No. 05-30212

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CENTER FOR INDIVIDUAL FREEDOM,
Plaintiff-Appellant,

v.

PAUL J. CARMOUCHE, DISTRICT ATTORNEY, 1ST JUDICIAL DISTRICT; ROBERT ROLAND, CHAIRMAN, T.O. PERRY, JR., VICE-CHAIRMAN, JOHN W. GREENE, E.L. GUIDRY, JR., R.L. HARGROVE, JR., MICHAEL J. KANTROW, SR., JOSEPH MASELLI, HENRY C. PERRETT, JR., ASCENSION DELGADO SMITH, DOLORES SPIKES, EDWIN O. WARE, III, OF THE LOUISIANA BOARD OF ETHICS AND THE SUPERVISORY COMMITTEE FOR CAMPAIGN FINANCE,
Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana

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CENTER FOR INDIVIUAL FREEDOM,
Plaintiff-Appellant

v. No. 05-30212

PAUL J. CARMOUCHE, *et al.*,
Defendants-Appellees.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. The Center for Individual Freedom, represented by:

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2. The State of Louisiana; Paul J. Carmouche, District Attorney, 1st Judicial District; Robert Roland, Chairman, T.O. Perry, Jr., Vice-Chairman, John W. Greene, E.L. Guidry, Jr., R.L. Hargrove, Jr., Michael J. Kantrow, Sr., Joseph Maselli, Henry C. Perrett, Jr., Ascension Delgado Smith, Dolores Spikes, Edwin O. Ware, III, of the Louisiana Board of Ethics and the Supervisory Committee for Campaign Finance, represented by:

Raymond Gray Sexton, Esq., Louisiana Board of Ethics and its individual members
Charles H. Braud, Esq., Office of the Attorney General

———————————————/S/

Harry Rosenberg

REQUEST FOR ORAL ARGUMENT

This case turns on a straightforward application of First Amendment standards established in *Buckley v. Valeo*, 424 U.S. 1 (1976), as construed by this Court in *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002). However, because the relief sought is the invalidation or substantial narrowing of a Louisiana statute, and because this will be this Circuit's first opportunity to assess *Buckley* and *Moore* in light of *McConnell v. FEC*, 540 U.S. 93 (2003), the plaintiff-appellant, the Center for Individual Freedom ("Center"), believes that oral argument is appropriate and would aid the Court.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this facial constitutional challenge to Louisiana statutes regulating independent issue advocacy because this action arose under the Constitution and laws of the United States, 28 U.S.C. § 1331, and sought to redress the deprivation of civil rights, 28 U.S.C. § 1343(a)(3). Timely notices of appeal were filed upon entry of the judgment denying a preliminary injunction and of the final judgment dismissing the complaint and denying all relief. This Court has jurisdiction over the resulting appeals under 28 U.S.C. §§ 1291 (final judgment) and 1292(a) (preliminary injunction denial).

STATEMENT OF THE ISSUES

Louisiana's campaign statute threatens civil and criminal penalties for those who make "expenditures" in excess of $500 to pay for independent speech "for the purpose of … influencing" an election unless they also make extensive reports and disclosures. *See* La. Rev. Stat. Ann. 18:1505.4, 1505.5, 1505.6, 1501.1, 1483(9)(a) (hereinafter "R.S."). Louisiana determines the "purpose" of independent speech by predicting whether a hypothetical reasonable audience, taking the speech as a whole and in its context (including the perceived priorities of the speaker), would perceive a clear message favoring or disfavoring a candidate or ballot issue. *See* Opinion of the Louisiana Board of Ethics, No. 2003-746, *In the Matter of Republican State Leadership Committee* (Jan. 13, 2005) ("*RSLC*") (Attached as Ex. C); R.S. 18:1483(9)(a). The issues presented by this appeal are the following:

1. Does Louisiana's definition of "expenditure" satisfy the First Amendment's demand that regulation of core speech and association employ precise, objective, and narrowly tailored standards that (i) avoid self-censorship and chilling of free speech and association rights by permitting a speaker to know confidently in advance whether regulatory burdens will be imposed and, (ii) that preclude discretionary regulation of the content of political speech?

2. Where, as here, core speech and association have been and are being chilled by a vague, subjective, or overbroad standard enforced by civil and

criminal penalties, does the First Amendment require the courts to declare that standard either invalid or subject to a constitutional narrowing construction?

3. Have Defendants-appellees borne their burden of showing that Louisiana's regulation of independent "expenditures" satisfies the "strict" and "exacting" judicial scrutiny applicable to burdens on core independent speech and association?

