No. 08-2257

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HOLLY ANN KOERBER and COMMITTEE
FOR TRUTH IN POLITICS, INC.,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of North Carolina, Northern Division, Case No. 2:08-cv-00039

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 08-2257 Caption: Koerber et al. v. FEC

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 08-2257 Caption: Koerber et al. v. FEC

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INTERESTS OF *AMICI CURIAE*

Amici curiae Campaign Legal Center and Democracy 21 are nonpartisan organizations that work to strengthen the laws governing campaign finance. *Amici* have participated in litigation to defend the specific laws at issue here, including representing intervening-defendants in *McConnell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), and also participated in this case below. *Amici* thus have a demonstrated interest in the issues raised by this proceeding.

SUMMARY OF ARGUMENT

Appellants Holly Ann Koerber and the Committee For Truth In Politics, Inc. (collectively "CTP") ran two political advertisements one month before the 2008 federal elections attacking the positions of then-Democratic Presidential nominee, Barack Obama, on the hot-button topics of partial birth abortion and the punishment of sex offenders. Appellants Brief ("Br.") at 5; Complaint at ¶¶ 31-43. CTP did so without fully disclosing its identity or the identity of its donors. Complaint at ¶¶ 36, 40.

Running these attack ads anonymously meant CTP violated the disclosure requirements for "electioneering communications"[1] under the Bipartisan Campaign

[1] "Electioneering communication" is defined as a "broadcast, cable, or satellite communication" that "refers to a clearly identified federal candidate," is "targeted to the relevant electorate," and airs within sixty days of general election

Reform Act of 2002 (BCRA), Pub. L. No. 107–155, 116 Stat. 81 (2002). These include both reporting requirements, *see* 2 U.S.C. § 434(f), and disclaimer requirements, *see* 2 U.S.C. § 441d. CTP accordingly challenged the constitutionality of the disclosure requirements as applied to its advertisements, although these requirements had been upheld by the Supreme Court in *McConnell* just five years ago by an 8-1 vote. 540 U.S. at 196, 231, 321.

The basis for CTP's challenge is the Supreme Court's 2007 decision in *WRTL II*, which held that BCRA's restrictions on corporate and union expenditures for electioneering communications are unconstitutional as applied to any communications that are not express advocacy or its "functional equivalent." 127 S. Ct. at 2667. CTP argues that *WRTL II* implicitly immunized from any regulation electioneering communications that do not meet the standard for express advocacy or its functional equivalent. According to CTP, such communications should therefore be exempt from BCRA's reporting and disclaimer requirements, although this result would be directly contrary to the holding of *McConnell*.

This argument is an overreach. The *WRTL II* Court made no mention of the disclosure of electioneering communications; it examined only the funding restrictions for such ads. The *WRTL II* decision therefore provides no basis to question the validity of the *McConnell* decision, which specifically reviewed the

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or thirty days of a primary election or nominating convention. *See* 2 U.S.C. § 434(f)(3).

electioneering communication disclosure requirements and upheld them in their entirety. Furthermore, CTP's argument that only "unambiguously campaign related" speech can be subject to regulation completely disregards the many laws requiring disclosure of issue speech that have been upheld by the Supreme Court and lower courts.

On these grounds, the district court below correctly denied CTP's motion for a preliminary injunction, finding that "the *McConnell* Court … held that 'electioneering communication' was neither vague nor overbroad for the purposes of [the disclosure requirements]" and CTP "presented no reason to warrant a departure from the reasoning and outcome of *McConnell*." Order, No. 2:08-cv-00039 (Oct. 29, 2009), slip op. at 9, 10. The same conclusion was reached by a three-judge district court in Washington, DC and by a district court in Ohio, both of which rejected almost identical challenges to the BCRA's disclosure requirements. *Citizens United v. FEC,* 530 F. Supp. 2d 274 (D.D.C. 2008) (three judge court) (granting summary judgment for FEC), *cert granted* No. 08-205 (S. Ct. 2008); *Ohio Right to Life Society*, *Inc. v. Ohio Elections Commission*, No. 2:08-cv-00492, 2008 WL 4186312 (S.D. Ohio Sept. 5, 2008) ("*ORTL*") (granting in part and denying in part motion for preliminary injunction).

