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.** _____

Preliminary Injunction Memorandum

Committee for Truth in Politics, Inc. ("CTP") is broadcasting constitutionally-protected "issue advocacy," also known as "political speech." *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652, 2659 (2007) ("*WRTL II*").[1] "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.* at 2667. Holly Lynn Koerber is receiving CTP's speech, and wants to continue doing so.

CTP and Koerber have moved for a preliminary injunction to protect this core First Amendment activity from unconstitutional, unauthorized regulation and to protect CTP from the unconstitutional, unauthorized burden of an investigation, enforcement action, and possible penalties for relying on the protections of the First and Fifth Amendments. As shall be shown, controlling

[1]The cited opinion is by Chief Justice Roberts, joined by Justice Alito. As the controlling *WRTL II* opinion, the principal opinion states the holding of the Court and will herein simply be referred to as *WRTL II*. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (citation omitted)).

precedents in the Fourth Circuit and the U.S. Supreme Court mandate injunctive relief.

Facts

As verified in the *Complaint*, the facts are as follows. The Federal Election Commission ("FEC") is the federal government agency with enforcement authority over the Federal Election Campaign Act ("FECA"). Its headquarters are located in Washington, District of Columbia. Purporting to act pursuant to its statutory authority, the FEC adopted the PAC enforcement policy at issue in this case.

Holly Lynn Koerber is a resident of Elizabeth City, North Carolina, where she has been able to receive a broadcast of CTP's two present ads, *Basic Rights* and *Tragic, but True*. She wants to continue exercising the First Amendment right to receive CTP's speech, but reasonably fears that CTP will be silenced and she will be unable to continue receiving CTP's ads and materially-similar ads, all in violation of her First Amendment rights.

CTP is a nonstock, nonprofit, North Carolina corporation with its principal place of business in Cary, North Carolina. CTP was incorporated in September 2008. CTP is exempt from tax under 26 U.S.C. § 501(c)(4) as an organization primarily devoted to social welfare.

CTP meets the criteria for an *MCFL*-corporation so that it may not be prohibited from making express-advocacy "independent expenditures," *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263-64 (1986) ("*MCFL*"), or from making "electioneering communications," *McConnell v. FEC*, 540 U.S. 93, 210 (2003), that may be prohibited under *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667. Specifically, CTP (a) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (b) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (c) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions

from such entities." *MCFL*, 479 U.S. at 264. CTP is also a "qualified nonprofit corporation" under the FEC's term for *MCFL*-corporations, because it meets the requirements of 11 C.F.R. § 114.10.

CTP is not a PAC because it neither is controlled by a candidate nor has "*the* major purpose," *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287 (4th Cir. 2008), of "primarily engag[ing] in regulable, election-related speech," *id.*, so that its major purpose is not the "nomination or election of a candidate," *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Rather, the majority of CTP's activities will be nonpolitical-intervention, social welfare activities, including lobbying. Although broadcasting CTP's ads set out herein and the materially-similar ads that CTP intends to broadcast are not "regulable election-related speech," *Leake*, 525 F.3d at 287, on which a determination of PAC-status may be based, they will not be the primary activity of CTP.

As set out in its Articles of Incorporation, CTP's purposes are as follows:

> Purpose. The Corporation is organized for the purpose of promoting the social welfare of the people of North Carolina by: (a) Advocating honesty in government; (b) Advocating limited government; and (c) Engaging in any and all lawful activities that are appropriate to carry out and fulfill any or all of the foregoing purposes.

As set out in its Articles of Incorporation, CTP's prohibited activities are as follows:

> Prohibited Activities. Notwithstanding any other provision of these Articles, the Corporation shall not, except to an insubstantial degree, carryon any activities not permitted to be carried on by an organization exempt from Federal income tax under Section 501(c)(4) of the Internal Revenue Code of 1986, as amended ("Code"), or the corresponding provision of any subsequent federal tax laws.

CTP is broadcasting an ad titled *Basic Rights* on television stations in Wilmington, North Carolina, that broadcast into Elizabeth City, North Carolina. *Basic Rights* was broadcast on stations in Pennsylvania, North Carolina, and Wisconsin on October 2, 2008, and it is scheduled to be broadcast in those states on October 3, 2008. CTP intends to also broadcast an ad titled *Tragic, but True*.

The script of ***Basic Rights*** is set out in the *Verified Complaint* at ¶ 32. The Script of ***Tragic, but True*** is set out in the *Verified Complaint* at ¶ 33.

CTP has not, and will not, coordinate the production and broadcast of *Basic Rights* and *Tragic, but True* (collectively "**Ads**") with any candidate, campaign committee, political committee, or political party.

The Ads meet the electioneering communications definition at 2 U.S.C. § 434(f)(3) and 11 C.F.R. § 100.29 because each will be a "broadcast, cable, or satellite communication," *id.* at § 100.29(a), that "[r]efers to a clearly identified candidate for Federal office," *id.*, and "[i]s publicly distributed with 60 days before a general election for the office sought by the candidate," *id.*

Because the Ads are electioneering communications, they are subject to the Disclaimer Requirement, codified at 2 U.S.C. § 441d(a). The Ads include the prescribed disclaimer language, *see* 11 C.F.R. § 110.11, but CTP challenges the constitutionality of requiring the prescribed disclaimer and it would prefer to use a shorter identification of itself so as not to consume so much valuable advertising time.

Because CTP has spent more than $10,000 in 2008 "for the direct costs of producing and airing" *Basic Rights*, CTP is subject to the Reporting Requirement, codified at 2 U.S.C. § 434(f)(1). Under the Reporting Requirement, once CTP reached the $10,000 trigger amount (the "disclosure date," *id.*), it was to have filed the required report "within 24 hours." *Id.* CTP reached the $10,000 trigger amount ("disclosure date") on October 2, 2008, making its report due on October 3, 2008. CTP has not filed the required report and so is currently in violation of the Reporting Requirement. CTP reasonably fears that a complaint will be filed against it for noncompliance with the Reporting Requirement, that the FEC will initiate an investigation and enforcement action, and that CTP may suffer penalties for noncompliance, all in violation of CTP's First

Amendment rights.

