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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CENTER FOR INDIVIDUAL FREEDOM, Plaintiff,	)	
v.	)	**Civil Action No. 07-2792**
THOMAS CORBETT, Attorney General of the Commonwealth of Pennsylvania, Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS AMENDED MOTION FOR SUPPLEMENTAL RELIEF, INCLUDING INJUNCTION AND ORDER OF JOINDER

A federal declaratory judgment is a solemn judicial act, and it is to be respected. Typically state officials comply with a declaratory judgment as scrupulously as with an injunction. But on the rare occasion they do not, Congress has provided a potent remedy: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." 28 U.S.C. § 2202. Pointing to that provision, the Third Circuit stressed that "prosecutions in disregard of [a federal] declaratory judgment could not be ignored.... This we cannot accept." *Conley v. Dauer,* 463 F.2d 63, 67 (3d Cir. 1972). *See Morris v. Travisono,* 509 F.2d 1358, 1361-62 (1st Cir. 1975) (authorizing an injunction under section 2202 where state officials began disregarding a "final consent decree" granting a "declaratory judgment").

This is one of those rare cases like *Conley* in which Pennsylvania officials have disregarded a federal declaratory judgment. As detailed below, Pennsylvania's Attorney General and Secretary of the Commonwealth ("Defendants") sought to suppress the

speech of Plaintiff Center for Individual Freedom ("CFIF") on grounds that were squarely foreclosed by the declaratory judgment contained in the Stipulated Judgment that this Court accepted on August 18, 2007. The Defendants' conduct was particularly galling because the Attorney General participated in crafting and consented to the precise terms of the decree, which the Secretary had agreed to respect. Moreover, the Defendants needlessly insisted on proceeding before the Commonwealth Court, even though CFIF's first-filed November 1 Motion presented the same issues to this Court, whose declaratory judgment was controlling, who had made clear a willingness to act as swiftly as circumstances required, and who could grant all necessary relief.

Although the Commonwealth Court ultimately rejected Defendants' attempt to enjoin CFIF's television ad, its non-precedential opinion further blurred the bright line of the declaratory judgment, erroneously suggested that Pennsylvania could regulate more than express advocacy without adopting new legislation, and suggested that further broadcast of the same or similar ads could expose CFIF to criminal penalties.[1] Reflecting that development, CFIF's Amended Motion for Supplemental Relief, Including Injunction and Order of Joinder ("Motion") seeks the following further relief based on the declaratory judgment this Court granted in its Stipulated Judgment:

- A declaration that Defendants' legal positions violate both the original declaration and the First Amendment, and that the CFIF ad attacked by Defendants does not contain express advocacy and is not subject to regulation under existing Pennsylvania law.

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[1] The parties have stipulated that any response to the complaint filed in the Commonwealth Court may be deferred until at least January 14, 2008, while briefing in this case proceeds. For its part, CFIF has agreed to give Defendants until January 14, 2008, in which to respond to the present Amended Motion.

- An injunction forbidding Defendants from disregarding the declared law.
- A monetary award, including fees and costs, either because CFIF is a prevailing party in a § 1983 action or as damages for the breach of the agreement that led to entry of the declaratory judgment, and at least nominal damages for the violation of CFIF's First Amendment rights.
- Re-joinder of the Secretary as a party defendant so that there will be no question he is bound by the Court's decision.

FACTS

Last summer CFIF brought suit against several Pennsylvania officials responsible for enforcing Pennsylvania's campaign finance laws. CFIF's complaint and papers seeking expedited declaratory or injunctive relief (incorporated herein by reference) showed it had planned independent speech in Pennsylvania near the time of the fall elections (and future elections), but Pennsylvania's vague definition and prohibition of regulated "expenditures" had imposed self-censorship and chilled CFIF's speech in violation of the First Amendment. CFIF asked that the laws either be struck down as unconstitutionally vague or be declared to have a precise and objective bright line meaning, so CFIF could determine in advance whether its speech would be regulated.

Several original defendants, including Secretary of the Commonwealth Pedro A. Cortés, requested dismissal by consent, saying the Attorney General was the appropriate party to litigate the meaning of the statute and they would accept whatever outcome he achieved, whether by settlement or adjudication. CFIF agreed. The Attorney General and CFIF then negotiated a Stipulated Judgment (Exhibit A).[2] It recited that the United

[2] Referenced Exhibits are attached to the Amended Motion.

States Supreme Court had construed similar federal laws to apply only to "express advocacy," citing *Buckley v. Valeo,* 424 U.S. 1, 43-44 & n. 52, 79-82 & n. 108 (1976). Ex. A at Background ¶ 7. Then, pursuant to the consent of the parties, this Court "ORDERED, ADJUDGED, AND DECREED" that:

> "Based on the foregoing, and to provide clear guidance to speakers in light of existing precedent of the United States Supreme Court, the Court declares that 25 P.S. § 3253(a) ... and § 3241(d)(1) defining "expenditure" ... are properly construed as applying only to spending for "express advocacy" as that term is defined in *Buckley*.

Id. at Judgment ¶ 1 (emphasis added).

