UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:08-cv-00039

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

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

UNOPPOSED MOTION OF THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 FOR LEAVE TO FILE MEMORANDUM AS *AMICI CURIAE*

The Campaign Legal Center (CLC) and Democracy 21 respectfully move for leave to file as *amici curiae* the attached Memorandum in Opposition to Plaintiff's Motion for A Preliminary Injunction. The CLC and Democracy 21 consulted with counsel for Plaintiffs and Defendants to request consent to the filing of the attached Memorandum as *amici curiae*. Plaintiffs and Defendant have consented to this motion; this motion is unopposed. The CLC and Democracy 21 submit this motion without request for oral argument.

In support of this motion, *amici* movants state:

1. This case seeks to have the Court enjoin on a preliminary and permanent basis, and to declare void, certain federal campaign finance statutes and Federal Election Commission (FEC) enforcement policies that establish when an organization such as Committee for Truth in Politics (CTP) must abide by the "political committee" requirements in the Federal Election Campaign Act (FECA), as well as when a corporation such as CTP must disclose to the FEC and

the public the fact that it has spent funds to disseminate an "electioneering communication." *See*, *e.g.*, Plaintiffs' Preliminary Injunction Memorandum ("Pl. PI Memo.") at 15, 18.

2. The CLC is a non-profit, non-partisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing the campaign and media laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that it is properly enforcing federal election laws, and files complaints with the Commission requesting that enforcement actions be taken against individuals or organizations which violate the law.

3. Democracy 21 is a non-profit, non-partisan policy organization that works to ensure the integrity of our democracy. It supports campaign finance and other political reforms, and conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented.

4. The *amici* movants have substantial experience and expertise with regard to the issues raised in this case.

5. The *amici* movants participated extensively in the FEC rulemaking proceedings that produced the challenged "PAC-Status Enforcement Policy"[1] Further, the *amici* movants participated in the FEC rulemaking proceedings to interpret the Supreme Court decision in *WRTL II*, which led to the FEC's promulgation of a regulation that does not – to Plaintiffs' disappointment – exempt from federal statutory "electioneering communication" disclosure

[1] Comments of Democracy 21, Campaign Legal Center and Center for Responsive Politics on FEC Notice 2004-6 (Political Committee Status) (April 5, 2004), *available at* http://www.fec.gov/pdf/nprm/political_comm_status/simon_potter_nobel_sanford.pdf.

requirements ads of the sort CTP wishes to disseminate free from public disclosure.[2] *See* 2 U.S.C. § 434(f) (disclosure of electioneering communications); *see also* 2 U.S.C. § 441d (disclaimer requirement for electioneering communications). The *amici* movants have also filed numerous administrative complaints with the FEC challenging the failure of various groups to register as federal political committees in violation of the FEC's political committee enforcement policy.[3] The *amici* movants thus have a significant interest in this action and can materially contribute to the Court's consideration of Plaintiff's claim.

6. The *amici* movants also have substantial expertise in litigation regarding the specific laws at issue in this case and campaign finance laws more generally. CLC and Democracy 21 have provided legal counsel to parties or *amici* in numerous campaign finance cases, including representing intervening defendants in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). More recently, CLC and Democracy 21 represented parties in *Wisconsin Right to Life v. FEC*, 126 S.Ct. 1016 (2006) (*WRTL I*) and *WRTL II*, 127 S.Ct. 2652 (2007), lawsuits which substantially underlie Plaintiff's claims in the present case. The CLC and Democracy 21 are presently participating as *amici curiae* in *SpeechNow.org v. Fed. Election Comm'n*, 567 F. Supp. 2d 70 (D.D.C. 2008) (Memorandum Order Denying Motion for Preliminary Injunction), and in *The Real Truth Against Obama v. FEC*, No. 3-08-CV-483, 2008 WL 4416282 (E.D. Va.

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[2] Comments of the Campaign Legal Center, Democracy 21, the Brennan Center for Justice, Common Cause, the League of Women Voters and U.S. PIRG on FEC Notice 2007-16 (Electioneering Communications) (Oct. 1, 2007), *available at* http://www.fec.gov/pdf/nprm/electioneering_comm/2007/campaign_legal_center_democracy21_brennan_center_for_justice_commoncause_league%20_of_women_voters_uspirg_eccomment7.pdf.

[3] *E.g.*, Complaint, *Democracy 21 et al. v. America Coming Together* (FEC June 22, 2004) (MUR 5403); Complaint, *Democracy 21 et al. v. The Media Fund*, (FEC Jan. 15, 2004) (MUR 5440); Complaint, *Democracy 21 et al. v. Progress for America Voter Fund* (FEC July 21, 2004) (MUR 5487); Complaint, *Democracy 21 et al. v. Swift Boat Veterans for Truth* (FEC Aug. 10, 2004) (MUR 5511).