CTP also reasonably fears that the FEC may deem CTP to be a political committee under the FEC's vague, overbroad, and unauthorized PAC enforcement policy, in violation of CTP's First and Fifth Amendment rights. *See* FEC, "Political Committee Status . . . ," 69 Fed. Reg. 68056 (Nov. 23, 2004) ("*PAC Status 1*"); FEC, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007) ("*PAC Status 2*"). The policy examines "*a* major purpose" instead of "*the* major purpose" of an entity, *Leake*, 525 F.3d at 287 (requiring the latter), to determine PAC status, and it employs a vague and overbroad totality-of-the-circumstances test for determining major purpose instead of the required "empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech," *id.* (emphasis added). CTP reasonably fears that a complaint will be filed against it for noncompliance with FECA's PAC requirements, that the FEC will initiate an investigation and enforcement action, and that CTP may suffer penalties for noncompliance, all in violation of CTP's First and Fifth Amendment rights.

CTP intends to continue its issue advocacy by broadcasting ads that are materially-similar to the Ads in that they will contain similar issue advocacy, but will similarly not be 'unambiguously related to the campaign of a particular . . . candidate,'" *id.* at 282 (*quoting Buckley*, 424 U.S. at 80) (emphasis added), because they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," *WRTL II*, 127 S. Ct. at 2670. In addition, CTP's materially-similar ads will be consistent with protected ads under the "safe harbor" in the FEC's own regulation implementing *WRTL II*, 11 C.F.R. § 114.15, in that they will fit the following criteria:

> (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
> (2) Does not take a position on any candidate's or officeholder's character, qualifications, or fitness for office; and

> (3) Either:
> (i) Focuses on a legislative, executive or judicial matter or issue; and
> (A) Urges a candidate to take a particular position or action with respect to the matter or issue, or
> (B) Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue . . . .

CTP is at risk for the irreparable harm of an investigation, an enforcement action, and possible penalties, and has no adequate remedy at law.

Argument

CTP and Koerber readily meet the preliminary injunction criteria. The Fourth Circuit follows the usual requirement of four factors—likelihood of success on the merits, irreparable harm, a balancing of harms, and the public interest—as follows:

> [I]n this circuit the trial court standard for interlocutory injunctive relief is the balance-of-hardship test. Whenever a district court has before it a Rule 65(a) motion, although it may properly consider the four general factors enumerated in Airport . . . , it should give them the relative emphasis required by the Sinclair rule: The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Blackwelder Furniture Co. of Statesville v. Seilig Mfg. Co., 550 F.2d 189, 196 (4th Cir. 1999) ("*Blackwelder*").[2] In First Amendment cases, irreparable harm is "'inseparably linked'" to the likelihood of success on the merits, *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002) (citation omitted), so the irreparable harm determination cannot be made until it has been determined whether plaintiffs have a likelihood of success on the merits.

The current preliminary-injunction motion should be considered in light of *WRTL II*, in

[2] *Blackwelder* recited the factors in *Airport Comm. of Forsyth Co., N.C. v. CAB*, 296 F.2d 95, 96 (4th Cir. 1961) as follows: "1) Has the petitioner made a strong showing that it is likely to prevail upon the merits? 2) Has the petitioner shown that without such relief it will suffer irreparable injury? 3) Would the issuance of the injunction substantially harm other interested parties? 4) Wherein lies the public interest?" *Blackwelder*, 550 F.2d at 193.

which the Plaintiff, Wisonsin Right to Life ("WRTL"), was denied a preliminary injunction allowing it to run its 2004 anti-filibuster grassroots lobbying ads. *See WRTL II*, 127 S. Ct. at 2661. Yet the four-justice *WRTL II* dissent argued that a preliminary injunction was the proper remedy in these situations:

> Although WRTL contends that the as-applied remedy has proven to be "[i]nadequate" because such challenges cannot be litigated quickly enough to avoid being mooted, Brief for Appellee 65-66, nothing prevents an advertiser from obtaining a preliminary injunction if it can qualify for one, and WRTL does not point to any evidence that district courts have been unable to rule on any such matters in a timely way.

Id.. at 2704 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ.). The necessary implication of this argument is that there should have been a *real* possibility of obtaining a preliminary injunction in the situation that WRTL faced then and that there should be such a possibility in the situation that CTP and Koerber now face. That means that all four preliminary-injunction elements must be *capable* of being met in this situation.

So the FEC must not be permitted to trump a preliminary injunction by merely asserting that it is always injured if it is unable to enforce a statute, no matter how questionable its constitutionality, or that the public will be harmed because the injunction would come near an election. Cases like *WRTL II* and the present one will, by definition, happen near elections because people decide to speak on issues as needed, especially when public interest in an issue becomes heightened. The mere longstanding existence of statutes, rules, or policies does not make people decide to challenge them. They challenge them when they decide they want to speak and realize that their speech is unconstitutionally restricted or burdened. And the public is never harmed if regulations demonstrated to be unconstitutional and unauthorized are declared unconstitutional and enjoined, just as it was not harmed when *WRTL II* limited the prohibition on electioneering communications to conform with the unambiguously-campaign-related requirement. *Buckley*, 424

U.S. at 80.

