plainly had the burden here, and the district court's failure to make it meet its burden was an error of law.

II. CTP Has Likely Success on the Merits.

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

This is a Fourth Circuit case, governed by the analysis in *Leake*, 525 F.3d 274, yet the FEC argues that the unambiguously-campaign-related principle as a threshold burden is "novel" and "lacks precedential foundation." FEC-Br. 37. It is clearly not "novel" for eight reasons.

First, it is not "novel" because *Leake* expressly relied on the unambiguously-campaign-related principle as being a *necessary foundation* for *all* campaign finance regulation—"after *Buckley,* 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). And *Leake* expressly applied this threshold principle to regulation of communications, *id.* at 281-83, and to imposing political committee ("PAC") status, *id.* at 287.

The FEC attempts to distinguish *Leake* (styling it "*Leake II*") as not focusing on "reporting requirements standing alone." FEC-Br. 39 n.15. Any case can be distinguished on such superficial grounds. But when a prior decision sets out a constitutional analysis that is directly applicable, as here, the FEC has a duty to show why that controlling *analysis* is inapplicable.[4] It must show that when this

[4] The FEC would instead rely on *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008) ("*NCRL-FIPE*"), FEC-Br. 39 n.15, but that case is *properly* distinguishable on several bases. It has no overarching, applicable constitutional analysis about where to draw speech-protective lines for issue advocacy and issue-advocacy groups, and it concerns reporting by candidate committees and PACs, which are "by definition, campaign related," *Buckley*, 424 U.S. at 79, so that the unambiguously-campaign-related principle was not addressed. The only thing arguably applicable from *NCRL-FIPE* is its rejection of "exacting scrutiny" as "strict scrutiny," but that was in the candidate/PAC reporting context. *Id.* at 439-40. *Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008), held that under "exacting scrutiny," "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." Since reporting burdens bear more heavily on

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Court said that the "appeal to vote" test of *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL-II*"), is the implementation of the unambiguously-campaign-related principle in the electioneering-communication context, *Leake*, 525 F.3d at 283, that analysis somehow doesn't apply to the electioneering communications at issue here. It must show that when this Court said that the unambiguously-campaign-related principle controls PAC status, *id.* at 287, and determining major purpose is "an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," *id.*, that analysis somehow doesn't apply to PAC status is this case. The FEC's argument, to the Court that decided *Leake*, that the unambiguously-campaign-related principle is "novel" fails to meet its burden.

Second, the unambiguously-campaign-related principle is not "novel" because it employs the very language of the unanimous *Buckley* Court establishing the lim-

[4] ...continue
issue-advocacy groups (CTP) than on PACs (NRLC-FIPE), *see FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 254-55 (1986) ("*MCFL*") (plurality opinion) ("Detailed recordkeeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear. Furthermore, such duties require a far more complex and formalized organization than many small groups could manage."), the burden and scrutiny are higher here than in *NCRL-FIPE*. Moreover, the level of scrutiny does not resolve this case, which instead revolves around the *threshold* unambiguously-campaign-related principle that must be satisfied *before* "exacting scrutiny" is applied.

its of congressional authority to regulate campaign finance in the very context at issue here, i.e., PAC status and non-PAC disclosure of expenditures for communications. 424 U.S. at 79-81. It describes a governing principle that the Court employed throughout *Buckley*, *MCFL*, *McConnell v. FEC*, 540 U.S. 93 (2003), and *WRTL-II.* CTP-Br. 20-32.

Third, it is not "novel" because the campaign-finance "reform" community (BCRA's prime sponsors and their supporting organizations and counsel) that pushed through the electioneering-communication laws expressly relied on it in *McConnell*. They argued that the electioneering-communication definition was an "adjustment of the definition of which advertising expenditures are *campaign related*." *Brief for Intervenor-Defendants Senator John McCain et al.* at 57, *McConnell*, 540 U.S. 93 (emphasis added) (*"Reform Community Brief*") (*available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1674/02-1674.mer.int.cong.pdf). "Campaign related" meant *unambiguously* campaign related because they argued that the electioneering-communication "[d]isclosure rules . . . 'shed the light of publicity on spending that is unambiguously campaign related but would otherwise not be reported.'" *Id.* at 58 (*quoting Buckley*, 424 U.S. at 81). They conceded the necessity of bright-line tests, arguing that the new "standards for defining which ads will be treated as campaign-related squarely serves a com-

pelling interest in using clear and objective lines to frame any rule that affects speech." *Id.* And they argued that the Court could permit regulation of electioneering communications in addition to express-advocacy communications based on *Buckley*'s analytical "roadmap," which they said had two principle concerns: (1) eliminating vagueness and (2) assuring that restrictions are "'directed precisely to spending that is *unambiguously related to the campaign of a particular federal candidate*.'" *Id.* at 62.