Also without merit is CTP's claim that the FEC's methodology for determining "political committee" status is unconstitutional. The FEC's "PAC

Enforcement Policy" and its application of the "major purpose" test is consistent with the Supreme Court's constitutional analysis of "political committees" in *Buckley v. Valeo*, 424 U.S. 1, 78-79 (1976). The district court below therefore refused to enjoin the FEC's policy. Slip op. at 11-16. CTP's argument on this point has also been explicitly rejected by another district court in this Circuit, and also on a preliminary basis by this Court, in *The Real Truth Against Obama v. FEC,* No. 3-08-CV-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008), *motion for inj. pending appeal den.* No. 08-1977 (4th Cir. Oct. 1, 2008) ("*RTAO*").

For all these reasons, *amici* respectfully submit that the district court below was correct in denying CTP's motion for a preliminary injunction and its decision should be affirmed.

ARGUMENT

I. CTP's Attempt to Create an "Unambiguously Campaign Related" Test Lacks Any Legal Basis and Should Be Rejected.

CTP asserts that the threshold test in the review of any campaign finance regulation is whether the regulated speech is "unambiguously related to the campaign of a particular federal candidate." *See, e.g.*, Br. at 7, 20-23. In CTP's view, only if speech meets this standard can it be subject to any type of regulation under the campaign finance laws. *Id*. at 20. According to CTP, BCRA's disclosure requirements and the FEC's "PAC-status enforcement policy," both fail

the "unambiguously campaign related" test and therefore violate the First Amendment.[2]

The problem with CTP's proposed test is that it has no legal basis. The "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 of the statutory term "expenditure." 424 U.S. at 79-80. To address "problems of vagueness," the *Buckley* Court construed "expenditure" in certain contexts to encompass only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 76, 80 (emphasis added). The Court then stated, in passing, that "this reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Id*. at 80. Thus, the constitutional "test" created by the *Buckley* Court in this passage was the express advocacy standard; the "unambiguously campaign related" phrase was simply a description of how this standard operated in the context of *Buckley*. Unsurprisingly, the phrase "unambiguously campaign related," which CTP

[2] In addition to creating the "unambiguously campaign related" test, CTP also devotes twelve pages to an attempt to manufacture a new "*WRTL II* Standard" for preliminary injunctions in First Amendment cases. *See* Br. at 9-20. Despite its length, however, CTP's argument does not cite a single legal authority that explicitly supports a "First Amendment" version of the standard for a preliminary injunction. Instead, CTP cobbles together a series of quotes from *WRTL II* and other campaign finance cases that do not address the standards for injunctive relief.

promotes as the overarching constitutional test established by *Buckley*, has not been so much as mentioned, much less applied, in any Supreme Court case since *Buckley*.

Thus, there is no legal foundation for CTP's proposed test. And in any event, the meaning and application of this test is entirely unclear. Indeed, CTP claims that the phrase entails a number of additional constitutional standards, including the subsequent test articulated in *WRTL II* for "the functional equivalent of express advocacy," as well as the "major purpose" test for political committee status. Br. at 25, 28. At other points in its argument, CTP appears to employ the phrase as shorthand for "express advocacy." Br. at 26, 32. Essentially, "unambiguously campaign related," as used by CTP, means whatever CTP wants it to mean. This is not a valid judicial standard for review.

At bottom, the "unambiguously campaign related" test is simply CTP's attempt to replace the Supreme Court's actual standard for reviewing speech-related regulation with a test more to its liking. The Supreme Court, however, does not employ any single test to review of campaign finance laws, but rather applies varying standards of scrutiny depending on the nature of the regulation and the weight of the First Amendment burdens imposed by such regulation.

For instance, expenditure limits, the most burdensome form of campaign finance regulation, are subject to strict scrutiny and reviewed for whether they are

"narrowly tailored" to "further[] a compelling interest." *WRTL II*, 127 S. Ct. at 2664; *see also Buckley*, 424 U.S. at 44-45. Contribution limits, by contrast, are deemed to impose a lesser burden on speech and are constitutionally "valid" if they satisfy "the lesser demand of being closely drawn to match a sufficiently important interest." *McConnell,* 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted). Disclosure, the "least restrictive" form of regulation, *Buckley*, 424 U.S at 68, is subject to only an intermediate standard of review, requiring no more than a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64 (internal footnotes omitted).