Sept. 24, 2008), *motion for inj. pending appeal den.* No. 08-1977 (4th Cir. Oct. 1, 2008) – both of which are pending civil actions that likewise challenge the FEC's regulation of political organizations as "political committees." The CLC and Democracy 21 have also represented parties or *amici* in the following cases relating to the interpretation of the federal and state campaign finance laws: *Randall v. Sorrell*, 126 S.Ct. 2479 (2006); *Shays v. FEC* ("*Shays I*"), 337 F. Supp. 2d 28 (D.D.C. 2004) aff'd 414 F.3d 76 (D.C. Cir. 2005); and *Shays v. FEC* ("*Shays III*"), 528 F.3d 914 (D.C. Cir. 2008).

7. *Amici* movants submit that the attached Memorandum of *Amici Curiae* in Opposition to Plaintiff's Motion for a Preliminary Injunction will assist the Court in considering the issues presented by Plaintiff's motion. This filing is timely because this motion and the attached memorandum are being filed on the date that the principal brief of the Defendant is due.

Wherefore, movants respectfully request that the Court grant leave to file the attached Memorandum of *Amici Curiae* In Opposition to Plaintiff's Motion for a Preliminary Injunction.

Respectfully submitted this 14th day of October, 2008.

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CERTIFICATE OF SERVICE

This is to certify that on October 14, 2008, a true and accurate copy of the foregoing UNOPPOSED MOTION OF THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 FOR LEAVE TO FILE MEMORANDUM AS *AMICI* CURIAE was served on the counsel of record, Paul Stam, Jr. for the Plaintiffs, Claire N. Rajan for the Defendant and R.A. Renfer, Jr. for the Defendant by electronically filing the same with the Court, using the CM/ECF system. In addition, a courtesy copy was sent by email to:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
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HOLLY ANN KOERBER and COMMITTEE FOR TRUTH IN POLITICS, INC.,	)
Plaintiffs,	)
v.	)
FEDERAL ELECTION COMMISSION,	)
Defendant.	)

MEMORANDUM OF CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS *AMICI CURIAE* IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

In this case, Plaintiffs Holly Ann Koerber and the Committee For Truth In Politics, Inc. (hereinafter referred to collectively as "CTP") challenge the constitutionality of federal disclosure requirements for broadcast ads that are "electioneering communications," and also challenge the policies of the Federal Election Commission (FEC) relating to when a group becomes a "political committee." Both challenges are brought in the context of television ads that CTP acknowledges constitute "electioneering communications" under federal law. *See* Plaintiffs Preliminary Injunction Memorandum ("Pl. PI Memo.") at 4 ("Because the Ads are electioneering communications….").[1]

The basis for CTP's challenge to the disclosure requirements is the Supreme Court's recent decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"),

[1] "Electioneering communication" is defined by federal law 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 or thirty days of a primary election or nominating convention. *See* 2 U.S.C. § 434(f)(3).

where the Court held that the statutory restriction on corporate and union funding of "electioneering communications" was unconstitutional as applied to any such broadcast ads that are not express advocacy or "the functional equivalent of express advocacy." 127 S. Ct. at 2667.

CTP's challenge to disclosure has no merit. The *WRTL II* Court said nothing about the disclosure of electioneering communications; the Court examined only the funding restriction for such ads. The *WRTL II* decision therefore provides no basis to question the Supreme Court's earlier decision in *McConnell v. FEC*, 540 U.S. 93, 194-202 (2003), where the Court did directly review the "electioneering communication" disclosure requirements, and upheld them by a vote of 8-1.

Furthermore, CTP's argument completely disregards the fact that laws requiring disclosure not only of campaign financing but also of lobbying activities and ballot measure advocacy have been consistently upheld by the Supreme Court and by lower state and federal courts.

For these reasons, CTP's argument here has already been soundly rejected by a three-judge district court in Washington, DC and by another district court in Ohio. *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008) (denying motion for preliminary injunction), *summary judgment granted*, 2008 WL 2788753 (D.D.C. July 18, 2008) (three judge court), *appeal pending* 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). This Court should do the same.

CTP's separate challenge to the FEC "PAC-status enforcement policy" is likewise wholly without merit. The FEC's determination of when a group is a "political committee," and the Commission's application of the underlying "major purpose" test, are both consistent with the

Supreme Court's constitutional analysis of "political committee" status in *Buckley v. Valeo*, 424 U.S. 1, 78-79 (1976) and its progeny. CTP's argument on this point has also been explicitly rejected, this time by another district court in this Circuit just last month, and also on a preliminary basis by the Fourth Circuit itself, 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*"). Again, this Court should do the same.

