United States District Court
Eastern District of North Carolina
Northern Division

Holly Lynn Koerber and **Committee for Truth in Politics, Inc.**, *Plaintiffs*, *v.* **Federal Election Commission**, *Defendant*.	**Case No. 2:08-cv-39-H**

Preliminary Injunction Reply Memorandum

Status Quo & Interests. The requested injunction is to maintain the status quo. As the FEC asserts, "[t]he purpose of a preliminary injunction 'is merely to preserve the relative positions of the parties until a trial on the merits can be held.'" FEC Mem. 7 (*quoting Univ. of Tex. v. Carmenisch*, 451 U.S. 390, 395 (1981)).[1] The status quo is that the FEC is not investigating CTP.

As to interests at issue, no interest justifying prohibition (i.e., either quid-pro-quo or corporate-form corruption) is involved here because the FEC acknowledges that CTP's Ads are protected from prohibition by *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), and the FEC's own regulation. So the Ads are perfectly legal. CTP may freely run them.

No interest in disclosure may be considered here because the FEC acknowledges that it could do nothing to force disclosure until after the election. It can't get an injunction to force disclosure prior to the election. If there is later an investigation and enforcement action, CTP might be punished for not complying with the Disclosure Requirements, but there will be no disclosure when it arguably might be pertinent to the public or this motion. Denying this preliminary injunction will not result in disclosure before this case is resolved on the merits, so there is no disclosure interest at issue.

No enforcement interest is at stake here because the FEC acknowledges that enforcement would not

[1] *See also Singleton v. Anson County Bd. of Ed.*, 387 F.2d 349, 350 (4th Cir. 1967) ("'The purpose of a preliminary injunction ordinarily is to preserve the status quo until the rights can be fully determined by trial.'" (citation omitted)); *Kemp v. Peterson*, 940 F.2d 110, 114 (4th Cir. 1991) ("The purpose of a preliminary injunction is to preserve the status quo 'where the balance of hardships tips decidedly toward the party requesting the temporary relief and that party has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation.'"(citation omitted)).

occur until sometime after the election. And if it wins on the merits, it may proceed.

So the only thing at issue here is whether the FEC may punish CTP by imposing an investigation before this case is resolved on the merits. A preliminary injunction maintains the status quo by preventing this. The balance of harms and public interest must be considered in light of this sole interest.

Balance of Harms. A preliminary injunction would not cause the FEC to lose its ability to investigate, if it is constitutionally permitted to do so, but only puts the investigation off until the constitutionality of such an investigation is settled. A constitutionally-illicit investigation is a serious harm to First Amendment rights. *See infra*. Where the constitutionality of disclosure is involved, an investigation can compel the very disclosure that CTP argues is constitutionally protected. The FEC has nothing to lose. CTP has much to lose of a highly-valued nature. The balance of harms tips sharply in CTP's favor.

Public Interest. The public interest is not harmed by delaying an investigation until its permissibility is determined on the merits. Even if an investigation were begun, FEC matters under review remain confidential until after they are concluded. So there would be no disclosure to the public until some undetermined future time, if ever. On the other hand, if the First Amendment requires that Congress may only regulate a communication if it meets the unambiguously-campaign-related requirement, the people do not want the FEC violating that line. The public has a powerful interest in seeing that the First Amendment is obeyed by a government agency monitoring core political speech.

Irreparable Harm. CTP will suffer irreparable harm without the requested relief. If the FEC engages in a constitutionally unwarranted investigation, it would violate CTP's free expression, free association, and due process rights by attempting to investigate constitutionally protected, confidential information about the inner workings of CTP without any constitutional foundation for doing so. While the FEC has statutory authority to investigate possible violations of *valid* campaign-finance law, it is beyond its statutory authority to investigate where a violation is not legally possible because the law it is enforcing is unconstitutional. A preliminary injunction will protect the status quo until the validity of the challenged provision and policy are resolved.

Because "it can hardly be doubted that the constitutional guarantee (of the First Amendment) has its fullest and most urgent application precisely to the conduct of campaigns for political office" and that interest is fundamental to our form of government, the Court of Appeals for the D.C. Circuit advised that an FEC investigation of political communications warranted "the most careful scrutiny." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) ("*MNPL*"). At the same time, the Supreme Court has recognized that First Amendment rights are uniquely harmed by regulatory schemes threatening prosecution or disruptive investigations and has accordingly held that the state must provide "adequate 'breathing space' to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1998) (*quoting Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988); *See also New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964). These doctrines have resulted in a line of cases in which investigations, required disclosures, and similar actions were held to infringe First Amendment rights.