But in no case has the Supreme Court used a test of whether speech is "unambiguously campaign related" as the standard for assessing the constitutionality of a campaign finance law. CTP argues that this Court's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), requires this standard to be applied to the disclosure provisions challenged here. *See* Br. at 20. While it is true that *Leake* interpreted *Buckley* to limit the application of state campaign finance law to "actions that are 'unambiguously related to the campaign of a particular … candidate,'" *Leake*, 525 U.S. at 281, the federal disclosure provisions challenged here differ significantly from those state laws examined in *Leake*. Moreover, the provisions challenged here have been

explicitly upheld by the Supreme Court in *McConnell* under a different test – the "substantial relation" test – applicable to disclosure laws. Furthermore, *Leake* considered the state's interest in preventing corruption as the only applicable justification for the particular state laws at issue in that case. The Supreme Court has made clear, however, that disclosure statutes serve different, broader government interests than the anti-corruption interest considered by this Court in *Leake*. Indeed, the Supreme Court has upheld political disclosure laws completely unrelated to candidate campaigns.

For all these reasons, this Court should reject CTP's proposed "unambiguously campaign related" test and adhere to the established Supreme Court standards for reviewing the constitutionality of political disclosure requirements.

II. The Electioneering Communication Disclosure Requirements Are Constitutional.

Instead of CTP's invented "unambiguously campaign related" standard, it is the analysis of the electioneering communications disclosure provisions in *McConnell* that controls here. There, applying intermediate scrutiny, the Supreme Court upheld the disclosure provisions against a facial constitutional challenge by a vote of 8-1.

CTP argues that *WRTL II* – which limited the scope of electioneering communications that could be subject to BCRA's funding prohibition – likewise

limited the scope of electioneering communications that could be subject to BCRA's disclosure requirements. However, *WRTL II* did not even consider the electioneering communications disclosure requirements, much less overrule *McConnell*'s approval of these requirements. Further, CTP's argument that *WRTL II* allows only "unambiguously campaign related" speech to be regulated in any fashion is belied by a series of Supreme Court cases that have upheld disclosure requirements for issue speech relating to lobbying and ballot measure advocacy. This was recognized by the district court below, which denied CTP's request for a preliminary injunction on this claim, and also by the courts in both *Citizens United* and *ORTL*, which rejected identical claims. This Court should reject CTP's challenge to the disclosure requirements as well.

A. *McConnell* Upheld the Electioneering Communication Disclosure Requirements on Their Face.

In *McConnell*, eight Justices, applying intermediate scrutiny, upheld both the reporting and the disclaimer requirements on their face, finding both were substantially related to important state interests. *See* 540 U.S. at 196 (Stevens, J.) and 321 (Kennedy, J.) (upholding the electioneering communication reporting requirements); 540 U.S. at 231 (Rehnquist, C.J., joined by all Justices except

Thomas, J.) (upholding the electioneering communication disclaimer requirements).[3] This result and analysis controls here.

1. Contrary to CTP's Allegations, the Disclosure Requirements Are Subject to Intermediate Scrutiny, Not Strict Scrutiny.

The Court in *McConnell* relied upon *Buckley* to apply an intermediate level of scrutiny to the disclosure requirements.

In *Buckley*, the Court reviewed the comprehensive reporting and record-keeping requirements for political committees under the Federal Election Campaign Act (FECA), *see* 424 U.S. at 60-74, as well as its more limited reporting requirements for independent expenditures, *see id*. at 74-82. The standard of review established by the Court was whether there was a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64. This intermediate standard of review was appropriate because disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id*. at 68 (footnotes omitted).

The majority opinion in *McConnell* adopted *Buckley*'s standard of review. 540 U.S. at 196. Moreover, the three concurring Justices expressly employed

[3] The three concurring Justices noted one exception, and found unconstitutional the requirement in section 202 of BCRA that speakers provide "advance disclosure" of executory contracts to purchase airtime for electioneering communications to be run in the future. 540 U.S. at 321 (Kennedy, J., concurring).

Buckley's "substantial relation" standard, holding that the electioneering communications disclosure requirements "do[] substantially relate" to the governmental interest in providing the electorate with information. *Id*. at 321 (Kennedy, J., concurring).

Undeterred by this precedent, CTP asserts that this Court should nonetheless apply strict scrutiny here, arguing that "exacting scrutiny" is the proper standard for the review of disclosure requirements, and that "the 'exacting scrutiny' applicable to the Disclosure Requirements is strict scrutiny." Br. at 35.