In light of *WRTL II*, it is clear that WRTL's ads *were* fully constitutionally-protected issue advocacy and WRTL *should* have been allowed to run them in 2004 when it sought judicial relief, including a preliminary injunction, to do so. It is now clear that WRTL was irreparably harmed, the FEC (and others) would not have been harmed, and the public interest would have been served if WRTL's ads had been run. While determining the likelihood of success on the merits is necessarily predictive—so that actual success does not necessarily establish that there was an ascertainable likelihood of success at the time the preliminary injunction motion was decided—WRTL succeeded on arguments grounded in the same constitutional analysis applied in the present case. So the likelihood of success is now easy to ascertain in the present case. Irreparable harm is also clear in light of *WRTL II* and *Leake*. In view of the high likelihood of success on the merits and the clear and serious irreparable harm, CTP and Koerber should only need to make a more modest showing as to concerns about harm to the FEC or others and about promoting the public interest. However, in light of the high likelihood of success on the merits, harm to the FEC or others is highly unlikely, and a benefit to the public is very likely if a preliminary injunction is granted. And *WRTL II* made clear that any doubts about protecting issue advocacy should be resolved in favor of speech, not censorship. 127 S. Ct. at 2659, 2667, 2669 n.7, 2674.

I. CTP and Koerber Have Likely Success on the Merits.

CTP and Koerber have a high likelihood of success on the merits in light of controlling precedents in the Fourth Circuit and the U.S. Supreme Court. In particular, the Fourth Circuit's recent decision in *Leake*, 525 F.3d 274, readily establishes their likely success on the merits.

A. The Unambiguously-Campaign-Related Requirement Analysis Controls.

In *Leake*, the Fourth Circuit recognized that the unambiguously-campaign-related requirement, as set out below, controls this case. *Id.* at 282-83, 287-88. CTP does not want to engage in what *WRTL II* called "campaign speech, or 'express advocacy,' but [rather] speech about public issues more generally, or 'issue advocacy,' that mentions a candidate for federal office." *WRTL II*, 127 S. Ct. at 2659. *WRTL II* also called issue advocacy "political speech," *id.* at 2659, and held that in drawing lines in the First Amendment area courts must "err on the side of protecting political speech rather than suppressing it." *Id.* "Issue advocacy conveys information and educates. An issue ad's impact on an election, if it exists at all, will come only after the voters hear the information and choose—uninvited by the ad—to factor it into their voting decisions." *Id.* at 2667. *WRTL II* reaffirmed strong constitutional protection for issue advocacy and the speech-protective analysis that it had articulated in *Buckley*, 424 U.S. 1. This *Buckley-WRTL II* analysis controls here.

The applicable *Buckley* analytic key is its unambiguously-campaign-related requirement, 424 U.S. at 79-81, from which the Court derived two tests that govern this case: (1) the major-purpose test, which determines which groups may be treated as "political committees," *id.* at 79 ("organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate"), and (2) the express-advocacy test, which determines when independent expenditures for communications may be subjected to non-PAC disclosure requirements, *id.* at 80 ("[W]e construe 'expenditure' . . . to reach only funds used for communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is *unambiguously related to the campaign of a particular federal candidate*." (emphasis added)).

Buckley also employed an unambiguously-campaign-related analysis to construe "contributions" as limited to "funds provided to a candidate or political party or campaign committee," 424 U.S. at 23 n.24 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign."). And *WRTL II* also applied an unambiguously-campaign-related requirement when it created its appeal-to-vote test to protect issue advocacy from prohibition as an "electioneering communication."

Buckley's unambiguously-campaign-related requirement asks whether "the *relation* of the information sought to the purpose of the Act [regulating elections] *may be too remote*," and, therefore, "*impermissibly broad*." *Id.* (emphasis added). The Court required that government restrict its election-related laws to reach only First Amendment activities that are "*unambiguously related* to the campaign of a particular federal candidate," *id.* (emphasis added), in short, "*unambiguously campaign related*," *id.* at 81 (emphasis added).[3]

The reason for the unambiguously-campaign-related requirement and its derivative express-advocacy, appeal-to-vote, contribution and major-purpose tests is twofold. First, since the only authority to regulate core political speech in this context is the authority to regulate elections, *see id.* at 13 ("constitutional power of Congress to regulate . . . elections is well established"), any restriction must be "unambiguously campaign related," *id.* at 81. *See also id.* at 66 (interest in providing disclosure information to the public is only as to "political *campaign* money" (emphasis added) (citation omitted). Second, the people's core political speech, in their sovereign, self-

[3]This requirement reaffirms and clarifies an earlier formulation of the unambiguously-campaign-related requirement where the Court established the standard of review as requiring both "exacting scrutiny" (i.e., strict scrutiny) and "*also* . . . that there be a 'relevant correlation' [footnote omitted] or 'substantial relation' [footnote omitted] between the governmental interest and the information required to be disclosed." *WRTL II*, 127 S. Ct. at 64 (emphasis added). This "relevant correlation" or "substantial relation" was applied by the Court to require that regulated activity must be "unambiguously related to the campaign of a particular federal candidate." *Id.* at 80.

government role, must not be burdened. The Court noted a dissolving-distinction problem as requiring a bright, speech-protective line between (1) "discussion of issues and candidates" and (2) "advocacy of election or defeat of candidates":

> [T]he *distinction* between *discussion of issues and candidates* and *advocacy of election or defeat of candidates* may often *dissolve* in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.

Id. at 42 (emphasis added). The Court elaborated further on the necessity of the bright line—between (1) "discussion, laudation, [and] general advocacy" and (2) "solicitation"—to protect issue advocacy:

> (W)hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between *discussion, laudation, general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. [¶] Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Id. at 43 (emphasis added).

The Supreme Court later reiterated the express-advocacy and major-purpose tests in imposing the express-advocacy construction on the prohibition on corporate and union "independent expenditures"[4] at 2 U.S.C. § 441b in *MCFL*. 479 U.S. at 249. *MCFL* reiterated that PAC status may not be imposed unless an organization's major purpose is nominating or electing candidates, *id.* at 253, 262, calculated on the basis of its "independent spending," *id.* at 262.