This was argued in *McConnell* by Democracy 21 and the Campaign Legal Center, and by Democracy 21's Fred Wertheimer, on behalf of BCRA's prime sponsors, *see Reform Community Brief* at inside cover (listing these three as counsel), who *now* argue that the unambiguously-campaign-related principle, on which they expressly *relied* in *McConnell*, "has no legal basis" and that "[t]he 'unambiguously campaign related' language appeared in *Buckley* not as some sort of foundational test for the constitutionality of all campaign finance laws, but rather as an *aside* in the court's discussion . . . ." *Brief Amici Curiae for Campaign Legal Center and Democracy 21* at 5. They can't have it both ways.

Fourth, that the analysis is not "novel" and that the reform community's *former* argument was correct is confirmed by the fact that *McConnell* simply adopted its analysis, permitting the Court to approve regulation of "electioneering commu-

nications" in addition to regulable express advocacy. *See* CTP-Br. 28.[5] *McConnell* expressly said that the twin governing principles that gave rise to the express-advocacy test were "avoid[ing] problems of vagueness and overbreadth." 540 U.S. at 192. And it said that this *particular* "overbreadth" principle was "'[t]o insure that the reach' of the disclosure requirement was 'not impermissibly broad,'" for which proposition it cited the very portion of *Buckley* to which the campaign reform community had pointed for the unambiguously-campaign-related principle. *Id.* at 191 (*quoting Buckley*, 424 U.S. at 80).

The *Buckley* portion to which *McConnell* pointed for its analysis said that the concern was that "the relation of the information sought to the purposes of the Act[6] may be too remote." *Buckley*, 424 U.S. at 80. So "[t]o insure that the reach of [the expenditure disclosure provision] [wa]s not impermissibly broad," the non-vague, non-overbroad, express-advocacy construction was employed. *Id.* "This reading [wa]s directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* That this statement was no mere "aside" in *Buckley* is clear from the facts that (a) it concludes the analytical explanation of fixing the overbreadth problem and (b) the analysis was re-

[5] The district court was wrong in holding that this analysis was "made and rejected . . . in *McConnell*." JA–34-35. It was made and *accepted*.

[6] The purpose of the Act was "to regulate elections," *Buckley*, 424 U.S. at 13, so only unambiguously-campaign-related activity is regulable.

peated—the expenditure disclosure provision

> as construed, bears a sufficient relationship to a substantial governmental interest. . . . As narrowed, . . . [it] does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result. . . . It goes beyond the general disclosure requirements to shed the light of publicity on spending that is *unambiguously campaign related*."

Id. at 81 (emphasis added).

Fifth, the analysis is not "novel" because *WRTL-II* employed it. *McConnell* held that the electioneering-communication definition was not vague, 540 U.S. at 194, and it facially upheld it, recognizing that it might be overbroad in certain applications: "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads," *id.* at 206 n.88. *WRTL-II* referenced this *McConnell* statement that this type of overbreadth was left unresolved, 127 S. Ct. at 2659. It then narrowed the scope of "electioneering communication," consistent with the unambiguously-campaign-related principle, by creating the appeal-to-vote test to distinguish speech that is unambiguously campaign related from speech that is not (and so not regulable), *id.* at 2667.[7] So

[7] *WRTL-II*'s recognition that *McConnell* had only *facially* upheld the electioneering-communication scope and *WRTL-II*'s narrowing of that scope consistent with the unambiguously-campaign-related principle precludes the FEC's reliance on *McConnell*'s facial-consideration language. FEC-Br. 29 (requirements upheld "because they did not suppress speech" and interests apply to "entire range of communications"). If the cited language had already decided as-applied chal-

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while, *WRTL-II* plainly did not decide the disclosure issue in this case (Appellants have never argued that it did, although the district court, the FEC, and Amici try to create such a straw man), the *analysis* of *WRTL-II* controls this case, just as *Buckley*'s analysis controlled the *MCFL* decision. Although *Buckley* did not decide the precise issue in *MCFL*, *MCFL* "agree[d] with appellee that this rationale requires a similar construction of the more intrusive provision that directly regulates independent spending. . . . [and] h[e]ld that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of [2 U.S.C.] § 441b." *MCFL*, 479 U.S. at 249.[8] So *McConnell* and *WRTL-II* are consistent with the first principles that campaign-finance regulations may not be vague and must reach

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[7] ...continue
lenges, such as the present one, *WRTL-II* could not have recognized that *McConnell* left open the electioneering-communication scope and then narrowed it. In *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL-I*"), the Court unanimously rejected the notion that *McConnell*'s facial decision concerning electioneering communications in any way precluded as-applied challenges. Moreover, a test upholding any disclosure so long as it does not "suppress speech" would allow government to impose draconian disclosure requirements without any First Amendment protection, which is not the law.