CTP is attempting to exploit the inconsistent use of the term "exacting scrutiny" by the Supreme Court in past cases.[4] While it is true that this term has denominated different standards of review, the crucial point is that the actual "substantial relation" test applied in *Buckley* and *McConnell* bears no resemblance to strict scrutiny review. Even a cursory reading of *Buckley* and *McConnell* indicates that the Supreme Court did not consider whether the challenged disclosure requirements served a "compelling state interest," nor whether the requirements were "narrowly tailored" to serve that interest. And it is the substance of the test applied by the Court that is dispositive, not the label given to

[4] *Compare Buckley*, 424 U.S. at 64 (applying "exacting scrutiny" by reviewing the challenged disclosure law for a "relevant correlation" or "substantial relation" to a "substantial" governmental interest") *with McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (applying "exacting scrutiny" to a state ballot measure disclaimer requirement by determining whether the requirement was "narrowly tailored to serve an overriding state interest").

it. *See ORTL*, 2008 WL 4186312, at *7 ("Defendants argue, and this Court agrees, that the appropriate standard of review regarding campaign finance disclosure laws is intermediate, not strict scrutiny.").

Moreover, given that the *Buckley* Court recognized that disclosure requirements are the "least restrictive" form of campaign finance regulations, 424 U.S. at 68, it would be illogical to subject them to the strictest level of scrutiny reserved for expenditure limits. The Court in *Buckley* and *McConnell* did not do so, and neither should the Court here.

2. *McConnell* Made Clear That the Electioneering Communication Disclosure Requirements Are Supported by Important Governmental Interests.

The *McConnell* Court's analysis of the state interests supporting BCRA's electioneering communication disclosure requirements also has its roots in the *Buckley* decision.

Buckley identified three "substantial" governmental interests served by disclosure requirements. 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." *Id*. at 66-67 (footnotes omitted). In addition to this informational interest, the Court also found that "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. Finally, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of the federal campaign finance laws. *Id*. at 67-68.

The Supreme Court relied upon this analysis in *McConnell*, holding that the three "important" state interests identified by *Buckley* – providing the electorate with information, deterring corruption, and enabling enforcement of the law – "apply in full" to the electioneering communication disclosure requirements. *McConnell*, 540 U.S. at 196.

Importantly, the Court upheld the electioneering communication disclosure requirements as "to the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 196 (emphasis added), even though it had acknowledged that the definition of "electioneering communications" potentially encompassed both express advocacy and "genuine issue ads." *Id*. at 206 (noting that the "precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief preelection timespans but had no electioneering purpose is a matter of dispute between the parties"). In so holding, the majority suggested that the governmental interests that had led the *Buckley* Court to uphold FECA's disclosure provisions also supported disclosure of electioneering communications, even if some percentage of "genuine issue ads" were covered by the electioneering communication disclosure requirement. And indeed, the three concurring Justices

in *McConnell* voted to uphold the disclosure provisions as constitutional even though they concluded the funding restrictions were unconstitutional as applied to the same ads. Thus, contrary to CTP's claims, the *McConnell* Court found that BCRA's disclosure provisions were valid even as applied to some number of advertisements that were not "unambiguously campaign related."

B. *WRTL II* in No Way Undercuts the *McConnell* Decision Upholding the Electioneering Communication Disclosure Requirements as to the Entire Range of Electioneering Communications.

The Supreme Court in *WRTL II* did not even consider, let alone invalidate, the electioneering communication disclosure requirements that had been upheld in *McConnell*.

Nor did the plaintiff WRTL contest the disclosure requirements. Its complaint made clear that "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grassroots lobbying advertisements." *WRTL II*, No. 04-1260, Amended Verified Complaint, 2004 WL 3753200, at ¶ 37 (D.D.C. Sept. 1, 2004). And in its brief to the Supreme Court, it stressed that its challenge to the statute, if successful, would leave a fully "transparent" system:

> Because WRTL does not challenge the disclaimer and disclosure requirements, there will be no ads done under misleading names. There will continue to be full disclosure of all electioneering communications, both as to disclaimer and public reports. The whole system will be transparent. With all this information, it will then be

> up to the people to decide how to respond to the call for grassroots lobbying on a particular government issue. And to the extent that there is a scintilla of perceived support or opposition to a candidate, … the people, with full disclosure as to the messenger, can make the ultimate judgment.

WRTL II, Brief of Appellee WRTL, Inc., 2007 WL 868545, at *49 (Mar. 22, 2007).

CTP does not seriously dispute that the Court in *WRTL II* reviewed only the constitutionality of BCRA's funding restriction and not its disclosure requirements. Br. at 29. Yet it nevertheless asserts that the *WRTL II* Court intended its analysis of the funding restriction to apply to the disclosure requirements as well. But because the funding restriction and the disclosure requirements are subject to different standards of scrutiny and supported by different governmental interests, the *WRTL II* Court's assessment of the former has virtually no bearing on the constitutionality of the latter.