An investigation in and of itself is a constitutionally cognizable burden on First Amendment rights of free expression and association that must be constitutionally justified before proceeding. *See*, *e.g.*, *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (HUD investigation into plaintiff's advocacy chilled free expression.); *Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999) (same); *Laird v. Tatum*, 408 U.S. 1, 12-13 (1972) (indirect discouragements may be coercive); *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 402 (1950) (same); *Bantam Books , Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (in free expression context, courts should "look through forms to the substance" of government conduct). The investigative process itself "tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). This is so because "[t]he mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference." *Watkins v. United States*, 354 U.S. 178, 196-97 (1957); *see also Sweezy*, 354 U.S. at 250. Compelled disclosures "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). *Da-*

vis has reaffirmed that compelled disclosure is a per se First Amendment burden. *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008).

This is particularly true with Federal Election Commission investigations because "[t]he sole purpose of the FEC is to regulate activities involving political expression, the same activities that are the primary object of the first amendment's protection. The risks involved in government regulation of political expression are certainly evident here." *FEC v. Florida For Kennedy Comm.*, 681 F.2d 1281, 1284 (11th Cir. 1982). Therefore, constitutional considerations require the FEC to prove to the satisfaction of the courts that it has statutory investigative authority over the party it wishes to investigate. *Id*. at 1285; *see also MNPL*, 655 F.2d at 387 (Because "[t]he subject matter which the FEC oversees . . . relates to behavior of individuals and groups only insofar as they act, speak and associate for political purposes," the Commission's investigative authority is subject to "extra-careful scrutiny from the court."). "The danger of treading too quickly or too blithely upon cherished liberties is too great to demand any less of the FEC." *Id.* In *MNPL*, the District of Columbia Circuit held that the Federal Election Campaign Act ("FECA") did not apply to "draft committees," based primarily on the fact that it would allow a dramatic expansion of the FEC's authority to intrude into citizens' First Amendment activities. 655 F.2d at 388.[2]

The court in *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986), also recognized the burden of investigations when it stated that disgruntled opponents might harass by taking advantage of broad and easy stan-

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[2]As *MNPL* stated the problem, *id.* (footnote omitted):

> [T]he subject matter of [the subpoenaed] materials represent[ed] the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. The FEC first demands all available materials which concern a certain political group's "internal communications," wherein its decisions "to support or oppose any individual in any way for nomination or election to the office of President in 1980" are revealed . . . . Then this federal agency, whose members are nominated by the President, demands all materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him. As a final measure, the FEC demands a listing of every official, employee, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any MNPL activities. The government thus becomes privy to knowledge concerning which of its citizens is a "volunteer" for a group trying to defeat the President at the polls . . . [R]elease of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.

dards, and the FEC would be forced "to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations." *Id.* at 165. "Rarely could the FEC dismiss a complaint without soliciting a response . . . ." *Id.*

The First Amendment requires bright lines—such as the unambiguously-campaign-related requirement and the appeal-to-vote[3] and major-purpose[4] tests that implement this requirement—to minimize this danger of constitutionally unjustified investigations and allow dismissal of complaints at an early stage without burdensome, unjustified investigations. This is wholly appropriate because the unwarranted burden resulting from investigations cannot be removed without bright-line rules. Without bright-line rules, election commissions are free to conduct incredibly burdensome and intrusive investigations. The investigation of the Christian Coalition in *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), is a dramatic and tragic illustration of the burden and intrusion caused by an investigation. The FEC's investigation of the Christian Coalition spanned six and a half years as the FEC tried to ferret out any evidence of contacts between people associated with the Coalition and various candidates to support its opportunity-for-coordination standard.[5] The FEC took 81 separate depositions of 48 different individuals, from the former President and Vice President of the United States and staff members of various campaigns, to past and present Coalition employees and volunteers. The breadth of the FEC's probe into every aspect, past, present, and even future, of the deponents' political activities was mind-boggling. Irrelevant and personal questions were asked of the deponents, including questions about their spouses', family members' (which includes children and in-laws), fellow volunteers', and other individuals' political and religious affiliations, campaign activities, political party activities, candidacies, private business dealings, and legislative and lobbying activities "[*b*]*ecause its something that we need to know*." *See*

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[3] *WRTL II*, 127 S. Ct. at 2667.

[4] The major-purpose test was set out in *Buckley*, 424 U.S. at 79. The Fourth Circuit held that it is determined by an "empirical judgment as to whether an organization primarily engages in regulable, election-related speech." *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008). Amici recite several quotes from *Leake* concerning PAC status, but ignore this controlling one.