[8] *MCFL* specifically noted that *Buckley* had applied the express-advocacy context in the *expenditure disclosure* context "to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," 479 U.S. at 249, and held that the same construction was required in the *prohibition* context, *id.* The same principle applies here, where *WRTL-II* construed "electioneering communication" in the *prohibition* context and now the same construction (of the identical statutory language) must be uniformly employed in the *expenditure disclosure* context.

only speech that is unambiguously campaign related.[9]

Sixth, the unambiguously-campaign-related principle is not "novel" because it has been expressly recognized by FEC Commissioners. In their *Statement of Reasons* (Dec. 16, 2003) in Matters Under Review ("MURs") 5024, 5154, and 5146 (available through www.fec.gov), Chair Weintraub and Commissioners Thomas and McDonald noted that *Buckley* expressed concern about reporting provisions "that might be applied broadly to communications discussing public issues which also happened to be campaign issues," and so imposed the express-advocacy construction. *Id.* at 2. "[T]he *Buckley* Court explained the purpose of the express advocacy standard," they declared, "was to limit application of the . . . reporting provision to 'spending that is *unambiguously related* to the campaign of a particular

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[9] The FEC argues that "appellants' counsel . . . noted in rulemaking comments" that *McConnell* had broader support for electioneering-communication disclosure than it did for the prohibition, FEC-Br. 30, which is irrelevant because disclosure follows the scope given the electioneering-communication definition. Now that *WRTL-II* has narrowed the scope of "electioneering communication" in a manner that must be followed in the disclosure context, any support for such disclosure follows that narrowed scope, which excludes *WRTL-II*-ads.

The FEC argues that "the *WRTL* plaintiff explicitly disavowed any challenge to the disclosure provisions . . . ," FEC-Br. 31, which is irrelevant because that argument was made *before WRTL-II* decided the case by narrowing the scope of regulable electioneering communications. There were other ways in which the Court could have decided the case, but once *WRTL-II* narrowed the scope of "electioneering communication" using the unambiguously-campaign-related principle, the necessity of applying that narrowed scope consistently in the disclosure context followed.

federal candidate.'" *Id.* (emphasis in *Statement*) (*quoting Buckley*, 424 U.S. at 81). The Commissioners also quoted 424 U.S. at 82, noting that "[u]nder an express advocacy standard, the reporting requirements would 'shed the light of publicity on spending that is *unambiguously campaign related* . . . .'" *Statement* at 2 (emphasis in *Statement*). And a January 22, 2009 *Statement of Reasons* in MUR 5541 (November Fund) by Vice Chair Petersen and Commissioners Hunter and McGahn spoke of the need to "fully incorporate important principles in recent judicial decisions," including *WRTL-II* "and the Fourth Circuit's persuasive decision in . . . *Leake*. *Id.* at 2 (citations omitted).[10] The OGC may not properly deem "novel" an analysis that members of its governing body have recognized.

Seventh, the analysis is not "novel" because other courts have recently recognized the unambiguously-campaign-related principle as a required threshold that government must meet to enact campaign-finance regulations. *See National Right to Work Legal Defense and Ed. Found'n, Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008) (recognizing unambiguously-campaign-related principle as threshold requirement in the ballot-initiative context); *Broward Coalition of Condomini-*

[10] This "*November-Fund Statement*" in its entirety merits the Court's attention because it is a jurisprudential statement reflecting a constitutional analysis consistent with *Leake* and Appellants, but contrary to the arguments advanced here by the FEC Office of General Counsel ("OGC"). It takes a properly speech-protective approach throughout, including extensive discussions of protected issue advocacy and a PAC-status analysis consistent with that set out in *Leake* and by Appellants.

ums, Homeowners Ass'ns and Community Orgs, Inc. v. Browning, No. 4:08-cv-445, 2008 WL 4791004, at *6 (N.D. Fla. Oct. 29, 2008) (recognizing principle as threshold requirement).