First, wholly different constitutional standards of review apply to the two provisions. Whereas a reporting requirement is constitutional so long as there is a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *Buckley*, 424 U.S. at 64, a restriction on political spending is constitutional only if it meets the strict scrutiny requirement of being "narrowly tailored to further a compelling interest," *WRTL II,* 127 S. Ct. at 2670 (quoting *McConnell*, 540 U.S. at 205). Examining the funding

restriction, and that provision alone, the Court in *WRTL II* applied strict scrutiny. The *WRTL II* Court gave no consideration to whether the disclosure requirements could be constitutionally applied to the ads at issue in the case under the different, and lesser, standard of scrutiny applicable to such disclosure laws.

Second, disclosure requirements serve different governmental interests than do restrictions on expenditures. The Supreme Court considered only two governmental interests in its review of the funding restriction in *WRTL II*: the government's interest in preventing actual or apparent corruption and its interest in avoiding the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form." *WRTL II,* 127 S. Ct. at 2672. Indeed, these two goals are the only state interests recognized by the Supreme Court as sufficiently compelling to justify a restriction on expenditures. By contrast, the Court has long recognized that disclosure provisions serve a broader range of governmental goals, including providing the electorate with information and enabling enforcement of the substantive provisions of the law. *Buckley*, 424 U.S. at 66-68. The *WRTL II* Court's conclusion that the state's anti-corruption and "corporate form" interests did not justify the expenditure restriction at issue in that case does not speak to whether the state's informational and enforcement interests will support a disclosure requirement.

In light of the clear legal distinctions between expenditure and disclosure regulations, the district court below found that "the Supreme Court's subsequent decision in *WRTL II* did not … overturn *McConnell*." Slip op. at 10. It went on to explain:

> The provision at issue in *WRTL II* was an expenditure regulation … and was, therefore, subject to strict scrutiny. The *WRTL II* decision makes no mention of the disclosure requirements upheld in *McConnell* and at issue before this court nor any other provision, the constitutionality of which is determined by the "relevant correlation" or "substantial relation" test.

Id. The same conclusion was drawn by the three-judge court in *Citizens United*: "We do not believe *WRTL* went so far. The only issue in the case was whether speech that did not constitute the functional equivalent of express advocacy could be banned during the relevant pre-election period." 530 F. Supp. 2d at 281 (emphasis added). In response to Citizen United's claim that its speech was not the functional equivalent of express advocacy under *WRTL II* and was therefore "constitutionally protected" from disclosure, the court in *Citizens United* said:

> We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provision triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.

Id. (citations omitted). For these reasons, the court dismissed precisely the claim made by CTP here, rejecting that *WRTL II* should be read to invalidate the BCRA disclosure requirements. *See also ORTL*, 2008 WL 4186312, at *9.

C. Compelled Disclosure of "Issue" Advocacy is Constitutional.

Further undercutting CTP's assertion that only "unambiguously campaign related" activities can be subject to disclosure is a line of Supreme Court cases approving the disclosure of issue advocacy relating to lobbying and ballot measure advocacy. This precedent illustrates that the constitutionality of a disclosure requirement does not turn on whether the speech meets *WRTL II*'s standard for express advocacy or CTP's made-up "unambiguously campaign related" test.

First, both federal and state courts have consistently upheld lobbying disclosure statutes. The leading Supreme Court case on lobbying disclosure, *U.S. v. Harriss*, 347 U.S. 612 (1954), considered the federal Lobbying Act of 1946, which required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to disclose their clients and their contributions and expenditures. *Id*. at 615 & n.1. After evaluating the Act's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests: "[F]ull realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate [lobbying] pressures....

[Congress] has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose." *Id*. at 625.[5]

That the Lobbying Act was unrelated to candidate campaigns and instead pertained only to issue speech was not deemed constitutionally significant. The Supreme Court found that lobbying disclosure nonetheless serves the state's informational interest and "maintain[s] the integrity of a basic governmental process." *Id*. at 625. *See also National Association of Manufacturers v. Taylor*, 549 F. Supp. 2d 33 (D.D.C. 2008) (dismissing First Amendment challenge to current federal lobbying disclosure law).

Further, the Court has recognized that even "grassroots" or "indirect" lobbying may be constitutionally subject to disclosure. Such communications generally describe a legislative action favored by the sponsor, and urge the public to lobby the relevant lawmakers regarding this action. The *Harriss* case upheld a grassroots lobbying disclosure provision in the 1946 Lobbying Act that required disclosure of lobbyists' efforts to "artificially stimulate[]" the public to conduct

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[5] The *Harriss* decision has been followed by lower courts which have uniformly upheld state lobbying statutes on the grounds that the state's informational interest in lobbying disclosure outweighs the associated burdens. *See, e.g., Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996); *Minnesota State Ethical Practices Board v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985); *Commission on Independent Colleges and Universities v. New York Temporary State Commission*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982).