Buckley applied the unambiguously-campaign-related requirement to (1) expenditure limita-

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

tions, *Buckley*, 424 U.S. at 42-44; (2) PAC status and disclosure, *id.* at 79; (3) non-PAC disclosure of contributions and independent expenditures, *id.* at 79-81; and (4) contributions, *id.* at 23 n.24, 78 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.").

In *Leake*, the Fourth Circuit recognized this unambiguously-campaign-related requirement as the controlling analysis and as requiring a narrow express-advocacy test (for independent expenditures) and a narrow appeal-to vote test (for electioneering communications):

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses specific election-related words. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This latter category, in particular, has the potential to trammel vital political speech, and thus regulation of speech as "the functional equivalent of express advocacy" warrants careful judicial scrutiny.

Leake, 525 F.3d at 282-83. *Leake* also held that the unambiguously-campaign-related requirement mandates a narrow major-purpose test for determining PAC status. *Id.* at 287-90.[5]

Applying this controlling *Buckley-WRTL II* analysis readily reveals that the challenged Disclosure Requirements and the FEC's PAC-status enforcement policy at issue here are unconstitutional, that the policy is beyond the statutory authority of the FEC, and, thereby, void under the

[5]Another federal district court recently followed *Leake* in holding that the unambiguously-campaign-related requirement is a threshold test for all campaign-finance regulation; that legislatures may only regulate magic-words express-advocacy communications or statutory electioneering communications that are subject to regulation under the appeal-to-vote test; that *Buckley* construed "contribution" to include donations made directly to a candidate and coordinated expenditures; that *McConnell v. FEC*, 540 U.S. 93 (2003), did not reject the "magic words" test and thereby vitiate the unambiguously-campaign-related requirement; that a "political issues expenditure" definition was unconstitutional for not being restricted to express advocacy; that compelled PAC status imposes substantial burdens; and that *Buckley* permitted PAC status to only be imposed on groups controlled by a candidate or with *the* major purpose of nominating or electing candidates. *See 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.).

Administrative Procedure Act, 5 U.S.C. § 706, and that CTP and Koerber have likely success on the merits.[6]

B. CTP's Ads Are Not Express Advocacy, Regulable Electioneering Communications, or Unambiguously Campaign Related.

CTP and Koerber seek a declaration that the Ads (*Basic Rights* and *Tragic, but True*) are neither express advocacy under 11 C.F.R. § 100.22(b) nor electioneering communications that may be prohibited under *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667. This is necessary because in another district court in this Circuit, the FEC took the litigation position that a similar communication was neither express advocacy nor subject to prohibition under *WRTL II*'s appeal-to-vote test, but the district court decided that the communication was in fact express advocacy under 11 C.F.R. § 100.22(b).[7] CTP's argument that it should not be subject to the Disclosure Re

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[6]Applying these standards, a federal district court in this Circuit recently issued a preliminary injunction limiting West Virginia to regulation of (1) communications that contain "magic words" express advocacy and (2) "electioneering communications" defined like the federal model as upheld in *WRTL II*. *See Center for Individual Freedom v. Ireland*, No. 1:08-190 (S.D. W. Va. April 22, 2008) (Dkt. 38; order granting prelim. inj.) ("*CFIF*") (cited documents available on PACER).

[7]The ad at issue, titled *Change*, is as follows:

> (Woman's voice) Just what is the real truth about Democrat Barack Obama's position on abortion?
>
> (Obama-like voice) Change. Here is how I would like to change America . . . about abortion:
>
> - Make taxpayers pay for all 1.2 million abortions performed in America each year
> - Make sure that minor girls' abortions are kept secret from their parents
> - Make partial-birth abortion legal
> - Give Planned Parenthood lots more money to support abortion
> - Change current federal and state laws so that babies who survive abortions will die soon after they are born
> - Appoint more liberal Justices on the U.S. Supreme Court.
>
> One thing I would *not* change about America is abortion on demand, for any reason, at any time during pregnancy, as many times as a woman wants one.
>
> (Woman's voice). Now you know the real truth about Obama's position on abortion. Is this the change that you can believe in?
>
> To learn more real truth about Obama, visit www.The RealTruthAboutObama.com. Paid for by The Real Truth About Obama.

In *The Real Truth About Obama, Inc. v. FEC*, No. 3:08-cv-483, this ad was set out in the *Verified Complaint*, Dkt. 1 at 5-6; the FEC said that *Change* was protected issue advocacy, not express advocacy under

quirements or the FEC's PAC-status enforcement policy is premised on the fact that the Ads are neither express advocacy nor subject to regulation under *WRTL II*'s appeal-to-vote test, so this is a necessary first step in this Court's analysis.

The Ads are not express advocacy because they contain no magic words, as the Fourth Circuit requires. *Leake*, 525 F.3d at 282-83. They are also not express advocacy under 11 C.F.R. § 100.22(b) (alternative FEC definition)—although that definition is inconsistent with *Leake*—because "[r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."[8] For the same reason that the Ads are not regulable electioneering communications, discussed next, they do not meet the FEC's alternative express-advocacy definition.

The Ads are not regulable electioneering communications under *WRTL II*'s appeal-to-vote test because, while they fit the statutory electioneering-communication definition, they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S. Ct. at 2670. These Ads may reasonably be interpreted as issue-advocacy discussions concerning the positions of an incumbent public official in the legislative branch of government on an important national issue (presently subject to heightened public interest). Their

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11 C.F.R. § 100.22(b) or a prohibited electioneering communication under *WRTL II*'s appeal-to-vote test, 127 S. Ct. at 2667, Dkt. 32 at 6; but the Court said that *Change* was express advocacy under 11 C.F.R. § 100.22(b). Dkt. 77 at 13-14 (mem. op. denying prelim. inj.; Sep. 24, 2008) (all documents available on PACER).