Eighth, it is not "novel," upon even a moment's serious reflection, because our Constitution provides the federal government with only limited powers. These include the authority to regulate elections but not the authority to regulate speech beyond that very limited scope. So there is a need to "cabin" federal authority as to campaign-finance regulation, and this Court recognized that *Buckley* cabined government authority with the unambiguously-campaign-related principle. *Leake*, 525 F.3d at 281. The *November-Fund Statement* indicates that at least three Commissioners understand the need for cabining:

> Self-serving efforts to unilaterally expand the Commission's jurisdiction and reach so as to generate issues that will create new test cases is not something that an agency is generally required to do nor is it appropriate unless required. This is particularly so given the large number of cases challenging broad areas of the Commission's jurisdiction and regulation which are already in litigation."

Id. at 18 (citations and footnote omitted) (collecting cases, including this one).

The FEC argues that disclosure as to "issue" speech has been upheld, citing disclosure in the ballot-initiative and lobbying contexts. FEC-Br. 36-37, 40-42.

These arguments have already been addressed. CTP-Br. 29-32.[11] As shown, they support, rather than vitiate, the unambiguously-campaign-related principle because in each context the regulable activity must be unambiguously related to the government authority under which the disclosure is authorized. So the Federal *Election* Commission, applying the Federal *Election* Campaign Act, as amended by the Bipartisan *Campaign* Reform Act, under the "constitutional power of Congress to regulate federal *elections*," *Buckley*, 424 U.S. at 13 (emphasis added), may only regulate unambiguously-campaign-related activities. It's authority to regulate *elections* does not permit it to regulate lobbying, or trade, or even criticism of public officials who happen to be candidates. The Supreme Court has held, specifically in the *election-campaign expenditure disclosure context*, that government authority extends only to regulating "spending that is unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.[12]

[11] The FEC argues that *MCFL* required reporting of MCFL's "independent expenditures" even though MCFL was not prohibited from making them (as an *MCFL*-corporation). FEC-Br. 44. This proves rather than disproves the unambiguously-campaign-related principle because "independent expenditures" are express advocacy, which is entirely consistent with *Buckley*, 424 U.S. at 80-81 (express-advocacy construction to limit disclosure to "unambiguously campaign related" communications to avoid overbreadth).

[12] Amici argue that Appellants' argument that disclosure as to ballot-initiative advocacy must reach only First Amendment activity that is unambiguously related to the ballot-initiative *campaign* (so as to reach express advocacy for or against the initiative, but not mere discussion of issues related to the initiative), *see* CTP-

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In sum, first principles govern the constitutional analysis here. First, the people are the true sovereigns and the First Amendments prohibits abridging their core political speech and association, so "freedom of speech" is the constitutional presumption and the government bears a heavy burden (including in the preliminary injunction context) to justify abridgement. Second, any campaign-finance regulation must not be vague, under a strict standard for clarity, to avoid chilling speech. Third, any campaign-finance regulation must reach only First Amendment activity that is unambiguously campaign related. Fourth, the unambiguously-

[12] ...continue
Br. 30-31, concedes that disclosure can "apply to speech about issues, not candidates," and so "unravels CTP's entire argument." AC-Br. 22. Amici are wrong.

CTP's counsel did, in fact, argue in *California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003), that no regulation of ballot-initiatives should be permitted because issue-advocacy was involved. The Ninth Circuit rejected that argument, although it has not been ruled on in other circuits.

But the applicable analysis here is that even where disclosure is required in the initiative context, government may only regulate express-advocacy communications, *id.* at 1098, i.e., those that meet the unambiguously-campaign-related principle. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), noted that "[r]eferenda are held on issues, not candidates for public office," *id.* at 790, but overturned a prohibition on bank and corporate "contributions" or "expenditures" "for the purpose of . . . influencing or affecting the vote on any question." "Contributions" to a referendum campaign would clearly be unambiguously campaign related, and *Buckley* gave "for the purpose of influencing" an express-advocacy construction to conform to the unambiguously-campaign-related principle in the expenditure disclosure context, 424 U.S. at 80, so the same principle would apply to that language here. Only such "contributions" and "expenditures" would be subject to any disclosure suggested. *Bellotti*, 435 U.S. at 792 n.32.

campaign-related principle is implemented by recognized tests, including the express-advocacy test (for regulable "independent expenditures"), the major-purpose test (for imposing PAC status), and the appeal-to-vote test (for regulable "electioneering communications").[13] Fifth, where a campaign-finance law (or regulation or policy) is not vague and is unambiguously campaign related, the government must still prove that it is supported by adequate interests (depending on the level of scrutiny). Sixth, the government must then prove that its regulation is sufficiently tailored under the applicable standard of review. Applying these principles, all recognized by this Court, readily resolves this appeal for Appellants.