"letter campaign[s]" to influence the acts of Congress. *Harriss*, 347 U.S. at 620 & n.10.[6] *See also Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 511 (8th Cir. 1985) (upholding Minnesota disclosure requirement as applied to communications sent from the NRA to its Minnesota members urging them to contact their state legislators about pending legislation). That this type of "classic" issue advocacy can be subject to disclosure fatally undermines CTP's claim that only "unambiguously campaign related" communications can be constitutionally regulated.

In a similar vein, the Supreme Court has expressed approval of statutes requiring the disclosure of expenditures relating to ballot measures, although such statutes also lack a connection to candidate campaigns. *See*, *e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999) (noting that "ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates"). In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on corporate expenditures to influence ballot measures, but did so in part because "[i]dentification of the source

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[6] Over twenty states have laws that require disclosure of expenditures funding grassroots lobbying. GAO REPORT, INFORMATION ON STATES' LOBBYING DISCLOSURE REQUIREMENTS, B-129874 (May 2, 1997), at 2. These statutes have been routinely upheld by the courts. *See, e.g., Florida League*, 87 F.3d at 460-61 (upholding Florida law which required disclosure of expenditures both for direct lobbying and for indirect lobbying activities which did not involve contact with governmental officials); *Minn. State Ethical Practices Bd.*, 761 F.2d at 512.

of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. Citing *Buckley* and *Harriss*, the Court took note of "the prophylactic effect of requiring that the source of communication be disclosed." *Id*.

The Supreme Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to ballot measure committees. Although the Court struck down the contribution limit, it based this holding in part on the disclosure that the law required from such committees. *See id.* at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting.").

In an attempt to distinguish the ballot measure decisions from this case, CTP argues that the statutes at issue there required disclosure only in connection to express advocacy for or against ballot initiatives. Br. at 30-31. But they did no such thing: nothing in these Supreme Court cases indicates that the disclosure requirements there were limited to spending for "express advocacy" for or against the ballot measure.

Further, in so arguing, CTP is conceding that disclosure requirements can constitutionally apply to speech about issues, not candidates. This unravels CTP's entire argument. The ballot measure statutes at issue in *Belotti* and *City of Berkeley* required the disclosure of speech – express or not – that was not even remotely related to candidate campaigns. If such speech can be constitutionally subject to disclosure in the ballot measure context – a point which CTP concedes – then *a fortiori* such speech can be subject to disclosure if it meets the definition of "electioneering communication" in the context of candidate campaigns. The ballot measure case law thus directly contradicts CTP's proposed "unambiguously campaign related" test.

D. The Electioneering Communication Disclosure Requirements Are Constitutional as Applied to CTP's Advertisements.

As discussed in the foregoing sections, the applicable constitutional standard here is not CTP's "unambiguously campaign related" test, but rather *Buckley*'s "substantial relation" standard. Under this standard, the application of the disclosure requirements to CTP's advertisements is constitutional because such disclosure is "substantially related" to the governmental interests in informing the electorate and enforcing federal campaign finance laws.

1. BCRA's Disclosure Requirements Serve the Government's Informational Interest.

The principal state interest justifying compelled disclosure is its interest in "providing the electorate with information." *McConnell*, 540 U.S. at 196. Indeed, disclosure laws have been sustained on the basis of this interest alone. *See, e.g., Buckley*, 424 U.S. at 80-81 (upholding FECA's independent expenditure disclosure provisions although they did not "stem corruption or its appearance" but rather "serve[d] another, informational interest," namely "increasing the fund of information concerning those who support the candidates"). CTP offers no reason why this interest would not support application of the disclosure requirements to its advertisements, and to non-express-advocacy electioneering communications more generally.

First, the *WRTL II* Court recognized that even those electioneering communications that do not constitute express advocacy or its functional equivalent are not necessarily "pure" issue advocacy. Instead, such communications will often consist of a *mix* of issue advocacy and electioneering. 127 S. Ct. at 2669 (acknowledging that distinction between electioneering and issue advocacy "may often dissolve in practical application," and that "discussion of issues" may be "pertinent in an election") (internal quotations omitted). *WRTL II*'s test for the "functional equivalent of express advocacy" is whether an ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or

against a specific candidate." *Id*. at 2667. This means that an electioneering communication that is susceptible of dual interpretations – both as issue advocacy and as electioneering – will not be subject to the funding restriction of BCRA.