CFIF then did just what its complaint had said it was planning. In the week before the elections for Pennsylvania Supreme Court, it began broadcasting a television ad. As the attached script (Exhibit B) demonstrates, the ad did not mention any election or identify anyone as a candidate. It advocated being tough on crime and noted that Judge Lally-Green had pursued such a policy. Pointing out that her stand had won praise from elements of Pennsylvania's law enforcement, legal establishment, and press, the ad urged viewers to thank her for her stand by logging on to a website – where viewers were invited to sign a petition to that effect. *Id.* The website remains active and the petition may be viewed at the address given in the ad.

Critically, the ad did not contain any explicit words such as vote for or elect that expressly advocated the election or defeat of any candidate. Nevertheless, it became politically controversial. Other candidates and their supporters complained that a corporation from outside Pennsylvania was speaking out in ways that could affect the election. Demands were made that state officials take action against CFIF.

The Defendants agreed to try to suppress CFIF's speech. Their effort began with a telephone call on Thursday, November 1, saying the ad was unlawful. That call was followed by a faxed letter to CFIF by the Secretary (Exhibit C) saying CFIF's ad constituted an unlawful corporate "expenditure" and demanding that CFIF either take the ad down immediately or justify its conduct to the Secretary's satisfaction by 3:00 p.m. CFIF responded in a timely manner (Exhibit D) and explained that the ad was protected by the Stipulated Judgment. It also refuted the Secretary's claim that the ad violated different and inapposite standards derived from recent U.S. Supreme Court precedent. However, late that afternoon, lawyers for the Defendants informed CFIF that they deemed the ad to be the functional equivalent of express advocacy and anticipated asking the Commonwealth Court to enjoin it the next day.

Following the Secretary's first telephone call, and prior to notice that the Defendants intended to seek an injunction, CFIF began preparing a motion to this Court for further relief. Within hours after the Defendants' counsel rejected CFIF's defense of its ad, on the evening of November 1, 2007, CFIF moved for emergency relief from this Court based on the declaratory judgment granted by the Stipulated Judgment. Copies of CFIF's November 1 motion papers were immediately faxed to Defendants, backed up by telephone notice. The relief sought by this motion included: (i) a declaration that the ad in question was not express advocacy under the Stipulated Judgment; (ii) a preliminary injunction against the Attorney General enjoining him from regulating the ad as an "expenditure" under Pennsylvania law; and (iii) conditional joinder of the Secretary of the Commonwealth.

Defendants ignored this Court. They did not seek an emergency hearing here either in person or by telephone. Instead, with full knowledge that the issues already were pending before this Court, they filed in the Commonwealth Court a complaint and application for preliminary injunction against broadcasting the CFIF ad, setting a hearing at 1:30 p.m. that very day, November 2. The relief sought by Defendants thus would have impaired this Court's ability to grant the relief sought by the CFIF motion.

The complaint and motion papers filed by Defendants (Exhibit E) argued that Pennsylvania law did not depend on the presence or absence of explicit words of advocacy but, instead, turned on a holistic assessment of speech and context and reached speech that "is the functional equivalent of express advocacy." ¶¶ 28, 30-31. These papers are excerpted and discussed *infra* at 18-19.

At the outset of the hearing, CFIF informed the Commonwealth Court of its pending motion, provided copies of the papers, and noted this Court had agreed to hold an emergency hearing. Thus, CFIF further moved to abate, stay, or defer, noting that the relief sought there could moot issues before this Court. Defendants urged the Commonwealth Court to proceed, arguing this Court would be too slow. (A transcript of the full proceeding before the Commonwealth Court is attached as Exhibit F).

In their oral presentation at the hearing, Defendants did <u>not</u> acknowledge that Pennsylvania's statutes regulating "expenditures" applied only to spending for "express advocacy <u>as defined in Buckley</u>." Although they briefly suggested *Buckley*'s standard could be met, their core position was that the meaning of "expenditure" was an evolving and elastic concept that, according to more recent cases, could be met by inferences

drawn from the ad as a whole and its surrounding circumstances as to the speaker's intent or a viewer's likely understanding. For example, the Secretary's counsel argued:

> *Buckley* ... and the so-called magic words is not the be all and end all.... We're not just looking at *Buckley*. Ex. F at 35.
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> No, they didn't use the magic words ... but the words they used, ... the context and the timing, the totality of the circumstances [and] the totality of Supreme Court precedent, leads to the conclusion [of] express advocacy. *Id.* at 70.

And the message the Commonwealth Court took from Defendants' papers and argument was that there "seems to be some evolving in the meaning of expenditure." *Id.* at 74.

Late in the afternoon of November 2, the Commonwealth Court denied the requested preliminary injunction. However, the court's Opinion (Exhibit G) accepted Defendants' position that express advocacy was "evolving." Although it found that the ad did not constitute "express advocacy" within the meaning of *Buckley*, it did not treat that finding as dispositive. *Id.* at 5. Instead, as Defendants urged, it referenced *FEC v. Wisconsin Right To Life*, 127 S. Ct. 2652 (2007) ("*WRTL*") and intimated there might now be a more relaxed standard for determining whether the express advocacy standard had been met. *Id.* It suggested that, given likely inferences about the ad's intent and effect, CFIF risked potential criminal liability if it allowed its ad to continue or if it broadcast similar ads in the future. *Id.* at 6. Although the opinion was not a merits determination, was prepared in great haste, and specified it should not be published, it reinforces the future threat posed by Defendants to CFIF's rights.