B. The Disclosure Requirements Are Unconstitutional as Applied.

Since (1) *Buckley* expressly mandated that *disclosure* cannot be required as to spending that is not "unambiguously related to the campaign of a particular federal candidate," *id.* at 80, and (2) *Leake* recognized that (a) meeting the unambiguously-campaign-related principle is a threshold requirement and (b) *WRTL-II*'s appeal-to-vote test determines which electioneering communications are unambiguously campaign related, 525 F.3d at 283,[14] the Reporting Requirement and Dis

[13] This answers Amici's mistaken notion that Appellants equate the unambiguously-campaign-related principle to express advocacy and that the principle "means whatever CTP wants it to mean." AC-Br. 6.

[14] Specifically, this Court held, *id.* (emphasis added), that

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claimer Requirement are unconstitutional as applied to all *WRTL-II*-ads, including CTP's Ads.[15]

The analysis as to the Disclosure Requirements is conclusively resolved by the preceding paragraph. There is no need for further analysis, but some further responses will be made to FEC arguments.

As to "exacting scrutiny," the government has no interest (compelling, substantial, or important) in regulating expenditures for communications that are not unambiguously campaign related. So regulating *WRTL-II*-ads is unconstitutional under any level of scrutiny. Appellants have already addressed the fact that "exacting scrutiny" is a high, i.e., strict, level of scrutiny in this context, and the Disclosure Requirements as applied fail this scrutiny. CTP-Br. 32-39. The FEC argues, FEC-Br. 35, that exacting scrutiny is determined by *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984), which said that there must be a "'relevant correlation' or 'substantial relation' between the governmental interest

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[14] ...continue
The Supreme Court has identified two categories of communication as being *unambiguously campaign related*. . . . Second, . . . an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

[15] The FEC concedes that CTP's Ads are not express advocacy and are *WRTL-II*-ads. FEC-Br. 19-20. In fact, the FEC concedes that the Ads fit the "safe harbor" in the FEC regulations, FEC-Br. 20, taking them *far* from the edge of what might be considered unambiguously campaign related.

and the information sought through disclosure," *id.* at 704 (*quoting Buckley*, 424 U.S. at 64). *Donovan* correctly identified the substantial-relation test that *Buckley* said was "*also*" required in addition to "exacting scrutiny," 424 U.S. at 64 (emphasis added), and in the relevant non-PAC, expenditure-disclosure context *Buckley* expressly interpreted this requirement as mandating the unambiguously-campaign-related principle. *See id.* at 80-81.[16] So it is a requirement in addition to, not the same as, "exacting scrutiny." The more developed recognition of the unambiguously-campaign-related principle and implementing tests in *Leake* supersedes and refines the earlier analysis.

Appellants have established that none of the interests recognized in *Buckley* as supporting disclosure apply to *WRTL-II*-ads. CTP-Br. 36-39. The FEC seeks recognition of another interest, i.e., "determining which ECs are exempt under *WRTL*[*-II*]." FEC-Br. 45. But the determination of whether electioneering communications are exempt from regulation is based on *WRTL-II*'s appeal-to-vote test, which is the implementation of the unambiguously-campaign-related principle, as *Leake* expressly recognized, 525 F.3d at 283. The whole premise of the unambigu-

[16] *Davis* held (even in the candidate reporting context) that the Supreme Court has "closely scrutinized disclosure requirements," requiring *both* "a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed, *and* . . . exacting scrutiny." 128 S. Ct. at 2775 (citations and internal quotation marks omitted) (emphasis added).

ously-campaign-related principle is that communications beyond that threshold are not regulable, so the FEC has no interest in regulating them at all. Moreover, the notion that citizens must report otherwise unregulable speech just so the FEC can assure itself that it is unregulable is antithetical to the First Amendment's presumed "freedom of speech." The argument is nonsensical in any event because the *content* of the ads is not reported to the FEC, so the Reporting Requirement is not tailored to the asserted interest and its underinclusiveness vitiates the asserted interest. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 766 (2002) ("[T]he Court need not decide whether achieving 'impartiality' (or its appearance) in the sense of openmindedness is a compelling state interest because, as a means of pursuing this interest, the announce clause is so woefully underinclusive that the Court does not believe it was adopted for that purpose."). The FEC's reliance here on a questionable[17] Ninth Circuit case, not the controlling *Leake* decision, presages this argument's doom.