[8]The regulation, 11 C.F.R. § 100.22(b) defines express advocacy alternatively as follows:

> Expressly advocating means any communication that . . . (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—
>
> (1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
>
> (2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

call to action is not a call to vote, so that the Ads are "susceptible of no reasonable interpretation other than as an *appeal to vote* for or against a specific candidate, *id.* at 2667 (emphasis added). Rather, they contain a grassroots lobbying call to the public to call upon the legislator to take a particular position on the public policy issue. In the case of any doubt (which should not be the case here), the benefit of the doubt goes to free speech. *Id.* at 2666, 2669 n.7, 2674.

Since the Ads are not regulable under the express-advocacy test and the appeal-to-vote test, which are implementing tests for the unambiguously-campaign-related principle, then they are not "*unambiguously* related to the *campaign* of a particular federal candidate," *Buckley*, 424 U.S. at 80 (emphasis added). Consequently, government may not regulate them.

C. The Disclosure Requirements Are Unconstitutional as Applied.

This is an as-applied challenge to the constitutionality of **(a) § 201** of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 88-89, titled "Disclosure of Electioneering Communications," which added a new subsection "(f)" to § 304 of FECA that requires reporting of electioneering communications and **(b)** BCRA **§ 311**, 116 Stat. 105, requiring that electioneering communications contain "disclaimers." *See* 11 C.F.R. § 110.11. BCRA § 201 is called herein the "**Reporting Requirement**," BCRA § 311 is called the "**Disclaimer Requirement**," and the requirements together are called the "**Disclosure Requirements**" for ease of identification. The Reporting Requirement is codified at 2 U.S.C. § 434(f). The Disclaimer Requirement is codified at 2 U.S.C. § 441d(a).

The Disclosure Requirements are challenged as applied to CTP, its present ad, materially-similar future ads, and to all statutory electioneering communications that lack an "electioneering nature," *WRTL II*, 127 at 2667, because they "may reasonably be interpreted as something other than as an appeal to vote for or against a specific candidate," *id.* at 2670, and so are not "unam-

biguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80, and are consequently unconstitutionally overbroad in violation of the First Amendment.

Applying the governing unambiguously-campaign-related requirement to the Disclosure Requirements is straightforward. Government may only require "*disclosure* of what an individual or group . . . spends," *Buckley*, 424 U.S. at 75 (emphasis added), for independent communications touching on candidates and issues, *id.* (i.e., that might be considered "'for the purpose of . . . influencing' the nomination or election of candidates for federal office"), if the communications are "*unambiguously* related to the *campaign* of a particular federal candidate," *id.* at 80 (emphasis added).[9]

This unambiguously-campaign-related requirement was applied in *WRTL II*, 127 S. Ct. 2652, to limit the scope of "electioneering communications" to those that meet the appeal-to-vote test, i.e., they "[are] susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate," *id.* at 2667, with all doubts resolved in favor of free speech, *id.* at 2667, 2669 n.7, 2674. Although *WRTL II* involved a challenge to the electioneering communication *prohibition*, the unambiguously-campaign-related principle that it applied also governs disclosures, *Buckley*, 424 U.S. at 80, so that the appeal-to-vote test is the application of the unambiguously-campaign-related principle to any *regulation* of electioneering communications.

The Fourth Circuit follows *Buckley* in holding that the unambiguously-campaign-related requirement applies to *all* campaign-finance *regulation*: "[C]ampaign finance laws may constitutionally *regulate* only those actions that are 'unambiguously related to the campaign of a particu-

[9] *See also Elections Bd. Wisc. v. Wisc. Mfrs. & Commerce*, 597 N.W.2d 721, 731 (Wisc. 1999) ("In our view, *Buckley* stands for the proposition that it is unconstitutional to place reporting or disclosure requirements on communications which do not "expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 80.").

lar . . . candidate.'" *Leake*, 525 F.3d at 282 (*quoting Buckley*, 424 U.S. at 80) (emphasis added). "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.* (*citing Buckley*, 424 U.S. at 80) (emphasis added).

The Fourth Circuit holds that the unambiguously-campaign-related requirement permits government to only *regulate* communications that contain magic-words "express advocacy" (such as "vote for') or "electioneering communications" limited in scope by *WRTL II*'s appeal-to-vote test:

> Pursuant to their power to regulate elections, legislatures may establish campaign finance laws, so long as those laws are addressed to communications that are unambiguously campaign related. The Supreme Court has identified two categories of communication as being unambiguously campaign related. First, "express advocacy," defined as a communication that uses specific election-related words. Second, "the functional equivalent of express advocacy," defined as an "electioneering communication" that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." This latter category, in particular, has the potential to trammel vital political speech, and thus *regulation* of speech as "the functional equivalent of express advocacy" warrants careful judicial scrutiny.

Leake, 525 F.3d at 282-83 (emphasis added).

Despite *WRTL II*'s clear application of *Buckley*'s unambiguously-campaign-related principle to the scope of regulable electioneering communications through the appeal-to-vote test, the FEC refused in its rulemaking implementing *WRTL II* to exempt from the Disclosure Requirements (*see infra*) electioneering communications that are not unambiguously campaign related under *WRTL II*'s appeal-to-vote test.[10] That is not an option under the unambiguously-campaign-related requirement, and it is most clearly not an option in the Fourth Circuit's interpretation of the prevailing constitutional requirements as set out in *Leake*, 525 F.3d 274.

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[10] *See* http://www.fec.gov/law/law_rulemakings. shtml#ec07 (rulemaking documents, including requests to eliminate disclosure for ads not subject to electioneering communication prohibition).