For all these reasons and those detailed below, *Amici* respectfully submit that CTP is unlikely to succeed on the merits of this challenge and we urge the Court to deny CTP's request for a preliminary injunction.

STATEMENT OF FACTS

Amici incorporate by reference and rely upon the Statement of Facts presented by the FEC in its Response to Plaintiffs' Motion for Preliminary Injunction.

ARGUMENT

I. Plaintiffs' 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* Pl. PI Memo. at 9. In CTP's view, only if speech meets this standard can it be subject to any type of regulation under the campaign finance laws. *See* Pl. PI Memo. at 10, 26. According to CTP, the disclosure provisions it challenges here, *see* Bipartisan Campaign Reform Act of 2002 (BCRA) §§ 201, 203, and 311, and the FEC's "PAC-status enforcement policy," fail the "unambiguously campaign related" test and therefore violate the First Amendment.

The problem with CTP's argument is that it is based on a fiction. The "unambiguously campaign related" language appeared in *Buckley*, not as some sort of foundational test for

constitutionality, but rather as a merely incidental reference in the Court's discussion of express advocacy. 424 U.S. at 79-80. The phrase certainly was not adopted as an independent constitutional test, and has not been so much as mentioned, much less applied in any subsequent Supreme Court case since *Buckley*.[2]

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 such "unambiguously campaign related" test 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, as 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 be less of a 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,

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[2] A review of *Buckley* illustrates the ancillary nature of the phrase. To address "serious problems of vagueness," the *Buckley* Court construed the term "expenditure" in FECA (as to groups without a "major purpose" to influence elections) to reach only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 76, 80. The Court then stated that "this reading is directed precisely to that spending that is *unambiguously related* to the campaign of a particular federal candidate." *Id.* at 80 (emphasis added). The only constitutional "test" created by the *Buckley* Court in this passage was the express advocacy standard for what constitutes an "expenditure" in certain contexts. The "unambiguously campaign related" language was simply a description of this standard, not a new stand-alone constitutional command.

requiring only 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 constitutionality of a campaign finance law. CTP argues that the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*Leake*"), requires this standard to be applied to the disclosure provisions challenged in this case. *See* Pl. PI Memo. at 9-13. 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 at 281, the federal disclosure provisions challenged in this case differ significantly from those state laws examined in *Leake* – and the federal laws challenged in this case have been explicitly upheld by the Supreme Court in *McConnell* under a different constitutional test applicable to disclosure laws. *See* Sec. II, *infra*. Furthermore, the Fourth Circuit in *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 that federal disclosure statutes serve different, broader government interests than the anti-corruption interest considered by the Fourth Circuit in *Leake* – and indeed, the Supreme Court has upheld political disclosure laws completely unrelated to candidate campaigns. *See* Sec. II, *infra.*

For these reasons, this Court should reject CTP's proposed "unambiguously campaign related" test for the constitutionality of the federal disclosure requirements at issue here. The Court instead should use the test employed by the Supreme Court in *McConnell*, where the Court upheld these same BCRA provisions against constitutional challenge.

II. BCRA's "Electioneering Communication" Disclosure Requirements Are Constitutional.

CTP argues that the Supreme Court's decision last year in *WRTL II* – which limited the scope of "electioneering communications" that could be subject to BCRA's funding restriction – likewise limited the scope of "electioneering communications" that could be subject to BCRA's disclosure requirements. (CTP refers to BCRA's reporting and disclaimer requirements collectively as the "disclosure requirements." *See* Pl. PI Memo. at 15. For the sake of clarity, we use the same terminology.) However, these same BCRA disclosure requirements were previously upheld by the Supreme Court in *McConnell* by a vote of 8-1.

WRTL II did not overrule the holding or alter the analysis of *McConnell* in approving these disclosure requirements, a conclusion reached by the courts in both *Citizens United* and *ORTL* in rejecting the identical claims raised in those cases. For the reasons discussed below, this Court should reject CTP's argument as well.

A. The *WRTL II* Decision 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*. The narrow focus of *WRTL II* is apparent on the face of the decision. The first sentence of the controlling opinion announces that the Court is considering the constitutionality of the funding prohibition, 2 U.S.C. § 441b(b)(2), as applied to WRTL's specific ads. The Court did not even mention the disclosure requirements that also applied to those ads, nor did WRTL challenge them.

In the complaint filed by WRTL, it 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 grass-roots lobbying advertisements." *WRTL II*, No. 04-1260, Amended Verified Complaint for Declaratory and Injunctive Relief, 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 Wisconsin Right to Life, Inc., 2007 WL 868545, at *49 (Mar. 22, 2007).