Nonetheless, as an "electioneering communication," it will, by definition, be an advertisement referring to a clearly identified candidate broadcast in very close proximity to a federal election. As an ad susceptible of a "reasonable interpretation" to vote for or against a candidate, it is likely to have an effect on a federal election, even if it is susceptible to another interpretation as well. And for that reason, disclosure will "substantially relate" to the state's informational interest in "aid[ing] the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67.

Furthermore, as the case law on lobbying and ballot measure advocacy demonstrates, the state has an interest in providing information to the public about even those activities that constitute "pure" issue advocacy. *See, e.g., Harriss*, 347 U.S. at 625 (lobbying and grassroots lobbying disclosure); *Am. Constitutional Law Found.*, 525 U.S. at 205 (ballot measure disclosure). Thus, even if CTP's advertisements are deemed pure issue speech, the public has an interest in receiving information about the sponsor and funders of the ads in order to judge the credibility of their messages.

2. BCRA's Disclosure Requirements Serve the Government's Enforcement Interest.

McConnell also upheld BCRA's disclosure requirements based upon a second governmental interest, namely "gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196. *See also Buckley* 424 U.S. at 67-68. This interest is relevant to disclosure of the "entire range" of electioneering communications, including those that do not constitute express advocacy or its functional equivalent under *WRTL II*.

For instance, comprehensive disclosure of electioneering communications is important to the FEC's ability to make determinations about whether a group is a "political committee," which includes an assessment of whether the group's "major purpose" is campaign related. *See Buckley*, 424 U.S. at 79. The FEC employs a comprehensive, multi-factor analysis to ascertain a group's major purpose, including reviewing the group's conduct, organic documents and public statements. *See* Section III, *infra*. A group's spending – even for non-express-advocacy electioneering communications – is highly relevant to this analysis. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (finding that a group's major purpose can be established by the nature of its "independent spending"); *see also* FEC Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5601 (Feb. 7, 2007) (noting that to determine major

purpose FEC may "evaluate the organization's spending on Federal campaign activity, as well as any other spending by the organization").

Further, under FECA, any payment for an electioneering communication that an outside group "coordinates" with a candidate is deemed an in-kind contribution to such candidate subject to federal contribution restrictions. 2 U.S.C. §§ 441a(a)(7), 441b; 11 C.F.R. § 109.21(c)(1). Without disclosure of the entire range of electioneering communications, the FEC's ability to enforce the coordination rules will be impaired, allowing outside spenders to circumvent the federal contribution restrictions.

III. The FEC's PAC-Status Enforcement Policy and Application of the "Major Purpose" Test Is Constitutional.

CTP also challenges the FEC's methodology for determining whether an entity is a "political committee." In particular, CTP claims that that the FEC's application of the "major purpose" test is based on an "ad hoc, case-by-case, analysis of vague and impermissible factors." Br. at 43.

The district court was correct in rejecting CTP's objections and denying injunctive relief on this claim. And the district court is not alone in this conclusion. Almost identical claims were rejected recently in the *RTAO* case, a decision which this Court declined to disturb pending appeal. *See RTAO*, No. 08-1977, Order Denying Injunction Pending Appeal (4th Cir. Oct. 1, 2008).

FECA defines "political committee" to include "any committee, club, association, or other group of persons" which "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4). The Supreme Court has construed this statutory definition of "political committee" to apply only to so-called "major purpose" groups.

The "major purpose" test was first articulated by the Supreme Court in *Buckley*. 424 U.S. at 78-81. FECA established disclosure requirements both for individuals and for "political committees," prompting the Court to address constitutional concerns that the statutory definition of the term "political committee" was overbroad and, to the extent it incorporated the definition of "expenditure," vague as well. The Court feared that because the term "expenditure" potentially "encompass[ed] both issue discussion and advocacy of a political result," the "political committee" definition (which relies on the definition of "expenditure") might "reach groups engaged purely in issue discussion." *Id.* at 78-79.

The Court resolved these concerns by narrowing the definition of "political committee" to only "encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Id.* (emphasis added). For such "major purpose" groups, the Court had no vagueness concerns about the statutory definition of "expenditure" because, the

Court held, "expenditures" by such groups "are, by definition, campaign related." *Id.* (emphasis added). By contrast, the Court narrowed the definition of "expenditure" as applied to non-major purpose groups to encompass only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Id.* at 80 (emphasis added).

Thus, following *Buckley,* there is a two-prong test for political committee status: whether a group makes "expenditures" or receives "contributions" in excess of $1,000 (the statutory test), and whether the group's "major purpose" is to influence elections (the *Buckley* test).