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

Christian Coalition's Memorandum in Support of its Motion for Summary Judgment at 60, 52 F. Supp. 2d 45. This bone-chilling statement by one of the FEC attorneys in *Christian Coalition* is a harbinger of future investigations absent adherence to the Supreme Court's mandated bright-line tests implementing the unambiguously-campaign-related requirement.[6]

The Coalition was also required to produce tens of thousands of pages of documents, many of them containing sensitive and proprietary information about finances and donor information. In all, the Coalition searched both its offices and warehouse, where millions of pages of documents were stored, in order to produce over 100,000 pages of documents. Third parties were also required to comply with burdensome FEC document requests and produce irrelevant yet confidential and proprietary information such as polls, surveys, and internal memoranda. The Bush Presidential archivists were required to search through two warehouses full of boxes without the benefit of a catalogue. Such investigations impose substantial burdens on third parties and can have serious adverse consequences. All in all, the investigation was exceedingly burdensome, costing the Coalition hundreds of thousands of dollars in attorneys fees and countless lost hours of work by Coalition employees and volunteers. In Washington, it is often said that "the procedure is the punishment." The *Christian Coalition* case proves that statement correct. Although the Christian Coalition won every allegation about coordination, it was still punished by a burdensome and intrusive investigation. Thus, the *Christian Coalition* is case-in-point of what happens when bright line First Amendment mandates—such as are at issue here— are not followed.

WRTL II not only established the appeal-to-vote test, 127 S. Ct. at 2667, which implements the unambiguously-campaign-related requirement for all regulation of electioneering communications, but it also mandated how an as-applied, electioneering-communication case involving issue advocacy—such as the present one—should be resolved: "It must entail minimal if any discovery, to allow parties to resolve

[6]Another target of an FEC investigation into alleged coordinated expenditures echoed these concerns. According to Herman Clark, once he had lost the primary and then spent four years embroiled in an FEC investigation, he did not have the resources to engage in protracted litigation with the FEC and wanted to put the matter behind him. *FEC v. Public Citizen*, 64 F. Supp.2d 1327, 1334 (N.D. Ga. 1999) (citation omitted).

disputes quickly without chilling speech through the threat of burdensome litigation." *Id.* at 2666. The same principle should apply here, requiring that there be little or no discovery and that the FEC not be permitted to bypass this limitation by instituting an investigation before the merits are resolved.

There is no redress for the heavy burden that an investigation would impose on CTP. The FEC certainly will not be liable for the legal fees, personnel costs, and other heavy expenses involved in complying with an investigation. This harm is irreparable.

Success on Merits. In opposing a preliminary injunction, the FEC fails to evade the unambiguously-campaign-related analysis stated in *Buckley*, 424 U.S. 1, and affirmed in *WRTL II*, 127 S. Ct. 2652, and *Leake*, 525 F.3d 274, which control this case. Under these binding precedents and this analysis, CTP has a high likelihood of success on the merits.

The FEC argues that "*Buckley* did not enshrine the phrase 'unambiguously campaign related' as a stand-alone constitutional "requirement" . . . that all disclosure statutes must pass." FEC Mem. 17. The FEC is correct that the unambiguously-campaign-related requirement does not stand alone because the Supreme Court has implemented it through established *tests*, such as the express-advocacy test, the major-purpose test, and the appeal-to-vote test. But the FEC is wrong that all campaign-finance regulations are not required to meet this requirement, as the Fourth Circuit has clearly held:

> The *Buckley* 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." [424 U.S.] at 80. This is because only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable. *Id.*

Leake, 525 F.3d at 281 (underscoring added). This holding governs this case. The FEC's arguments and citations to other circuits disregard the fact that this is a case in the Fourth Circuit. Moreover, *Buckley* specifically applied the unambiguously-campaign-related requirement in the context of *disclosure* concerning independent communications, 424 U.S. at 80, so it must be applied to the Disclosure Requirements as applied to the present independent communications. And *Buckley* did not impose the require-

ment solely to solve vagueness, but it also did so to solve an overbreadth problem, i.e., "[t]o insure that the reach of [the expenditure disclosure provision] is not impermissibly broad" and that "the relation of the information sought to the purposes of the Act [is not] too remote." *Id.* That makes it a universal requirement in campaign-finance regulation, as *Leake* has recognized, regardless of the degree of scrutiny. The FEC wholly disregards another court decision that CTP cited that also recognizes the requirement as a threshold mandate for all campaign-finance regulation. *See* CTP Mem. 12 n.5.

The FEC argues that *McConnell v. FEC*, 540 U.S. 93 (2003), upheld the Disclosure Requirements facially, FEC Mem. 12, which is true, but that does not preclude as-applied challenges or decide this case. In *Wisconsin Right to Life v. FEC*, 546 U.S. 410 (2006) ("*WRTL I*"), the Court unanimously rejected the notion that broad facial-challenge language in *McConnell* precluded as-applied challenges to the electioneering-communication laws.