For this reason, the Court in *WRTL II* reviewed only the constitutionality of BCRA's funding restriction – not its disclosure requirements. Because the funding restriction and the disclosure requirements are subject to different standards of scrutiny and are 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 2671 (quoting *McConnell*, 540 U.S. at 205; *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley*, 424 U.S. at 44-45). *See also ORTL*, 2008 WL 4186312, at *7 ("Plaintiff maintains that the Court should apply strict scrutiny in analyzing

Ohio's [electioneering communication] disclosure provisions…. Defendants argue, and this Court agrees, that the appropriate standard of review regarding campaign finance disclosure laws is intermediate, not strict scrutiny."). 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 review 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 or contributions. 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 meaningful enforcement of the substantive provisions of the federal campaign finance laws. *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 at all to whether the state's informational and enforcement interests will support a disclosure requirement.

For these reasons, the three-judge court in *Citizens United* rejected an identical claim that *WRTL II* must be read as overruling *McConnell* on the constitutionality of the disclosure provisions. The three-judge court said:

> 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. Although *McConnell* upheld the § 203 prohibition on its face, the Court left open the issue that was presented in *WRTL*, reserving it for decision on an as-applied basis. In contrast, when the *McConnell* Court sustained the disclosure provision of § 201and the disclaimer provision of § 311, it did so for the "entire range of electioneering communications" set forth in the statute.

Citizens United, 530 F. Supp. 2d at 281. In response to Citizen United's claim there that its speech was "constitutionally protected" under *WRTL II*, and therefore also shielded 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 rejected precisely the claim made by CTP here – that *WRTL II* necessarily must be read to invalidate the BCRA disclosure provisions.

Likewise, the court in *ORTL* also rejected the argument CTP makes here, concluding not only that "the appropriate standard of review regarding campaign finance disclosure laws is intermediate, not strict[,]" *ORTL*, 2008 WL 4186312, at *7, but also that "*McConnell* is determinative of Plaintiff's constitutional challenge." *Id.* The court explained:

> Plaintiff ORTL argues *WRTL* provides a basis for overturning the 8-1 decision of the *McConnell* Court upholding electioneering communication disclosure requirements. … The Court disagrees. The *WRTL* Court made clear that the Court was only considering the constitutionality of the BCRA's federal electioneering communication funding prohibition…. The Court did not even mention disclosure requirements, much less consider their constitutionality. And, though the *McConnell* Court left open the possibility of as-applied challenges to the BCRA's blackout provision (the issue presented in *WRTL*), the Court sustained the BCRA's disclosure provisions for the "entire range of 'electioneering communications.'"

Id. at *9.

B. *McConnell* Upheld BCRA's "Electioneering Communication" Disclosure Requirements on Their Face.

The Supreme Court's analysis of the electioneering communications disclosure provisions in *McConnell* controls here. There is no dispute that *McConnell* rejected – by an 8-1 vote – a facial challenge to these provisions. Applying intermediate scrutiny, eight Justices upheld both the reporting and the disclaimer requirements, 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 230 (Rehnquist, C.J., joined by all Justices except Thomas, J.) (upholding the "electioneering communication" disclaimer requirements).[3] This analysis still serves to support the constitutionality of the provisions CTP challenges here.

1. Contrary to CTP's allegations, the disclosure requirements are subject to intermediate scrutiny, not strict scrutiny.

Relying upon the analysis in *Buckley*, the Court in *McConnell* applied an intermediate level of scrutiny to the disclosure requirements. In *Buckley*, the Court reviewed FECA's comprehensive reporting and recording-keeping requirements for political committees, *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

[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).

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

Last month in *ORTL*, the court rejected the plaintiff's argument that strict scrutiny is applicable to "electioneering communication" disclosure requirements. *See ORTL*, 2008 WL 4186312, at *7. The *ORTL* court said: "With respect to campaign finance disclosure provisions, the Supreme Court has consistently applied an intermediate level of scrutiny." *Id*. at *8 (citing *Buckley*, 424 U.S. at 64-66 and *McConnell*, 540 U.S. at 46).

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 "exacting scrutiny" is the equivalent of strict scrutiny. *Id*. at 23 ("*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.'").

[4] *See Alaska Right To Life Comm. v. Miles*, 441 F.3d 773, 788 (9th Cir. 2006) ("The [*McConnell*] Court was not … explicit about the appropriate standard of scrutiny with respect to disclosure requirements. However, in addressing extensive reporting requirements applicable to … 'electioneering communications' … the Court did not apply 'strict scrutiny' or require a 'compelling state interest.' Rather, the Court upheld the disclosure requirements as supported merely by 'important state interests.'") (internal quotations omitted).

CTP is attempting to exploit the inconsistent use of the term "exacting scrutiny" by the Supreme Court in past cases.[5] 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 it.

Indeed, 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. It would confound reason to apply strict scrutiny both to expenditure limits, the most restrictive campaign finance regulation, and disclosure requirements, the least restrictive regulation. 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.