Defendants' conduct inflicted and continues to inflict serious disruption and expense on CFIF of precisely the type that the Stipulated Judgment was intended to prevent. In addition to lost time of CFIF executives, CFIF incurred large legal fees and

costs seeking to protect its First Amendment rights, both in this forum and before the Commonwealth Court. Worst of all, CFIF now finds itself again chilled from its plans for future speech in Pennsylvania.

ARGUMENT

The declaratory judgment ordered by this Court provided clear guidance to speakers by construing Pennsylvania's definition and prohibition of "expenditure" narrowly to apply only to the precise and objective bright line definition of "express advocacy" established by the Supreme Court in *Buckley*. To avoid any doubt, it identified the specific pages in that decision where the definition appeared. Ex. A at Background ¶ 7 (citing *Buckley,* 424 U.S. at 43-44 & n. 52, 79-82 & n. 108). Disregarding that declaration, Defendants attacked an ad that clearly did not meet the *Buckley* definition based on a fuzzy and subjective standard they attributed to other cases. Rather than holding Defendants to the declaratory judgment, the Commonwealth Court's non-precedential ruling threatened CFIF with serious consequences based on a standard that the declaratory judgment foreclosed.

Like any consent decree, the declaratory judgment is as binding as an adjudicated outcome. It expressly demands application of *Buckley*'s definition of express advocacy. By taking enforcement action based on a different legal standard and by seeking to suppress speech that clearly was not regulated under the declared standard, Defendants wrongfully disregarded that binding judgment. This misconduct was doubly improper because the new cases relied upon by Defendants do not re-define *Buckley*'s "express advocacy" standard. Instead, in discussing a new bright line legislative standard, they identify speech that is not express advocacy but can be regulated. But at the same time,

they reaffirm that *Buckley* express advocacy demands explicit words of express advocacy and that implications will not do.

This Court should grant further relief rejecting Defendants' positions, holding that CFIF's ad is not express advocacy, enjoining further departure from the standard enunciated in the declaratory judgment, and awarding CFIF its reasonable fees and expenses, as well as at least nominal damages for First Amendment injury.

1. The declaratory judgment conclusively establishes that regulated "expenditures" must contain "express advocacy as that term is defined in *Buckley*"

Defendants' attack fundamentally misconstrues the precedents relied upon, but that is not the controlling point at this stage.[3] Pursuant to agreement of the parties, this Court "ORDERED, ADJUDGED, AND DECREED" that "to provide clear guidance to speakers," Pennsylvania's statutory definition and prohibition of "expenditures" are "properly construed as applying only to spending for 'express advocacy' as that term is defined in *Buckley*." *Id.* at Judgment ¶ 1 (emphasis added). Moreover, the Stipulated Judgment specified the specific pages in *Buckley* where that definition appears, "424 U.S. 1, 43-44 & n. 52, 79-82 & n. 108." *Id.* at Background ¶ 7.

Once a "declaratory judgment is valid and final, it is conclusive with respect to matters declared." *Henglein v. Colt Indus. Operating Corp.*, 260 F.3d 201, 211 (3d Cir. 2001) (citing *Restatement (Second) of Judgments* § 33 cmts. b & e). Although entered pursuant to the agreement of the parties, "right or wrong [it is] the judgment of the court." *United States v. Swift & Co.*, 286 U.S. 106, 117 (1932). On rare occasions a consent

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[3] If the case had been litigated to a conclusion, CFIF is confident the Court independently would have concluded that the *Buckley* test controls. But the Attorney General – Pennsylvania's chief legal officer – chose not to insist upon such a litigated outcome. At this point, the issue is the meaning of the Stipulated Judgment.

judgment may be modified, if there is a "clear showing of grievous wrong evoked by new and unforeseen conditions." *Id.* at 119. But no such modification was or could be sought here, since the cases Defendants relied upon to set aside *Buckley*'s definition all were decided before the declaratory judgment was entered. There are no changed circumstances.

The declaratory judgment conclusively establishes that existing Pennsylvania law regulates only expenditures for speech containing express advocacy as defined in *Buckley*, and none other. Defendants' claim that post-*Buckley* cases define express advocacy differently now is irrelevant — though it also is mistaken.

2. *Buckley*'s definition requires explicit words of express advocacy and rejects attempts to infer the speaker's intent or the audience's understanding

At the pages cited in the Stipulated Judgment, *Buckley* described the uniquely high degree of precision necessary when core First Amendment speech is regulated. It rejected half-measures and held that fatal vagueness could be avoided only if the vague definitions of expenditure were narrowly construed to require "explicit words" such as "vote for" or "elect" that "expressly advocate the election or defeat" of a clearly identified candidate. *Buckley,* 424 U.S. at 43-44 & n.52, 79-82 & n.108 (emphasis added).