Amici argue that the Disclosure Requirements serve an informational interest

[17] *Alaska Right to Life Committee v. Miles*, 441 F.3d 773 (9th Cir. 2006), upheld the imposition of PAC-style burdens on an *MCFL*-corporation. It purported to apply strict scrutiny, but scrutiny was not strict. It was a post-*McConnell* decision (when some courts read *McConnell* as granting *carte blanche* to government speech regulation) that is of questionable vitality in the wake of *WRTL-II*'s reaffirmation of high First Amendment protection for issue advocacy and issue-advocacy groups. It has no precedential or persuasive value here.

because "pure" issue-advocacy electioneering communications are but a subset of all *WRTL-II*-ads, while *WRTL-II*-ads "will often contain a *mix* of issue advocacy and electioneering." AC-Br. 23. In support, Amici cite the dissolving-distinction problem. The argument fails because *WRTL-II*-ads are determined on the basis of *WRTL-II*'s appeal-to-vote test, 127 S. Ct. at 2667, which is the implementation of the unambiguously-campaign-related principle, as this Court has recognized, and government is simply foreclosed from regulating the unregulable in an effort to capture "mixed" ads within the protected class.

Moreover, the dissolving-distinction problem cuts against Amici, not in their favor. *WRTL-II* specifically identified the dissolving-distinction problem, 127 S. Ct. at 2659, 2669, that *Buckley* had first recognized, *see* CTP-Br. 26-27, and reaffirmed that the problem requires *protection* of speech with the appeal-to-vote test, 127 S. Ct. at 2667, not *regulation* of speech.[18] So *WRTL-II* drew no line between "pure" and "mixed" "issue advocacy," drawing the line instead at the "appeal to vote" test and referring to *all* speech protected by that line as "issue advocacy," *id.* at 2667, and "political speech," *id.* at 2672. Amici have already lost this argument

[18] *WRTL-II* noted that the FEC and intervenors (represented by present Amici) argued that WRTL's ads were more electioneering than pure issue advocacy but said that their arguments only illustrated the dissolving-distinction problem, which "[u]nder the test set forth above," i.e., the appeal-to-vote test, requires their protection, not regulation.127 S. Ct. at 2669.

and cannot now redraw the line because *WRTL-II* expressly rejected "a prophylaxis-upon-prophylaxis approach to regulating expression" and reaffirmed that "'[t]he Government may not suppress lawful speech as the means to suppress unlawful speech,'" *id.* (citation omitted).[19] And as a factual matter, the FEC concedes that CTP's Ads fit the FEC's "safe harbor," FEC-Br. 20, and so are far from any pure/mixed borderline, even if such a borderline were analytically cognizable.

After conceding that the Ads fit the FEC's own safe harbor, the FEC argues that they are regulable because they are "highly critical" of the candidate. FEC-Br. 42-43. But the FEC lost this argument in *WRTL-II* itself, which drew the regulable line at an "appeal to vote," 127 S. Ct. at 2667, not criticism, and it was the *dissenters* who argued that WRTL's ads were regulable because they were critical of a candidate. 127 S. Ct. at 2698-99.[20] Moreover, the FEC and Intervenors (BCRA

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[19] Moreover, the FEC's Exhibit, by which the FEC claims to show where CTP's Ads were broadcast and how much they cost, belies the FEC's claim that without the Disclosure Requirements complainants and the FEC "would have difficulty knowing when ECs are being broadcast . . . ." FEC-Br. 45.

[20] In fact, *WRTL-II* was decided in response to the FEC's and Intervenors' argument that criticism was the real indicator of the wrong intent that made an electioneering communication subject to prohibition and to WRTL's extended argumentation that criticism of public officials is at the core, not the periphery, of First Amendment protection, *see Brief for Appellee* at 1-5, *WRTL-II*, 127 S. Ct. 2652, which included the following quote about criticism from WRTL:

> This struggle of the government to silence the people continues here as BCRA sponsors, Intervenors herein, defend the "electioneering communica-

continue...

prime sponsors Sen. McCain et al.) in two post-*WRTL-II* cases agreed to a stipulated judgment conceding that the ads at issue were protected political speech under *WRTL-II*'s test, although they contained criticism. *See WRTL v. FEC*, No. 04-1260, slip op. at 1 (D.D.C. July 23, 2007); *Christian Civic League of Maine v. FEC*, No. 06-614, slip op. at 1-2 (D.D.C. Aug. 21, 2007). Consequently, there is now no question that ads stating a candidate's position and criticizing or praising the candidate for that position may be fully protected political speech.