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[5] The Supreme Court has used the phrase "exacting scrutiny" to describe significantly different standards of review. In *Buckley*, the court applied "exacting scrutiny" by reviewing the challenged disclosure provisions for a "relevant correlation" or "substantial relation" to a "substantial" governmental interest." 424 U.S. at 64. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), the Supreme Court also applied "exacting scrutiny" to a state ballot measure disclaimer requirement but there reviewed whether the requirement was "narrowly tailored to serve an overriding state interest." *Id*. at 347. *Compare also Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) (applying "exacting scrutiny" to ballot measure committee contribution limit by assessing whether the law "advance[s] a *legitimate* governmental interest *significant* enough to justify its infringement of First Amendment rights") (emphasis added).

In *Buckley*, the Court acknowledged that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but found "that there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Buckley*, 424 U.S. at 66 (*quoting Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). The Court then 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. The Court also noted that invalidating the disclosure provisions would disserve the First Amendment interests of the public:

> Plaintiffs' disdain for BCRA's disclosure provisions is nothing short of surprising. … Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: 'The Coalition-Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), 'Republicans for Clean Air' (funded by brothers

> Charles and Sam Wyly). … Given these tactics, Plaintiffs never satisfactorily answer the question of how 'uninhibited, robust, and wide-open' speech can occur when organizations hide themselves from the scrutiny of the voting public. Plaintiffs' argument for striking down BCRA's disclosure provisions does not reinforce the precious First Amendment values that Plaintiffs argue are trampled by BCRA, but ignores the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."

Id. at 196-97 (quoting *McConnell,* 251 F. Supp. 2d 176, 237 (D.D.C. 2003)) (internal citations omitted) (emphasis added). The Court here should take note that the name "Committee for Truth in Politics" closely resembles the kind of "dubious and misleading" names mentioned by the Court in *McConnell* as grounds for upholding the disclosure requirement.

Importantly, the Court upheld the "electioneering communication" disclosure requirements as "to the entire range of 'electioneering communications,'" *McConnell*, 540 U.S. at 196, 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 "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.

C. Even Disclosure of "Issue" Discussion is Constitutional.

CTP argues that disclosure is unconstitutional unless it is "unambiguously campaign related," and never if it is "issue" related. The error of CTP's argument is underscored by two types of laws requiring disclosure of issue advocacy that have been approved by the Supreme Court, namely those relating to lobbying and to ballot measure advocacy. These cases plainly

illustrate that the constitutionality of a disclosure requirement does not depend on whether the speech is "unambiguously campaign related."

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 Regulation of Lobbying Act, 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 report information about 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:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. … Toward that end, Congress has not sought to prohibit these pressures. It 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 625-26.[6]

The fact that the Lobbying Act is unrelated to candidate campaigns and instead pertains only to issue speech was not constitutionally significant. The Supreme Court found that the

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[6] 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. *Florida League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 460 (11th Cir. 1996) (upholding a state lobbying disclosure statute in light of the "interest of voters" in receiving information to "apprais[e] the integrity and performance of officeholders and candidates"); *Minnesota State Ethical Practices Board v. NRA*, 761 F.2d 509, 512 (8th Cir. 1985) (finding that "the State of Minnesota's interest in disclosure outweighs any infringement of the appellants' first amendment rights"); *Commission on Independent Colleges and Universities v. New York Temporary State Commission*, 534 F. Supp. 489, 494 (N.D.N.Y. 1982) ("The lobby law serves to apprise the public of the sources of pressure on government officials, thus better enabling the public to access their performance."); *Kimbell v. Hooper*, 665 A.2d 44, 49 (Vt. 1995) ("Vermont's lobbyist disclosure law is a reasonable means of evaluating the lobbyist's influence on the political process.").

disclosure it requires 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 federal lobbying disclosure law as recently amended by the Honest Leadership and Open Government Act of 2007).

Further, the Court has recognized that even "grassroots" or "indirect" lobbying, *i.e.*, communications to persuade the *public* to lobby government officials, may be constitutionally subject to disclosure. The *Harriss* case upheld not only disclosure of lobbyists' *direct* communications with legislators, but also their "artificially stimulated" public "letter campaign[s]" to Congress. *Harriss*, 347 U.S. at 620; *see also id*. at 621 n.10 (noting that the Act covered lobbyists' "initiat[ion] of propaganda from all over the country, in the form of letters and telegrams," to influence the acts of legislators).[7] Such communications generally describe a legislative action favored by the sponsor, and urge the public to contact the relevant lawmakers regarding this action. *See, e.g.*, *Minn. State Ethical Practices Bd. v. NRA*, 761 F.2d 509, 511 (8th Cir. 1985) (upholding Minnesota disclosure requirement as applied to four communications sent from the NRA to its Minnesota members urging them to contact their state legislators about pending legislation). That these "classic" issue ads can be subject to disclosure fatally

[7] 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 of Prof'l Lobbyists, Inc.*, 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 (upholding Minnesota statute requiring disclosure from groups who conduct grassroots lobbying campaigns); *Kimbell*, 665 A.2d at 46 (upholding provisions of Vermont statute requiring reporting of indirect contacts to influence legislators, such as "solicitation of others to influence legislative or administrative action").