Buckley's formulation was not accidental or casual. Quoting *Thomas v. Collins,* 323 U.S. 516, 535 (1945), *Buckley* rejected any test based on the "intent and effect" of speech because a speaker could not be certain what "inference may be drawn as to his intent and meaning," and the First Amendment does not allow core speech to be threatened with gray zones that cause a speaker to "hedge and trim" to "steer far clear" of possible risk. 424 U.S. at 43. Consistent with that rationale, the Stipulated Judgment

adopted the same definition of express advocacy, thus requiring explicit words, such as "vote for" or "elect." Ex. A at Background ¶ 7.

Further underscoring its demand for explicit words of express advocacy, *Buckley* provided that speakers would be "free to spend as much as they want to promote the candidate and his views" so long as they simply "eschew expenditures that in express terms advocate the election or defeat" of a candidate. 424 U.S. at 45. It acknowledged but was not moved by the obvious ability of speakers to devise "expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." *Id.* In short, the Court recognized that its express advocacy definition did not comprehensively reach all speech that had the intent or effect of influencing an election or assisting a candidate, but only a subset of such speech containing truly explicit words of advocacy.

From the day *Buckley* was decided, those who favored greater regulation argued the Court could not really have intended a simple-minded demand for "magic words." But abundant federal appellate authority established that was exactly what *Buckley* meant. An early example is the emphatic and unanimous holding of the en banc Second Circuit in *FEC v. Central Long Island Tax Reform Immediately Comm.,* 616 F.2d 45, 53 (2d Cir. 1980) (en banc). This opinion is discussed below at 15-16. A recent example is *CFIF v. Carmouche,* 449 F.3d 655, 663-65 (5th Cir. 2006), which reviewed the case law, held that it does not relax the *Buckley* standard, and said that any broader regulation must be accomplished by new legislation. In *WRTL*, the controlling opinion by Chief Justice Roberts and the concurring opinion by Justice Scalia both referred to *Buckley* as requiring "magic words" of express advocacy. 127 S. Ct. at 2667, 2669 n.7, 2681-82. Similarly,

McConnell spoke of "*Buckley*'s magic words requirement." 540 U.S. at 193-94. Abundant additional authority is discussed in CFIF's Memorandum in Support of Preliminary Injunction (July 6, 2007), incorporated herein by reference. That authority is not necessary to construe the declaratory judgment – *Buckley*'s language is plain and controlling. But if there were doubt, this authority would resolve it.

3. The *McConnell* and *WRTL* decisions confirmed that *Buckley* express advocacy demands explicit advocacy, but held that properly drafted new legislation may reach some non-express advocacy

The two Supreme Court cases that Defendants relied upon for their expanded standard were *McConnell v. FEC,* 540 U.S. 93 (2003) and *WRTL* (decided in 2007). Those cases deal with the extent to which new and precise legislation can regulate speech that is not express advocacy.[4] Since Pennsylvania retained its old vague statute, that aspect of the cases was irrelevant. But it was significant that, in discussing *Buckley* express advocacy as a starting point, they strongly reaffirmed that explicit words of electoral advocacy ("magic words") were essential.

McConnell considered facial challenges to the Bipartisan Campaign Reform Act of 2002 ("BCRA"). 540 U.S. at 187-94. BCRA extended regulation to a new category of speech – so-called "electioneering communications" – for which it provided a detailed, precise, and objective statutory definition. 2 U.S.C. § 441b(b)(2).[5] Because the new statutory standard was at least as precise and objective as *Buckley*'s express advocacy

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[4] In *CFIF*, the Fifth Circuit rejected Louisiana's claim that *McConnell* allowed it to follow an expanded view of the express advocacy test, holding that "legislation" may adopt a broader standard. 449 F.3d at 665 (emphasis by court). It held that *McConnell* does not alter the express advocacy standard that applies "when we are confronted by a vague statute." *Id.*

[5] As *McConnell* explained, the new standard drew an objective bright line by specifying that "[t]he term 'electioneering communication' applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners." 540 U.S. at 194.

test, *McConnell* held it was not facially vague. *Id.* at 194. However, since it intentionally reached beyond express advocacy, there was a question of facial overbreadth – did Congress have an adequate justification for regulating non-express speech? *Id.* at 193-94.

McConnell's overbreadth analysis began with *Buckley*'s holding that Congress had adequately justified regulating express advocacy. 540 U.S. at 191.[6] It then pointed out that, as *Buckley* had recognized, it was easy to develop ads that had the same effect as express advocacy but that omitted the "magic words" required by *Buckley*. *Id.* at 193. *McConnell* held that the same government interest that justified regulating express advocacy also justified the legislature's regulation of "functionally equivalent" speech. *Id.* at 193-94. Since Congress' justification turned on the function of speech, rather than its form, *McConnell* held that the new standard was justified as a way to reach such functionally equivalent speech. *Id.*

McConnell recognized that the language of the new electioneering communication standard also would reach some speech that was not functionally equivalent to express advocacy. *Id.* at 207. However, the Court was not persuaded the amount would be substantial enough to strike the entire provision down as facially overbroad. *Id.* Instead, it left open the issue of whether it might be invalid in some applications — the issue addressed in *WRTL*. But before turning to that case, *McConnell's* discussion of *Buckley*'s express advocacy test should be noted since that is its relevance here.