The FEC's analysis of CTP's Ads in light of the dissolving-distinction problem, FEC-Br. 42-43, reveals its flawed understanding of (or resistance to) *WRTL-II*'s required analysis of issue advocacy. After noting that CTP's Ads (like WRTL's ads) criticized a candidate and were run near an election, the FEC argues that there may well be "[v]oters who perceive a connection between ads like these

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[20] ...continue

> tion" prohibition by declaring that quashing criticism is the true intent behind the provision and thus argue that broadcast ads are sham, not genuine, if the ads (a) "took a *critical* stance regarding a candidate's position on an issue" and (b) "referred to the candidate by name.". . . Intervenors' Brief is replete with complaints about Senators being criticized for their positions on a current legislative matter. . . . So is the FEC's Brief. . . .

Id. at 5 (citations omitted). *WRTL-II* rejected the FEC's notion then, as this Court must do now, that if citizens criticize public officials then the government may restrict their speech. Such pre-Revolutionary British and European thought was rejected in this Republic with the First Amendment. *See Bridges v. California*, 314 U.S. 252 (1941) (tracing American rejection of British speech laws that punished criticism of officials).

and an upcoming election" (who might want disclosure). This is an "effect" argument, i.e., that one should look at the possible "effect" of an ad to determine whether it is regulable. But intent-and-effect tests were forbidden in *Buckley* and *WRTL-II*. *See WRTL-II*, 127 S. Ct. at 2665 ("*Buckley* had already rejected an intent-and-effect test for distinguishing between discussions of issues and candidates."), 2669 n.7 ("there can be no free-ranging intent-and-effect test"). Under *WRTL-II*'s application of the unambiguously-campaign-related principle, regulable electioneering communications are distinguished by whether they contain language that constitutes an "appeal to vote," *id.* at 2667, not on what the effect might be on a hearer.[21]

The FEC argues that certain other courts have rejected the unambiguously-campaign-related principle as a controlling analysis, FEC-Br. 32, but some have recognized it, *see supra*, and especially so did this Court in *Leake*, which is the only controlling decision, other than the cited Supreme Court cases that established this first principle. Under the analysis of *Buckley*, *MCFL*, *McConnell*, *WRTL-II*, and *Leake*, the government may not compel disclosure as to unregulable

[21] In an obscurely-worded paragraph, Amici seem to argue that *any* electioneering communication (because it names a candidate near an election) may be interpreted as an appeal "to vote for or against a candidate, [and so] it is likely to have an effect on a federal election, even if it is susceptible to another interpretation as well." AC-Br. 24. This not only turns *WRTL-II*'s appeal-to-vote test on its head, it also violates *WRTL-II*'s prohibition on intent-and-effect tests.

WRTL-II-ads, so Appellants have likely success on the merits.

C. The FEC's PAC-Enforcement Policy Is Unconstitutional and Void.[22, 23]

The FEC argues that CTP may lack standing to challenge the FEC's PAC-enforcement policy. FEC-Br. 49. But as set out in Appellants' opening brief, the FEC has launched investigations without initial evidence that the $1,000 trigger in "contributions" or "expenditures" has been met. CTP-Br. 45-46. And the problem with the FEC's vague and overbroad (for failing the unambiguously-campaign-related principle) enforcement policy is knowing what will establish PAC status. *See* CTP-Br. 41-45. Clearly, the FEC is resisting the formulation for the major-purpose test that this Court set out in *Leake*— "*Buckley*'s articulation of the permissible scope of political committee regulation is best understood as an empirical judgment as to whether an organization primarily engages in regulable, election-related speech," 525 F.3d at 287—in favor of an ad hoc test lacking the requi-

[22] Strict scrutiny unquestionably applies to the imposition of PAC status, *see* CTP-Br. 39 n.25, which is uncontested. The FEC attempts to interpret Appellants' "overbreadth" claim into a no-set-of-circumstances test or a First Amendment substantial-overbreadth test, FEC-Br. 52, but Appellants challenge the policy as "impermissibly broad," *Buckley*, 424 U.S. at 80, for violating the unambiguously-campaign-related principle by using an invalid major-purpose test. The FEC has the burden of proof on this threshold burden, not Appellants (as Appellants would for a First Amendment substantial-overbreadth challenge).