Consequently, as applied to (**a**) communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, and (**b**) CTP's Ads and materially-similar future ads, the Disclosure Requirements, i.e., BCRA §§ 201 and 311, are unconstitutional because the activity is not "unambiguously related to the campaign of a particular federal candidate," *Buckley*, 424 U.S. at 80. Failing this threshold requirement, the Disclosure Requirements do not come within congressional authority to regulate elections and are overbroad for sweeping in First Amendment activity without authority. And as applied to (**a**) communications that may not be prohibited as electioneering communications under *WRTL II*, 127 S. Ct. 2652, and (**b**) CTP's Ads and materially-similar future ads, the Disclosure Requirements are unconstitutional under the First Amendment guarantees of free expression and association.

D. The FEC's PAC-Status Enforcement Policy Is Void.

As noted in the Facts, CTP is not a PAC because it neither is controlled by a candidate nor has "*the* major purpose," *Leake*, 525 F.3d at 287, of "primarily engag[ing] in regulable, election-related speech," *id.*, so that its major purpose is not the "nomination or election of a candidate," *Buckley*, 424 U.S. at 79. Rather, the majority of CTP's activities will be nonpolitical-intervention, social welfare activities, including lobbying. Although broadcasting CTP's ads set out herein and the materially-similar ads that CTP intends to broadcast are not "regulable election-related speech," *Leake* 525 F.3d at 287, on which a determination of PAC-status may be based, they will not be the primary activity of CTP. Expenditures for solicitations to CTP will be insubstantial.[11]

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[11]As set out in its Articles of Incorporation, CTP's purposes are as follows:

Purpose. The Corporation is organized for the purpose of promoting the social welfare of the people of North Carolina by: (a) Advocating honesty in government; (b) Advocating limited government; and (c) Engaging in any and all lawful activities that are appropriate to carry out and fulfill any or all of the foregoing purposes.

CTP reasonably fears that the FEC may deem it to be a political committee under the FEC's vague, overbroad, and unauthorized PAC enforcement policy, in violation of CTP's First and Fifth Amendment rights. *See PAC Status 1*; *PAC Status 2*. CTP reasonably fears that a complaint will be filed against it for noncompliance with FECA's PAC requirements, that the FEC will initiate an investigation and enforcement action, and that CTP may suffer penalties for noncompliance, all in violation of CTP's First and Fifth Amendment rights.

In the Fourth Circuit, PAC status is based on determining "*the* major purpose" of an entity, *Leake*, 525 F.3d at 287, not *a* major purpose, and the determination of major purpose requires an "empirical judgment as to whether an organization primarily engages in *regulable*, election-related speech," *id.* (emphasis added).

The FEC's enforcement policy regarding PAC status does not follow *Leake*. It is set out in two FEC policy statements: *PAC Status 1*, 69 Fed. Reg. 68056, and *PAC Status 2*, 72 Fed. Reg. 5595. *PAC Status 2* cited 11 C.F.R. §§ 100.22(b) and 100.57 as components of its enforcement policy. As noted above, the alternative express-advocacy definition at § 100.22(b) is unconstitutional under *Leake*'s requirement that express advocacy contain magic words, 525 F.3d at 182-83.[12]

The major-purpose test is the third element of the FEC's PAC status enforcement policy. In *PAC Status 2*, the FEC explained that, after having initiated a rulemaking proceeding, it declined to adopt a rule for the major-purpose test, declaring that "the major purpose doctrine . . . requires

[12] The *Verified Complaint*, at ¶ 28, affirms that "[e]xpenditures for solicitations to CTP will be insubstantial, so § 100.57 (which converts donations to "contributions" if made in response to a solicitation to "support or oppose" candidates) is inapplicable here, either in triggering PAC status due to receipt of more than $1,000 in "contribution," *see* 2 U.S.C. § 431(4) (PAC definition with monetary thresholds for "contributions" or "expenditures," or in meeting the major-purpose test for PAC status, *see Buckley*, 424 U.S. at 79. Were § 100.57 applicable, CTP would challenge it as unconstitutionally vague and overbroad.

the flexibility of a case-by-case analysis of an organization's conduct." *PAC Status* 2, 72 Fed. Reg. at 5601. Instead, it set out its vague and overbroad enforcement policy regulating major purpose, requiring the FEC to engage in "a fact intensive inquiry," in order to weigh various vague and overbroad factors with undisclosed weight, requiring "investigations into the conduct of specific organizations that may reach well beyond publicly available statements," including all an organization's "spending on Federal campaign activity" (but not limited to spending on regulable activity) and other spending, and public and non-public statements, including statements to potential donors. *Id.*

PAC Status 2 identified the "major purpose" at issue in its major-purpose test as being "*Federal campaign activity*," *id.* at 5605 (emphasis added), not the narrower "*nomination or election of a candidate*," which *Buckley* required as "the major purpose," *Buckley*, 424 U.S. at 79 (emphasis added). While *MCFL* used "campaign *advocacy*," 479 U.S. at 252 (plurality opinion) (emphasis added), to "further the *election* of candidates," *id.* at 253 (plurality opinion) (emphasis added), and "campaign activity," *id.* at 262 (majority opinion), when speaking of the purpose at issue in the major-purpose test, it did so solely as synonyms for *Buckley*'s "nomination or election" requirement, which it cited and quoted, *MCFL*, 479 U.S. at 252 n.6 (*citing Buckley*, 424 U.S. at 79). There is no authority for the FEC's reformulation of the major-purpose test to focus on "Federal campaign *activity*."

PAC Status 2 also indicated that the FEC would consider other factors in its ad hoc, totality-of-the-circumstances, major-purpose test when it discussed its application of the policy to some 527 organizations in previous investigations. *PAC Status 2*, 72 Fed. Reg. at 5603-04. These included the fact that an entity spent much of its money "on advertisements directed to Presidential *battleground States* and direct mail *attacking* or expressly advocating," *id.* at 5605 (emphasis

added), the fact that groups ceased activity after an election, *id.*, and the fact that they didn't make disbursements in state and local races, *id.* In addition, the FEC thought that it could determine a 527 group's major purpose from internal planning documents and budgets, *id.*, which would normally be protected by First Amendment privacy concerns and were only obtained because the organization was subjected to a burdensome, intrusive investigation. Major purpose was even based on a private thank-you letter to a donor, after the donation had already been made. *Id.*

PAC Status 2, therefore, sets out an enforcement policy based on an ad hoc, case-by-case, analysis of vague and impermissible factors applied to undefined facts derived through broad-ranging, intrusive, and burdensome investigations, often begun when a complaint is filed by a political or ideological rival, that, in themselves, can shut down an organization, without adequate bright lines to protect issue advocacy in this core First Amendment area.