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 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 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."); *see also Am. Constitutional Law Found.*, 525 U.S. at 205 (invalidating several Colorado regulations concerning the state's ballot petition process but upholding the regulation requiring "sponsors of

ballot initiatives to disclose who pays petition circulators, and how much" because this requirement informed voters of "the source and amount of money spent by proponents to get a measure on the ballot").

These precedents led the Ninth Circuit to hold that, "[g]iven the Supreme Court's repeated pronouncements, we think there can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws." *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003), *appeal after remand California Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007). It also noted that "[t]hough the *Buckley* Court discussed the value of disclosure for candidate elections, the same considerations apply just as forcefully, if not more so, for voter-decided ballot measures." *Id*. at 1105. Otherwise stated, the court recognized that the informational interest recognized by *Buckley* applies equally to ballot measure disclosure, although the underlying speech is neither "campaign related" nor the functional equivalent of express advocacy under the standard established by *WRTL II*.[8]

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[8] Another example of a disclosure system that regulates "pure" issue advocacy is the political broadcast disclosure requirements of the Federal Communications Act of 1934, 47 U.S.C. §§ 301 *et seq*. Section 504 of BCRA amended the Communication Act to require television broadcasters to keep records of requests to broadcast "message[s]" about "a national legislative issue of public importance" or "any political matter of national importance." 47 U.S.C. §§ 315(e)(1)(B), (e)(1)(B)(iii). The records must include information about the name of the person purchasing the time, and in the case of an entity, a list of the chief executive officers or members of the executive committee or of the board of directors of such entity. 47 U.S.C. § 315(e)(2). Because these records must be made available to the public, 47 U.S.C. § 315(e)(1), this statute ensures that the name of every person and entity wishing to broadcast an "issue ad" will be publicly disclosed.

Although this statute thus regulates issue advocacy in arguably its "purest" form, the Supreme Court upheld the statute in *McConnell*. The Court determined that the requirements "seem likely to help the FCC determine whether broadcasters are carrying out their 'obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance,' and whether broadcasters are too heavily favoring entertainment." 540 U.S. at 240 (internal citations omitted).

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 the "substantial relation" standard set forth in *Buckley*. Under this standard, the application of the disclosure requirements to CTP's advertisements, *i.e.*, to non-express-advocacy electioneering communications, 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.[9]

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

[9] *Amici* note that CTP has not even attempted to meet the rigorous standard set by the *Buckley* decision for an as-applied exemption from a political disclosure statute based upon a "reasonable probability" that the disclosure will subject the regulated parties to "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. *See also McConnell*, 540 U.S. at 198, 199 (reiterating *Buckley*'s standard for as-applied challenges). *See also Citizens United v. FEC*, 530 F. Supp. 2d at 281 (noting that plaintiff "states that there may be reprisals, but it has presented no evidence to back up this bald assertion").

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 a 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 broadcast in very close proximity to a federal election that refers to a clearly identified candidate. 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. And for that reason, disclosure will directly serve 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). *See also McConnell*, 540 U.S. at 240 (upholding political broadcast disclosure requirements), discussed in n.9, *supra*. 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 legitimacy and credibility of their messages.

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

McConnell also upheld FECA'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 (disclosure "gather[s] the data necessary to detect violations of the contribution limitations"). 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. A group's expenditures for even non-express-advocacy electioneering communications is relevant to this determination. *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").[10]

Further, FEC regulations prohibit an outside group from coordinating its spending for an "electioneering communication" with either a candidate or party 11 C.F.R. § 109.21(c)(1). Without disclosure of the entire range of such electioneering communications, the FEC's ability to enforce this restriction will be impaired.

[10] This document is available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-3.pdf.

III. The FEC's PAC-Status Enforcement Policy and "Major Purpose" Test Are Constitutional.

Finally, CTP challenges the FEC's "PAC-status enforcement policy" and the underlying "major purpose" test to determine when a group is a "political committee" subject to contribution limits and reporting requirements. *See* Pl. PI Memo. at 18-22. In particular, CTP claims that the FEC's focus on "Federal campaign activity," rather than on activity relating solely to the "nomination or election of a candidate" to determine an organization's "major purpose," renders the test impermissibly overbroad. *Id*. at 20. Additionally, CTP alleges that the FEC's application of the "major purpose" test is unconstitutional because it is based on "ad hoc, case-by-case, analysis of vague and impermissible factors." *Id.* at 21.