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[6] To be clear, CFIF believes that *Buckley* erred in allowing regulation of core First Amendment speech and hopes the Supreme Court soon will reaffirm the First Amendment's demand for "no law ... abridging the freedom of speech." For the present, however, CFIF must work with existing precedent.

If the new legislative standard was to be justified as a means of reaching speech that was not express advocacy but was its functional equivalent, an example of such non-express speech seemed appropriate. Thus, *McConnell* quoted an ad that broadcast during a 1996 Montana congressional race in which Bill Yellowtail was a candidate:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But "her nose was not broken." He talks law and order ... but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments – then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Id. at 194 n.78. *McConnell* found it obvious that this speech would be understood, not to seek calls urging reformation, but to advocate a vote against Yellowtail. But that clearly implied the message was not sufficient to make the ad express advocacy as that term was defined in *Buckley*. *Id.* at 193-94. To the contrary, *McConnell* held that the *Buckley* test really did require "magic words." *Id.* at 191. What *McConnell* taught was that calling a candidate a felonious, wife beating, child-abandoning hypocrite was not express advocacy, even though it would function just like express advocacy.

In 2007, *WRTL* picked up where *McConnell* left off, deciding whether the facially valid electioneering communication legislative standard could be applied to all speech its language encompassed or must be limited in some way. *WRTL* held that *Buckley* and *McConnell* justified – by statute – regulation of only two categories of speech: (i) express advocacy, and, by logical extension, (ii) other functionally equivalent speech.

127 S. Ct. at 2774. *WRTL* held it was unconstitutional to apply the new legislative standard to any other types of speech. *Id.* at 2670.[7]

The category of express advocacy already was defined in *Buckley*. Thus, *WRTL* only needed to define the second category – functionally equivalent speech – that the new statute constitutionally would regulate. Importantly, however, this definition was not to provide a facially non-vague primary standard. To the contrary, *McConnell* had held that the electioneering communication standard provided the necessary bright line. 540 U.S. at 194. Instead, *WRTL* was defining a secondary limit on how that constitutionally clear bright line test could be applied. 127 S.Ct. at 2669 n.7 (noting the test articulated in *WRTL* "is only triggered if the speech meets the [electioneering communication] brightline requirements"). Although *WRTL* sought to be clear in its "as-applied" holding, it was not required and did not purport to meet the *Buckley* standard for facial clarity of a primary standard.

WRTL's ultimate holding was not relevant to Pennsylvania's old, vague provisions. But it was significant that, like *McConnell*, *WRTL* (i) recognized a distinction between express advocacy and speech that is functionally equivalent to express advocacy, (ii) repeatedly said that *Buckley*'s express advocacy standard required "magic words," and (iii) reaffirmed *Buckley*'s holding that any standard turning on the intent or effect of speech is inherently vague. *Id.* at 2665-69.

There is nothing novel in the notion that words do not become explicit and express merely because they may clearly imply a call to vote a given way. To the

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[7] Because the plurality opinion by Chief Justice Roberts provided the narrowest ground for the outcome, it is deemed the ruling of the Court. *See Marks v. United States*, 430 U.S. 188, 192-93 (1977); *Horn v. Thoratec Corp.*,376 F.3d 163, 175 (3d Cir. 2004).

contrary, not long after *Buckley* was decided the Second Circuit, sitting en banc, unanimously held that context could not convert a similar non-explicit tag line into express advocacy. *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (en banc).

That case involved a bulletin that an advocacy group distributed at election time. The bulletin strongly advocated low taxes and less government, reported that 21 of 24 reported votes by the local Congressman (who was a candidate) had been for "Higher Taxes and More Government," and exhorted readers that "if your Representative consistently votes for measures that increase taxes, let him know how you feel. And thank him when he votes for lower taxes and less government." *Id.* at 50. The en banc court unanimously held that (i) *Buckley*'s standard "does not reach all partisan discussion [but only] those expenditures that expressly advocate a particular election result;" (ii) "the words 'expressly advocating' mean exactly what they say;" and (iii) the bulletin "contains nothing which could rationally be termed express advocacy," specifically including the election-time exhortations to "let him know how you feel" or "thank him." *Id.* at 53.[8]

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[8] Such non-electoral calls to action are a standard and recognized way of avoiding express advocacy. A recent example is provided in an Arkansas Ethics Commission Advisory Opinion. There, the following corporate ad was held not to be express advocacy:

> Here in Arkansas we have a proven leader in Jane Doe, who is fighting to protect the unborn, the elderly, and the disabled [*sic*]. Some are trying to stop progress here in Arkansas by giving in to liberal special interest groups. Jane Doe has spent 12 years fighting [them]. Call Jane Doe at XXX-XXX-XXXX and thank her for fighting for Arkansas' future.

Ark. Ethics Comm'n, Adv. Op. No. 2006-EC-004 (April 21, 2006) at http://www.arkansasethics.com/opinions/06-EC-004.htm (last visited Nov. 29, 2007).