Under the major-purpose test set out in *Buckley*, 424 U.S. at 79, however, PAC status may be determined by either an entity's expenditures, *MCFL*, 479 U.S. at U.S. at 262 (major-purpose calculation looks at express-advocacy independent expenditures in relation to total expenditures: "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee"); *Leake*, 525 F.3d at 287 ("an empirical judgment as to whether an organization primarily engages in regulable, election-related speech"), or by the organization's central purpose revealed in its organic documents, *MCFL*, 479 U.S. at 252 n.6 ("[O]n this record . . . MCFL['s] . . . central organizational purpose is issue advocacy."). Thus, the first test for major purpose requires a comparison of the entity's total disbursements for a year with its unambiguously campaign related and regulable expenditures, so that only the amount of true political "contributions"

and "expenditures" would be counted. The second test requires an examination of the entity's organic documents to determine if there was an express intention to operate as a political committee, *e.g.*, by being designated as a "separate segregated fund" (an internal "PAC") under 2 U.S.C. § 441b(2)(c). Because *Buckley* and *MCFL*'s major-purpose test is an authoritative construction of the definition of "political committee," and a constitutional limit on the application of the political committee requirements of FECA, the FEC's enforcement policy that does not comply with this construction is beyond the FEC's statutory authority.

Because the FEC's enforcement policy for determination of PAC status goes beyond any permissible construction of the major-purpose test, employs invalid regulations to determine whether the entity received a "contribution" or made an "expenditure," is unconstitutionally vague and overbroad, and is "in excess of the statutory . . . authority . . ." of the FEC, it is void under 5 U.S.C. § 706.

E. There Is No "Mere" Disclosure and the Disclosure Requirements Fail Strict Scrutiny.

The Supreme Court recently reaffirmed that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Davis v. FEC*, 128 S. Ct. 2759, 2774-75 (2008) (*quoting Buckley*, 424 U.S. at 64) (internal quotation marks omitted). The level of scrutiny to be applied depends on the extent of the burden imposed. *Id.* at 2775.

Here the scrutiny must be strict. The Disclosure Requirements include the disclosure of donors, which is a severe burden. *Buckley* 424 U.S. at 64-66, 68 (identifying per ser burdens), 237 (Burger, C.J., concurring in part and dissenting in part) (stating examples of burdens).[13] An on-

[13]Evidence of such burdens was put in the *McConnell* record by the National Rifle Association, the Associated Builders and Contractors, the Associated General Contractors of America, the U.S. Chamber, and the ACLU. *McConnell v. FEC*, 251 F. Supp. 2d 176, 227-29 (D.D.C. 2003) (per curiam). The evi-

communication disclaimer is also required by the Disclosure Requirements, for which the Supreme Court required strict scrutiny in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."). The scrutiny must also be strict simply because the Disclosure Requirements burden what *WRTL II* called "political speech." 127 S. Ct. at 2664 ("Because BCRA § 203 burdens political speech, it is subject to strict scrutiny.").

Buckley required "exacting scrutiny" of disclosure provisions, 424 U.S. at 64, which it referred to as the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See WRTL II*, 127 S. Ct. at 2669 n.7 (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny."); *see also McIntyre*, 514 U.S. at 347 (*citing First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978), as equating "exacting" scrutiny with "strict" scrutiny).

In applying strict scrutiny, the FEC has the burden of proving that the Disclosure Requirements are narrowly tailored to a compelling interest. *See WRTL II*, 127 S. Ct at 2664 (stating scrutiny standard).

Buckley set out three interests applicable in the disclosure context generally. "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 fed-

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dence ranged from large numbers of contributions at just below the disclosure trigger amount, to vandalism after disclosure, to non-contribution because of concerns about a group's ability to retain confidentiality, to concerns about employers, neighbors, other business entities, and others knowing of support for causes that are not popular everywhere and the results of such disclosure. *Id. See also AFL-CIO v. FEC*, 333 F.3d 168, 176, 179 (D.C. Cir. 2003) (recognizing that releasing names of volunteers, employees, and members would make it hard to recruit personnel, applying strict scrutiny, and striking down an FEC rule requiring public release of all investigation materials upon conclusion of an investigation); William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1 (2003); Dick M. Carpenter II, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* (2007) (available at http://www.ij.org/publications/other/disclosurecosts. html).

eral office." *Buckley*, 424 U.S. at 66-67 (emphasis added; footnote omitted). "Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id.* at 67. "Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above." *Id.* at 67-68.

The second and third of these interests deal with preventing corruption. But *Buckley* held that with respect to "independent expenditures," "[t]he absence of prearrangement and coordination . . . with the candidate . . . undermines the value of the expenditure to the candidate . . . [and] alleviates the danger [of] quid pro quo," so that restrictions on independent expenditures do not "prevent[] circumvention of the contribution limitations . . . ." *Id.* at 47. If this is true of independent express advocacy, then *a fortiori* it is true of independent "issue advocacy." *WRTL II*, 127 S. Ct. at 2667. *WRTL II* questioned whether a circumvention interest applies to expenditures, but held that, in any event, it did not apply to speech that is not the functional equivalent of express advocacy: "[T]o justify regulation of WRTL's ads, this interest must be stretched yet another step to ads that are *not* the functional equivalent of express advocacy. Enough is enough. Issue ads like WRTL's are by no means equivalent to contributions, and the *quid-pro-quo* corruption interest cannot justify regulating them." *Id.* at 2672 (emphasis in original).