CTP's objections on both counts are misplaced. And indeed, almost identical claims were rejected just last month in *RTAO*, 2008 WL 4416282, when the district court refused to issue a preliminary injunction on these claims, a decision which the Fourth Circuit declined to disturb pending appeal. *See RTAO*, No. 08-1977, Order Denying Motion for 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 aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year…." 2 U.S.C. § 431(4).

The Supreme Court has construed this statutory definition of "political committee" to apply only to so-called "major purpose" groups. The Supreme Court first articulated the "major purpose" test in *Buckley* in the context of analyzing FECA's disclosure requirements. *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 found the term "expenditure" caused "line drawing problems" by potentially "encompassing both issue discussion and advocacy of a political result," so that the "political committee" standard (which relies on the definition of "expenditure") might "reach groups engaged purely in issue discussion." *Id.* at 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.* at 79 (emphasis added). For such "major purpose" groups, the Court had no vagueness concern about the statutory "for the purpose of influencing" standard because, the Court held, "expenditures" by such groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related."[11] *Id*. (emphasis added). *See also McConnell*, 540 U.S. at 170 n.64 (restating the "major purpose" test).

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 has the "major purpose" to influence elections (the *Buckley* test). CTP challenges the Commission's implementation of both prongs, albeit the first one just in passing.

As to the first test, the Commission deems only those communications that include express advocacy to be "expenditures." The Commission defines express advocacy to include both "magic words," 11 C.F.R. § 100.22(a), and also communications that "could only be

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[11] By comparison, "when the maker of the expenditure is not within these categories – when it is an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80 (emphasis added).

interpreted by a reasonable person" as advocating the election or defeat of a candidate. *Id.* at 100.22(b).

Seemingly as an aside, CTP asserts that the FEC's subpart (b) definition of express advocacy is unconstitutional because it does not require "magic words." *See*, *e.g.*, Pl. PI Memo. at 14, 19. In support of this claim, CTP mischaracterizes the Fourth Circuit's decision in *Leake*. Rather than requiring magic words, the *Leake* Court explicitly recognized that under *WRTL II* a "category of activity beyond the 'magic words' identified in *Buckley* [is] regulable as the 'functional equivalent of express advocacy." *Leake*, 525 F. 3d at 282. As a legal and practical matter, the definition of "expressly advocating" at 11 C.F.R. § 100.22(b) is indistinguishable from the *WRTL II* test for the "functional equivalent of express advocacy," which the Supreme Court described as whether an ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II*, 127 S.Ct. at 2667. In the *RTAO* decision last month, the district court agreed that the two standards are indistinguishable, explaining:

> [T]he test in section 100.22(b) is the same analysis as was enumerated in WRTL. WRTL required that the ad be deemed express advocacy "only if the ad is susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate." 127 S. Ct. at 2667. Section 100.22(b) states that express advocacy can be found if "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)." Because section 100.22(b) is virtually the same test stated by Chief Justice Roberts in the majority opinion of WRTL, … the test enumerated in section 100.22(b) to determine express advocacy is constitutional.

RTAO, 2008 WL 4416282, at *11 (emphasis added). Furthermore, the Fourth Circuit in *Leake* characterized the *WRTL II* standard as "sufficiently 'protective of political speech' to allow legislators to regulate beyond *Buckley's* 'magic words' approach." *Leake*, 525 F. 3d at 282, *quoting WRTL II*, 127 S. Ct. at 2669 n.7. For this reason, CTP's passing assertions that the

subpart (b) definition of express advocacy is unconstitutional should be disregarded by this Court.

CTP's principal objection to the FEC's PAC-status enforcement policy is that the FEC's application of the *Buckley* "major purpose" test is vague and overbroad. *See* Pl. PI Memo. at 20. Specifically, CTP argues that, in assessing whether a group must register and operate as a "political committee," the FEC has improperly expanded its "major purpose" inquiry by examining whether a group's major purpose is "Federal campaign activity" rather than what CTP calls the "narrower" standard of whether the group's major purpose is the "nomination or election of a candidate." Pl. PI Memo. at 20.

There is no basis for this purported distinction and, indeed, the Supreme Court has used the tests interchangeably. In *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986) ("*MCFL*"), the Court held that a non-profit ideological corporation was not subject to the ban on express advocacy expenditures that applies to business corporations. *See* 2 U.S.C. § 441b. The Court noted, however, that MCFL could be required to register and operate as a "political committee" if it met the "major purpose" test set forth in *Buckley.* According to the Court, "it is undisputed on this record that MCFL" is not an entity "the major purpose of which is the nomination or election of a candidate." *MCFL*, 479 U.S. at 253 n.6. But, the Court noted that:

> [S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns.