* * *

If Pennsylvania's legislature had enacted a new legislative standard then *Buckley*, *McConnell* and *WRTL* all might be relevant. *Buckley* would demand that the statute provide, on its face, an objective bright line standard. *McConnell* would demand that the facially precise legislative standard appear, on its face, to be tailored to reach speech the Commonwealth had a compelling need to regulate. *WRTL*, then, would limit application of such a facially valid legislative standard to speech that was either express advocacy or its functional equivalent. But no bright line legislation has been adopted in Pennsylvania. And the existing vague law applies only to express advocacy as defined in *Buckley* – i.e., explicit words that expressly advocate electoral action.

4. Defendants disregarded the declaratory judgment and violated CFIF's declared rights.

Defendants violated the declaratory judgment in two ways. First, they sought to give Pennsylvania's existing vague statute a meaning different and broader than express advocacy as defined in *Buckley.* Second, they sought to suppress speech that clearly did not contain such express advocacy. In addition to violating the declaratory judgment, this conduct violated the First Amendment rights the judgment protected.

The violation began with the Secretary's November 1 letter (Exhibit C). Although it mentions *Buckley,* it does not even state *Buckley*'s definition of express advocacy, much less make a serious attempt to apply it. Instead, the letter's fundamental analysis concerns whether the timing and overall content of the ad is a "true issue ad" as subjectively judged by the Defendants. Ex. C at 2. But *Buckley*'s test is not based on identifying "true issue ads." To the contrary, *Buckley* flatly rejected a proposal to draw such a line, holding it would not provide the necessary clarity:

> [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.[50]
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> [50] In connection with another provision containing the same advocacy language ... the Court of Appeals concluded: "Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records, and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections."

424 U.S. at 42-43.

Defendants' disregard of the declaratory judgment and its *Buckley* standard continued in the papers they filed in the Commonwealth Court (Exhibit E). The complaint and application for special injunction paid lip service to the express advocacy standard. But Defendants' core position was simply that CFIF's ad was not a true issue ad and could therefore be condemned, with or without any legislative action. In Defendants' subjective view, it had the intent and the effect of supporting the candidacy of Judge Lally-Green. For example, the Complaint says:

> 28. ...Viewing the ad as a whole and in the context of its airing one week before the election when the airwaves are filled will political ads for candidates, including ads paid for directly by Judge Lally-Green's candidate campaign committee, any listener or viewer of the CFIF ad would reach the unmistakable conclusion that Pennsylvania voters are being urged to vote for Judge Lally-Green....
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> 30. In the context of the entire CFIF ad and its timing, the use of the word "thank" in the conclusion of the ad is the functional equivalent of an invitation to vote for or

> support Judge Lally-Green in the election for Supreme Court.
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> 31. With its singular focus on the high virtues of Supreme Court candidate Maureen Lally-Green, the CFIF ad stands in stark contrast to the ad that the United States Supreme Court considered recently in *Federal Election Commission v. Wisconsin Right to Life, Inc.* [which] ruled that courts "should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate." *WRTL,* at 2667. The Court added that WRTL's ads were not "express advocacy" because: (1) their content was consistent with a genuine issue ad ...; (2) the content of the ads lacked indicia of express advocacy ...."

Ex. E at ¶¶ 28, 30-31.

Obviously these paragraphs urged a standard very different than the explicit words of express advocacy demanded by the declaratory judgment and, in the absence of further legislative activity meeting the *McConnell* standard, demanded by the rulings of the U.S. Supreme Court. Indeed, CFIF's recent Fifth Circuit case specifically rejected Louisiana's effort to adopt just such a whole-ad-in-context standard to define "expenditure" and, instead, insisted on express advocacy as defined in *Buckley*. 449 F.3d at 661, 665 (Louisiana impermissibly adopted a "holistic, practical approach" that applied if "any viewer ... would understand, even without explicit word(s) of express advocacy, that when taken as a whole and in its factual context, the unmistakable intent was to oppose or otherwise influence").

The positions taken in Defendants' papers were reiterated during oral argument, as the excerpts quoted above (at 6-7) demonstrate. Indeed, Defendants expressly contended that *Buckley*'s magic words test was not controlling, and that, even absent proper legislative activity, the court should simply apply an inapposite evolving standard.

Ex. F at 65-66. In short, they nullified the bright line test established by the declaratory judgment.

Defendants argued that the word "thank" in the ad would be understood by viewers to imply "vote," making it functionally equivalent to express advocacy. But that is not how *Buckley*'s express advocacy standard works. As the Second Circuit said in rejecting reliance on calls to "let him know how you feel" and "thank him," the CFIF ad contains "nothing which could rationally be termed express advocacy." *Central Long Island Tax Reform Immediately Comm.,* 616 F.2d at 53. There was literally no explicit statement as to how anyone should vote.[9] Indeed, the concepts of candidate, campaign, and voting are completely absent. On the contrary, the call was to "thank" Judge Lally-Green for her policy stands by logging onto a website where a petition of thanks could be signed. This was not an explicit call to vote at all, much less a in particular way. Even if some viewers might perceive an implied message to vote for Judge Lally-Green, equating "explicit" and "express" words with implications from context would "nullify" the whole point of the *Buckley* test. *Id.* In the words of the unanimous Second Circuit, Defendants' "position is totally meritless." *Id.*