The FEC argues that disclosure is burdensome only to socially-disfavored groups who may seek a blanket exemption from disclosure. FEC Mem. 12. This ignores the Supreme Court's recognition that compelled disclosure "in itself" is a First Amendment burden. *Davis*, 128 S. Ct. at 2774. The FEC even argues that CTP has no burden under the Disclosure Requirements because as a PAC it can make all of the communications it wants. FEC Mem. 20. This ignores the fact that imposed PAC status is a constitutional burden per se, requiring strict scrutiny. *See Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990) (*citing FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("*MCFL*"). " PACs impose well-documented and onerous burdens, particularly on small nonprofits." *WRTL II*, 127 S. Ct. at 2671 n.9. CTP seeks to avoid this onerous burden.

FEC and Amici try to avoid the unambiguously-campaign-related requirement by pointing to disclosure in ballot-initiative campaigns, which involve issues and not candidates. FEC Mem. 17; Amici Mem. 17. They assert that because the Supreme Court has approved disclosure in the ballot measure context, it must follow that CTP's "issue advocacy" may also be subjected to disclosure. This argument fails. First, this case is not about ballot-initiative campaigns. The *candidate* campaign standard applies, which

requires that a communication may only be regulated if it is "unambiguously related to the *campaign* of a particular federal *candidate*." *Buckley*, 424 U.S. at 80 (emphasis added). Second, even in the ballot-initiative context, the unambiguously-campaign-related requirement remains applicable because government may only regulate communications that are unambiguously related to the ballot-initiative *campaign*. *See e.g.'s National Right to Work Legal Defense and Education Fund v. Herbert*, No. 2:07-cv-809, 2008 WL 4181336 (D. Utah Sep. 8, 2008) (mem. and op. granting summ. j.) (unambiguously-campaign-related requirement requires that "political issues expenditure" definition include only those communications containing express advocacy and that PAC status may only be imposed on ballot measure groups with the major purpose of passing or defeating a ballot measure.). *See also California Pro-Life Council v. Getman*, 328 F.3d 1088 (9th Cir. 2003) ("*CPLC I*") ("express advocacy" construction saves California's definition of "independent expenditure" in ballot measure elections from "overeach[ing]").[7]

The FEC cites lobbying disclosure requirements in an effort to show an example of constitutional compelled disclosure for issue advocacy. The FEC overreaches. At issue in this case is Congress and the FEC's regulation of campaign financing under the Federal *Election Campaign* Act and the Bipartisan *Campaign* Reform Act ("BCRA"), which stem from "[t]he constitutional power of Congress to regulate federal *elections*," *Buckley*, 424 U.S. at 13 (emphasis added). So this is not a lobbying case, and whatever Congressional power and state interests might justify disclosure of lobbying activities are not at issue here. Nevertheless, the FEC and Amici cite *United States v. Harriss*, 347 U.S. 612 (1954), to support

[7] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is not contrary. There the court merely noted in passing that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 792 n.32. The law at issue barred the corporation "from making contributions or expenditures 'for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation.'" *Id.* at 768. Since *Buckley* had already found "for the purpose of influencing" unconstitutionally vague and given it the express-advocacy construction to implement the unambiguously-campaign-related requirement, 424 U.S. at 77, 81, it is clear in *Bellotti* that the "disclosure" of the "source" of any "expenditure" for a communication was only for one that expressly advocated passage or defeat of a measure, i.e., they must be unambiguously related to the ballot-initiative campaign. Similarly, *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981), spoke of "publication of lists of contributors," *id.* at 298, "to *committees* formed to support or oppose ballot measures." *Id.* at 291 (emphasis added). *See Buckley*, 424 U.S. at 23 n.24 (applying unambiguously-campaign-related requirement to "contribution" to include gifts to committees).

compelled disclosure of issue advocacy. FEC Mem. 17; Amici Mem. 15. But *Harriss* relied on the government's interest in providing information to "elected representatives," in an act of Congressional "self-protection," so that elected *officials* might know who was pressuring them. *Id.* at 625. *Harriss* did not involve the Congressional power to regulate federal campaigns and did not involve any state interest relevant to, or recognized in, the context of campaign finance law. In the context of regulating federal elections, Congress may only regulate activity that is "unambiguously related to the campaign of a particular candidate." *Buckley*, 424 U.S. at 80.

The FEC argues that the Administrative Procedure Act ("APA") does not apply to its PAC-status enforcement policy. FEC Mem. 23. The FEC's refusal to make a rule, but instead to state its enforcement policy in the Federal Register, is a "final agency action," 5 U.S.C. § 704, that is reviewable here. The same argument made here was made by the FEC (on a challenge to the same provision) and was rejected in *The Real Truth About Obama, Inc. v. FEC*, No. 08-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008), "because the rule establishing what the FEC would consider as a 'political committee' is a standard set by the FEC, even absent a definition." *Id.* at *9.

For the foregoing reasons a preliminary injunction should issue.

Dated: October 15, 2008

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