[23] The FEC argues that its enforcement policy is nonreviewable, FEC-Br. 50-51, which the district court rightly rejected. JA–12-14.

site bright lines for First Amendment protection.[24]

And despite the problems with a PAC-enforcement policy that would investigate major purpose *before* any statutory "contribution" or "expenditure" trigger was proven, there remained support on the FEC as recently as December 19, 2008, for pursuing the targets of MUR 5541 (November Fund et al.) under just such an approach. In that MUR, three Commissioners voted to approve a conciliation agreement based on this very approach to imposing PAC-status, and two of them published a statement of reasons defending the November Fund investigation, which they acknowledged "spanned several years and uncovered thousands of pages of documents." *Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub* at 2, MUR 5541 (November Fund) (Dec. 19, 2008) (all MUR documents available through www.fec.gov). The threat remains.

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[24] Amici attempt to evade *Leake*'s clear statement of how to determine major purpose by ignoring it and citing less-specific statements from *Leake*. AC-Br. 30. As always, more-specific formulations must govern less-specific ones. Amici also argue that disclosure of all electioneering communications is necessary to permit determining of major purpose. AC-Br. 25. But under the *Leake* formula for establishing "major purpose," only "*regulable*, election-related speech" may be considered, so unregulable electioneering communications must clearly be excluded for purposes of determining PAC status. Moreover, the only expenditure that may be employed to determine PAC status are express-advocacy "independent expenditures," *see MCFL*, 479 U.S. at 262, and BCRA did not place "electioneering communications" within the independent-expenditure definition, so no electioneering communication may be used to determine major purpose.

III. CTP Has Irreparable Harm.

The reason why the FEC insisted on doing the irreparable-harm analysis out of the mandated order is because it was attempting to isolate it from the merits analysis. But once the foundational merits analysis is established, it is clear that government may not regulate the unregulable, i.e., that which is not unambiguously campaign related under a recognized implementing test. If government has no constitutional authority to launch an investigation or initiate an enforcement proceeding, then doing so is a clear and irreparable constitutional harm. The First and Fifth Amendments protect Appellants from any investigation or enforcement action lacking a constitutional foundation.[25]

In the *November-Fund Statement* (*see supra* at 13), three of the six FEC Commissioners made clear their view that "an unwarranted multi-year investigation . . . was both burdensome and intrusive." *Id.* at 19. "Such enforcement can, and does, chill the free speech of citizens exercising their free rights," they concluded.

[25] The FEC argues that the only recognized protection from disclosure is in the situation of a reasonable likelihood of reprisals. FEC-Br. 46. But that protection only applies where the government actually has authority to investigate and enforce. The FEC argues that there is no irreparable harm because CTP's speech was not chilled. FEC-Br. 47. There is a general chill on speech where there are vague and overbroad regulations of speech, as here, because most would-be speakers would be chilled from proceeding with their speech. But the alleged harm here as to CTP is not a chill, but an imminent risk of an unconstitutional investigation and enforcement action, which the FEC has not eschewed and awaits only FEC action.

Id. As to PAC-status, they state that under the theory used in that MUR, which sought to determine major-purpose before any $1,000 trigger amount in "contributions" or "expenditures" was established,

> any organization that dared criticize a federal candidate, even if it scrupulously avoided engaging in express advocacy, would be vulnerable to an intrusive and time and resource-consuming investigation into (1) the private communications the organization's officials may have hade about its purpose or (2) what the organization's donors might have been thinking when giving their money. The chilling effect this approach would have upon political speech is painfully obvious, and we do not see how it passes muster under the First Amendment.

Id. at 17 n.78.

These three Commissioners also note that "[s]imply because one court has upheld the Commission's 'case-by-case' approach in an action to compel the promulgation of regulations because the Commission was able to, after a few tries, justify its decision for purposes of the Administrative Procedures Act, does not mean it is not vulnerable to attacks under the First Amendment or Due Process Clause." *Id.* at 17, n.80.

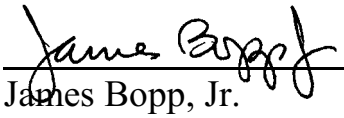
IV. The Balance of Harms and Public Interest Favor Appellants.

Once the likelihood of success on the merits is resolved in Appellants' favor, the balance of harms tips in favor of Appellants, *see* CTP-Br. 55-56, as does the public interest, *see* CTP-Br. 56-57.

Conclusion

The preliminary-injunction denial should be reversed.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

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Dated: May 1, 2009

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I hereby certify that on May 1, 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:

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