5. The court should declare that Defendants' enforcement effort was contrary to the binding declaratory judgment, enjoin Defendants from pursuing enforcement efforts in derogation of the declared law, and grant monetary relief

At the outset of this Memorandum, we quoted the Third Circuit's admonition that "prosecutions in disregard of [a federal] declaratory judgment could not be ignored," but should be remedied under § 2202. *Conley,* 463 F.2d at 67. Indeed, federal precedent is clear that, where state officials do not comply with a final declaratory judgment, whether

[9] This one fact is controlling. We address the other aspects of the ad to respond to Defendants' arguments and underscore how untenable they were. But the sole controlling test is the "magic words" test.

entered after full adjudication or by consent, additional relief should be granted under § 2202. *See Morris,* 509 F.2d at 1361-62 (disregard of a declaratory judgment entered by consent). If declaratory judgments could be ignored in this way, the declaratory remedy would become a mere advisory opinion that the federal courts do not have power to grant.

The relief to be granted under § 2202 may include any form of relief that would have been available under the original cause of action. *See Conley*, 463 F.2d at 67 (§ 2202 "authorizes injunctive relief ... and is one of the express exceptions to The Federal Anti-Injunction Act"); *Horn & Hardart Co. v. Nat'l R.R. Passenger Corp.*, 843 F.2d 546, 548-49 (D.C. Cir. 1988) (noting that the injunction may be sought and granted long after the declaration); *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 166 (3d Cir. 1986) ("Such 'further relief' may include damages."). The requirements are not stringent: "proper" relief is available, whether or not it is "necessary" and whether or not it was sought in the original action. *Horn & Hardart Co.*, 843 F.2d at 548-49 & n.7.

(a) Restoring clear guidance

The first remedial step should be to restore the clear guidance for speakers that the original declaratory judgment provided in terms that Defendants cannot misunderstand. To that end, this Court should declare that:

- The meaning of "expenditure" under the existing Pennsylvania statutes apply to spending for speech only if it meets *Buckley*'s definition of express advocacy. In the absence of further legislation, "expenditure" cannot be defined based on a supposedly evolving standard derived from other cases.

- *Buckley*'s definition demands explicit words such as "vote for" or "elect" that expressly advocate the election or defeat of a clearly identified candidate and that

definition cannot be satisfied by inferences as to what message the speaker intended or what effect the speech is likely to have on the election. The required "magic words" really are required.

- *Buckley*'s definition does not attempt to reach all speech that is intended to or is likely to influence an election. In particular, speech that may in some minds equate to express advocacy, but lacks explicit words of electoral advocacy, simply is not express advocacy.

- The CFIF ad challenged by Defendants is a concrete example of speech that plainly does not contain explicit words of express advocacy as that term is defined by *Buckley*.

These declarations are necessary, not to change the original declaratory judgment, but to correct Defendants' misconstruction and the uncertainty they have caused.

(b) Enjoining contrary prosecutions

Under the "fool me once" doctrine, the Court should not rest with these further declarations. Instead, it should permanently enjoin Defendants from pursuing enforcement actions on grounds that are inconsistent with the declared law. *See Morris,* 509 F.2d at 1361 (affirming injunction even though state officials had resumed compliance); *Public Citizen v. Carlin*, 2 F. Supp. 2d 18, 20-22 (D.D.C. 1998) (granting injunction where declaratory judgment was disregarded); *Ladd v. Thomas*, 14 F. Supp. 2d 222, 224-25 (D. Conn. 1998) (limiting initial relief to a declaration, noting an injunction may be granted under § 2202 if defendants do not comply). Such injunctions are commonly granted to protect constitutional rights, and they are particularly appropriate

where, as here, state officials were given the opportunity to comply voluntarily but did not do so.

To be clear, the requested injunction would not interfere with Defendants' ability to pursue normal state enforcement procedures. But it would forbid them from asserting that the term "expenditure" in existing Pennsylvania law applies to anything other than "express advocacy" as defined in *Buckley*.

(c) Granting fees and other monetary relief

The Court also should award CFIF its reasonable fees and costs, as well as nominal damages for injury to its First Amendment rights. In this case, CFIF sued under 42 U.S.C. § 1983. A prevailing party in a § 1983 suit is presumptively entitled to its reasonable legal fees and expenses under § 1988. *Coleman v. Kaye*, 87 F.3d 1491, 1509 (3d Cir. 1996).[10] Moreover, § 1983 authorizes compensatory damages, including nominal damages for First Amendment injury. *See Allah v. Al-Hafeez*, 226 F.3d 247, 251 (3d Cir. 2000) (collecting authority).

Section 2202 overrides any other time limits and permits a recovery of fees available under substantive law for obtaining a prior declaratory judgment, provided there is no laches and the facts make such relief proper. *Continental Cas. Co. v. Assicurazioni Generali, S.P.A.*, 903 F. Supp. 990, 992-94 (S.D. W.Va. 1995); *Omaha Indem. Ins. Co. v. Cardon Oil Co.*, 687 F. Supp. 502, 503-04 (N.D. Cal. 1988). *See Grant v. Grand Lodge of Texas*, 12 F.3d 998, 1001-03 (10th Cir. 1993).