CTP's principal objection to the FEC's PAC-status enforcement policy focuses on the Commission's application of *Buckley*'s "major purpose" test. Specifically, CTP argues that the FEC's implementation of the "major purpose" test, as set forth in its most recent statement on the question, *see* FEC Notice 2007-3, 72 Fed. Reg. 5595, and in recent enforcement actions, is an overbroad and unbounded inquiry into "vague and impermissible" factors. Br. at 43.

CTP argues that as a constitutional matter, the major purpose test must be narrowed to only two permissible inquiries. First, CTP claims that the Commission can examine whether a group's contributions and express advocacy expenditures constitute a majority of its total disbursements. Br. at 40-41. Alternatively, CTP states that the FEC can examine a group's "organic documents"

– but only those documents – to determine if they contain an "express intention" to operate as a political committee. *Id*. at 41. According to CTP, any other inquiry is impermissible.

But these are limitations that CTP simply makes up. It cites no support in the law for them, and there is none. The test set forth by the Supreme Court is whether a group's "major purpose" or "primary objective" is "the nomination or election of a candidate" or "campaign activity" or "to influence political campaigns." *Buckley*, 424 U.S. at 79. The Court did not limit the scope of the inquiry about how this "major purpose" determination is to be made, and certainly did not do so along the lines suggested by CTP.

To the contrary, a federal district court recently approved the FEC's "fact intensive approach" to this major purpose determination. *Shays v. FEC,* 511 F. Supp. 2d 19, 29 (D.D.C. 2007). There, the plaintiff sought to require the FEC to issue a regulation specifying the standard for the "major purpose" determination. The FEC defended its decision to make "major purpose" determinations on a case-by-case basis, principally through enforcement actions, arguing that the major purpose doctrine "requires the flexibility of a case-by-case analysis of an organization's conduct," including "whether there is sufficiently extensive spending on federal campaign activity," "the content of [a group's] public statements," "internal statements of the organization," "all manner of the

organization's spending" and "the organization's fundraising appeals." *Id.* The district court approved the FEC's approach, noting that "*Buckley* established the major purpose test, but did not describe its application in any fashion." *Id.*; *see also FEC v. Malenick,* 310 F. Supp. 2d 230, 234 (D.D.C. 2004), *quoting FEC v. GOPAC*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("An organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.").

Indeed, in *Leake*, this Court described the test as an inquiry into whether an organization has the major purpose "of supporting or opposing a candidate" and said that political committee status is "only proper if an organization primarily engages in election-related speech." 525 F.3d at 288 (emphasis added). The Court further said that the test is to be implemented by examining, *inter alia*, whether "the organization spends the majority of its money on supporting or opposing candidates." *Id.* at 289 (emphasis added). None of these formulations states or implies the kind of highly restricted inquiry which CTP assumes.

Leake also suggested that the major purpose test could be implemented by reviewing an organization's bylaws or other statements expressing its primary purpose, or by reviewing how it spends a majority of its funds. 525 F.3d at 289. But this Court expressly did not reach the plaintiff's suggestion there – the same

claim made by CTP here – that these were the only permissible inquiries: "While this standard would be constitutional, we need not determine in this case whether it is the only manner in which North Carolina can apply the teachings of *Buckley*." *Id.* at 289 n.6.

The district court in *RTAO* rejected virtually the same claim as CTP makes here. In so holding, it noted:

> The FEC rule is flexible with a "case-by-case analysis" of conduct including spending on Federal campaign activity, spending on other activities, analysis of public statements, declaration of purpose on website, fundraising appeals, and similar types of activities. Because the FEC employs the same factors the Supreme Court has approved … Plaintiff's claim of overbreadth appears to be lacking and therefore will likely not succeed on the merits.

RTAO, 2008 WL 4416282, at *14 (citations omitted) (emphasis added).

In short, the Supreme Court in *Buckley* added the "major purpose" test as a gloss on the statutory definition of "political committee" in order to narrow the sweep of the statutory standard. But neither the Supreme Court nor any lower court has constricted the scope of the inquiry that the Commission is to use in making a "major purpose" determination as narrowly as CTP here proposes. This Court should therefore reject CTP's challenge to the FEC's PAC-status enforcement policy.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

This is to certify that, pursuant to local rule 31, on April 24, 2009, I mailed the original and eight copies of the foregoing BRIEF *AMICI CURIAE* FOR THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE for filing by United States mail, first-class postage prepaid, to:

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