WRTL's identification of preventing *quid-pro-quo* corruption as the government's compelling interest in regulating in the campaign-finance area is consistent with *Davis*. 128 S. Ct. 2759. In *Davis*, this Court considered possible compelling interests for burdening (not restricting) a self-funding candidate's ability to make expenditures for his own speech. 128 S. Ct. at 2773. The Court rejected as compelling any interest in equalizing spending and reaffirmed that the only compelling interest in this area is preventing corruption and its appearance. *Id.* So in the present

context, where the Disclosure Requirements burden CTP's and Koerber's political speech, those requirements must be narrowly-tailored to preventing corruption.

Buckley's first interest by its terms deals with "campaign" funds and "candidate" spending, "to aid the voters in evaluating those who seek federal office," 424 U.S. at 66-67, which address the *quid-pro-quo* corruption interest. The Disclosure Requirements here reach independent issue advocacy communications by non-candidates, so the Disclosure Requirements do not address the *quid-pro-quo* corruption interest and do not help the voters evaluate candidates for office. Therefore, the Disclosure Requirements fail strict scrutiny.

II. CTP and Koerber Have Irreparable Harm.

Since CTP and Koerber have established a high likelihood of success on the merits, their showing as to irreparable harm should be decreased. *See Blackwelder*, 550 F.2d at 196 ("The decision to grant or deny a preliminary injunction depends upon a "flexible interplay" among all the factors considered."). But CTP and Koerber clearly have irreparable harm, in the form of a high risk of a complaint, imminent FEC investigation,[14] an FEC enforcement action, and potential penalties.

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[14]An investigation, in and of itself, is a First Amendment burden. Unique among federal administrative agencies, the FEC has as its sole purpose the regulation of core constitutionally protected activity–"the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *FEC v. Machinists Non-Partisan Political League*, 210 U.S. App. D.C. 267, 655 F.2d 380, 387 (D.C. Cir. 1981). As a result, FEC investigations into alleged election law violations frequently involve subpoenaing materials of a "delicate nature . . . representing the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and office holding." *Id.* at 388; *see id.* at 387 ("extra-careful scrutiny" is warranted where political activities and association are subject to investigation). When otherwise legitimate investigations impinge on freedom of speech, that power must be "carefully circumscribed" if it is to avoid violating First Amendment rights. *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957); *see also AFL-CIO v. FEC*, 333 F.3d 168, 176-178 (D.C. Cir. 2003) (describing the chilling effect governmental investigations and forced disclosures have on protected First Amendment activities). "'The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.'" *Id.* at 175-76 (*citing Buckley v. Valeo*, 424 U.S. 1, 64-68, (1976); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958)).

III. The Balance of Harms Favors CTP and Koerber.

CTP and Koerber have demonstrated both probable success on the merits and a clear irreparable injury, so a preliminary injunction should issue. But the balance of hardships also tips in the favor of Koerber and CTP because if CTP is silenced and penalized, and Koerber can no longer recieive CTP's speech, that is an irreparable loss of First Amendment rights to engage in core political speaking and hearing in the context of highly-protected issue advocacy at the most opportune time in terms of public interest. Defendant's interest in enforcing the FEC's regulations and policy is substantially reduced by the showing of the high probability of success on the merits. Clearly, if the challenged provisions are unconstitutional, Defendant has *no* cognizable interest in enforcing them. Moreover, there remain numerous campaign-finance laws and regulations that will remain in effect that will adequately protect the governmental interests that the Supreme Court has identified in this area to the extent that they regulate only activity that meets the unambiguously-campaign-related requirement and the derivative express-advocacy test, "contribution" construction, major-purpose test, and appeal-to-vote test.

As another district court held recently in issuing a preliminary injunction limiting the reach of Ohio's "electioneering communication" law, "'if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere to its enjoinment.'" *Ohio Right to Life*, No. 2:08-cv-492, slip op. at 23 (S.D. Oh. Sep. 5, 2008) (op. and order granting prelim. inj.) (citation omitted); *see also CFIF*, No. 1:08-190, slip. op. at 13 (S.D. W. Va. April 22, 2008) (Dkt. 37; mem. op. granting prelim. inj.) ("carefully tailored injunction will not unduly restrict the defendants' power to regulate the election process in legitimate ways").

IV. The Public Interest Favors CTP and Koerber.

The public interest analysis also follows the high likelihood of success that has been shown and favors CTP and Koerber. The public has an interest in its representative government entities enacting and enforcing constitutional laws and policies in a constitutionally-permissible manner. It has an interest in promoting core political speech. It has a First Amendment interest in receiving CTP's speech. An injunction serves these interests. "[I]ssuance of a preliminary injunction will serve the public interest because 'it is always in the public interest to prevent violation of a party's constitutional rights.'" *Ohio Right to Life*, No. 2:08-cv-492, op. at 23 (citation omitted).

> Protection of freedom of speech in a democratic society is of critical public interest. *See West Virginians for Life, Inc.*, 919 F. Supp. at 960. In this case, it appears that several provisions . . . are vague, and consequently chill the public's right to speak on political matters. Accordingly, the court finds that the public has a strong interest in having the challenged laws enjoined or clarified.

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

Conclusion

For the foregoing reasons a preliminary injunction should issue and no security should be required because Defendants have no monetary stake.

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Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that a true and accurate copy of the foregoing Preliminary Injunction Memorandum was served by certified mail on the persons identified below on October 3, 2008. In addition, a courtesy copy was sent by email to the FEC at tduncan@fec.gov, dkolker@fec.gov, and kdeeley@fec.gov, and a courtesy copy was sent by FedEx overnight service to General Mukasey.

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