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[10] Since CFIF obtained a judicially ordered and binding consent decree that changed the legal relations of the parties, it clearly is a "prevailing party." *See Buckhannon Bd. & Care Home v. West Va. Dept. of Health & Human Res.*, 532 U.S. 598, 604-05 (2001) (A party who obtains a judicially ordered "consent decree" has prevailed.). Because the relief obtained was directly related to a substantial federal claim, it calls for a fee award under § 1988. *See Williams v. Thomas*, 692 F.2d 1032, 1036 (5th Cir. 1982) (collecting authority); *New York v. 11 Cornwell Co.*, 718 F.2d 22, 25 n.3 (2d Cir. 1983) (en banc).

In return for Defendants' agreement to accept and comply with the Stipulated Judgment, CFIF agreed not to pursue the fees and expenses it incurred in obtaining that Judgment. But Defendants breached the agreement. Thus, they should be estopped from relying on it to preclude a fee award. In the alternative, CFIF's damages for the breach should be valued to at least include the fees incurred in obtaining the stipulation.

In any event, CFIF clearly is entitled to recover the reasonable fees and expenses it incurred after the Stipulated Judgment was entered. This includes the efforts necessary to fend off a ruling in the Commonwealth Court that would have undercut the declaratory judgment and mooted the relief CFIF was seeking in its first-filed Motion in this Court.

Finally, CFIF should recover damages for the injury to its First Amendment rights, as protected by the declaratory judgment. Because it would be extremely difficult to quantify those damages at trial, CFIF does not seek full compensation. But no trial is necessary to determine that a violation occurred warranting vindication in the form of nominal damages.

6. The Secretary should be formally joined as a party

As noted above, the Secretary was dismissed from this action based on his agreement to accept whatever result was obtained by the Attorney General. However, the Secretary now has disregarded the Stipulated Judgment and, indeed, was the active party in pressing the Attorney General to do likewise. This unanticipated misconduct is a sufficient basis to revise the Secretary's dismissal under most of the subsections of Rule 60, e.g., under Rule 60(b)(1) (surprise at the Secretary's actions), 60(b)(2) (newly discovered evidence that the Secretary will not respect the Stipulated Judgment), 60(b)(3) (misrepresentation or misconduct of an adverse party), and 60(b)(6) (other reasons justifying relief).

Alternatively, the Secretary's now concretely displayed interest in enforcing Pennsylvania's law against ads like CFIF's ad justifies an order joining him pursuant to Rule 19(a). This is doubly so since the Secretary actively encouraged and induced the Attorney General to disregard his binding federal obligations.

The Secretary is free, of course, to oppose the additional relief sought by this Motion on a proper ground. However, he is not free to contest the Stipulated Judgment. He waived that opportunity by obtaining dismissal on the understanding that he would accept the outcome of litigation against the Attorney General. Moreover, because this is a situation in which the Secretary conceded that his interests were virtually represented by the Attorney General, he is bound.

The leading statement of the law in this area is Judge Goodrich's concurrence in *Bruszewski v. United States,* 181 F.2d 419, 423 (3d Cir. 1950):

> Privity states no reason for including or excluding one from the estoppel of a judgment. It is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.

In assessing the closeness of the relationship, courts consider a range of factors, including the legal interest of the parties, their practical concerns, and whether any facts suggested that one represented the other. Where such facts exist, a state Attorney General readily may be held the virtual representative of other governmental interests. *See Nash County Bd. of Ed. v. Biltmore Co.,* 640 F.2d 484, 494-95 (4th Cir. 1981) (relying on *Bruszewski* to hold that the North Carolina Attorney General was in privity with a local school board, so that a consent decree negotiated by the Attorney General bound the school board). *See EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 493-95 (3d Cir.

1990) (citing *Broszewski* and holding that, where a party "acts as the nonparty's representative" and their legal interests are closely aligned, the nonparty is bound).

Here, the Attorney General and the Secretary are officers of the same state with responsibility for enforcing the same law. They initially were co-defendants, but the Attorney General's office appeared for the Secretary consistent with his broad duty to provide legal representation protecting interests of the state. At that time, the Secretary declined to litigate independently of the Attorney General and, indeed, indicated that he regarded the Attorney General as an adequate representative. When the Secretary decided to disregard the Stipulated Judgment, he did so by cooperating with the Attorney General rather than by acting independently. Thus, even if the Secretary had not affirmatively agreed to adhere to the Stipulated Judgment, he would be in privity with the Attorney General and thus bound.

CONCLUSION

For the foregoing reasons, Plaintiff's Amended Motion for Supplemental Relief, Including Injunction and Order of Joinder should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 3, 2007, the undersigned caused the foregoing Plaintiff's Memorandum in Support of its Amended Motion for Supplemental Relief, Including Injunction and Order of Joinder to be served by ECF filing and email on the Defendants as follows:

The Honorable Thomas Corbett, Attorney General
c/o J. Bart DeLone, Esq.

The Honorable Pedro Cortés, Secretary of the Commonwealth
c/o Albert H. Masland, Esquire

John F. Smith, III