Id. at 262 (emphasis added).

Thus, the *MCFL* Court set forth the *Buckley* standard – whether the group's major purpose is "the nomination or election of a candidate" – and then equated that test to whether the group's "major purpose may be regarded as campaign activity." The distinction CTP draws

between the two standards simply does not exist. CTP admits as much when it notes that the two tests set forth in *MCFL* are "synonyms" for each other. Pl. PI Memo. at 20. Thus, the FEC's formulation of the "major purpose" test as one that examines a group's "Federal campaign activity" is fully permissible under *Buckley* and *MCFL*.

The district court in *RTAO* last month rejected precisely the claim made here by CTP:

> RTAO further alleges that the FEC has failed to incorporate the Buckley standard and has therefore gone beyond its statutory authority by making the major purpose test to focus on "*federal* campaign activity." (Compl. ¶ 79) (emphasis added). There is really no difference between "campaign related," as enumerated in Buckley and "campaign activity" as the FEC codified in the regulation. 72 Fed. Reg. at 5601.

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

In addition, CTP objects 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, "Political Committee Status," 72 Fed. Reg. 5595 (Feb. 7, 2007), and in recent enforcement actions, is an overbroad and unbounded inquiry into "vague and impermissible" factors. Pl. PI Memo. at 21. Again, this objection is unwarranted.

The Supreme Court in *MCFL* described political committees as "those groups whose primary objective is to influence political campaigns." 479 U.S. at 262. CTP argues that as a constitutional matter, this test must be narrowed to only two permissible inquiries. First, CTP claims that the FEC can examine whether a group's contributions and express advocacy expenditures constitute a majority of its total disbursements. Pl. PI Memo. at 21-22. 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*. According to CTP, it is impermissible for the FEC to make any other inquiry.

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." 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 in Washington, DC 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 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*, the Fourth Circuit 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.

The Fourth Circuit in *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 the Fourth Circuit expressly did not reach NCRL'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.

In rejecting virtually the same claim made here, the district court in *RTAO* last month said:

> To determine what a "major purpose" is, courts have permitted evaluation of public statements, an organization's spending or contributions, letters to primary contributors, and other non-public statements. Courts have even mentioned that when an entity organizes itself as a 527, it is "inherently indicative of its choice to principally engage in electoral activity, which goes a long way to satisfying the major purpose test." …
>
> 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. 72 Fed. Reg. 5595, 5602. Because the FEC employs the same factors the Supreme Court has approved in these aforementioned cases, 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).

Finally, CTP argues that in *Leake* the Fourth Circuit disapproved a North Carolina law which established the test for political committee status as whether a group had "a" major purpose to influence campaigns. The court held the appropriate test under *Buckley* is to decide whether a group has "the" major purpose to influence campaigns. *Leake*, 525 F.3d at 289-90. However, CTP goes on to incorrectly state that the "FEC's enforcement policy regarding PAC status does not follow *Leake*" in this regard. Pl. PI Memo. at 19. There is no conflict between the *Leake* ruling and the rule as applied by the FEC – which also uses a test of "the" major purpose. *See* 72 Fed. Reg. at 5601 ("Not only must the organization have raised or spent $1,000 in contributions or expenditures, but it must additionally have the major purpose of engaging in Federal campaign activity.") (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 reject CTP's arguments and uphold the FEC's PAC-status enforcement policy and implementation of the major purpose standard.

CONCLUSION

For the foregoing reasons, the challenged "electioneering communication" disclosure requirements and the FEC's procedures for determining an organization's "political committee" status, including its implementation of the underlying "major purpose" test, do not violate the First Amendment. Accordingly, this Court should find that CTP is unlikely to succeed on the merits of its challenge and deny CTP's motion for a preliminary injunction.

Respectfully submitted this 14th day of October, 2008.

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CERTIFICATE OF SERVICE

This is to certify that on October 14, 2008, a true and accurate copy of the foregoing MEMORANDUM OF THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS *AMICI* CURIAE IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION was served on the counsel of record, Paul Stam, Jr. for the Plaintiffs, Claire N. Rajan for the Defendant and R.A. Renfer, Jr. for the Defendant by electronically filing the same with the Court, using the CM/ECF system. In addition, a courtesy copy was sent by email to:

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:08-cv-00039

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

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

ORDER

Pending before the Court is an unopposed motion by the Campaign Legal Center and Democracy 21 for leave to appear in this cause as *amici curiae*. For good cause shown, the motion for leave to participate as *amici curiae* by the Campaign Legal Center and Democracy 21 is hereby GRANTED.

This ____ day of October, 2008.

MALCOLM J. HOWARD
Senior U.S. District Judge