4. Did the district court err in dismissing the Complaint and denying any relief?

STATEMENT OF THE CASE

This appeal seeks to vindicate core free speech, free association, and due process rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, and Article I, § 7 of the Louisiana Constitution. It presents a facial challenge to a provision in Louisiana's campaign laws that requires anyone who makes an "expenditure" of more than $500 for independent speech "for the purpose of … influencing" an election to make intrusive and burdensome reports and disclosures, on pain of civil and criminal penalties. R.S. 18:1505.4, 1505.5, 1505.6, 1501.1, 1483(9)(a). Louisiana determines the "purpose" of independent speech by asking whether a hypothetical reasonable audience, taking the speech as a whole and in its context (including the perceived priorities of the speaker), would perceive a clear message favoring or disfavoring a candidate or ballot issue. R.S. 18:1483(9)(a); *RSLC* at 5 (Attached as Ex. C).

Plaintiff-appellant Center for Individual Freedom ("Center") wants to speak freely to residents of Louisiana on matters of public importance, and many in Louisiana want to hear what the Center has to say. Record, pp. 2, 9 (hereinafter as "R."). At the same time, however, the Center cannot and will not engage in speech that will trigger the reporting and disclosure requirements of the statute, or the civil and criminal penalties that will flow, if the Center is unable to predict the type of subjective approach defendants will use to scrutinize the Center's speech. R. 10.

Thus, Louisiana's imprecise, subjective, and overbroad definition of "expenditure" forces the Center to self-censor its intended speech, even to the point of standing mute to avoid being punished by criminal and civil penalties. R. 37.

Most recently, during the fall of 2004, the Center wished to speak to residents of Western Louisiana on justice issues that were of particular public concern because a primary election for associate justice of the Louisiana Supreme Court was to occur on September 18, 2004, and the candidates for that position illustrated the Center's issue positions. R. 25. The Center had raised the necessary money, retained a vendor, and prepared draft ads. R. 25, 47. However, because the Center could not accept the risk that paying to run its ads would be deemed an "expenditure," the Center sought judicial relief. R. 10.

Proceeding under the Civil Rights Act, 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201, and the United States Constitution, the Center brought an action in the United States District Court for the Western District of Louisiana challenging the "expenditure" standard established by Louisiana law. R. 2. It named as *Ex parte Young* defendants the members of the Louisiana Board of Ethics who, sitting as the Supervisory Committee for Campaign Finance, are charged with civil enforcement and construction of the challenged laws, along with the Shreveport District Attorney, who is an official charged with criminal enforcement of those laws. R. 4-6, 26.

Hoping to be able to broadcast its ads while the election was focusing the public's attention on justice issues and while the candidates for Louisiana's Supreme Court could be used to illustrate its concerns, the Center moved for emergency relief. R. 15-16. Defendants opposed the motion, arguing that the Center had no right to a clearer legal standard, that emergency relief would seriously disrupt the then-impending election, and that there were threshold obstacles to relief. R. 109-137; Supplemental Record, pp. 17-28 (hereinafter as "Supp. R."). The district court rejected Defendants' threshold arguments, finding that the Center had standing, its facial challenge was ripe, abstention was unwarranted, and venue was proper. Transcript of Oral Argument, dated Sept. 2, 2004, pp. 84-87 (hereinafter as "Tr."). However, it denied preliminary injunctive relief, holding that the First Amendment did not entitle the Center to a precise, objective, and narrow standard. R. 143; Tr. 89. This Court denied emergency relief. Supp. R. 2. The parties then agreed that the district court could render final judgment on the basis of the preliminary injunction submissions and record. The district court then dismissed the Complaint for the same reasons that it had denied preliminary injunctive relief. Supp. R. 74-75. This Court consolidated the timely appeals from the denial of preliminary relief and from the final judgment.

STATEMENT OF THE FACTS

The Center and Its Activities

Plaintiff-appellant Center "is a non-partisan, non-profit organization whose mission is to protect and defend individual freedoms and individual rights guaranteed by the U.S. Constitution." R. 3. It is headquartered in and organized under the laws of Virginia, and is tax exempt under § 501(c)(4) of the Internal Revenue Code. R. 4.

"The Center seeks to focus public, legislative, and judicial attention on the rule of law as embodied in the federal and state constitutions and structural protections that constrain and disperse governmental authority." R. 3. "It also seeks to foster intellectual discourse and to promote education that reaffirms the imperatives of the U.S. Constitution as they relate to contemporary conflicts." *Id.* "For example, in 2003 the Center broadcast advertisements in Louisiana concerning the need to provide prompt confirmation votes for nominees to the federal bench." *Id.* The Center's goals, principles, and nationwide activities are more fully described at its Internet website at <http://www.cfif.org>. *Id.*[1]

[1] The Center's Louisiana activities and interests are part of a broader mission. "[S]ince 2000 the Center has spoken out on . . . similar issues of public importance in other states and nationwide. For example, the Center has run broadcast and print advertisements in the District of Columbia and the States of Illinois, Maryland, North Dakota, and Virginia, as well as nationally, on matters of public importance ranging from the dire need to confirm federal judges to taxation issues to concerns about public corruption to the right of citizens not to be compelled to fund speech with which they disagree." R. 3, 45.

The Center's funding comes voluntarily from its supporters. *Id.* "Consistent with its commitment to individual freedom, the Center staunchly and zealously guards [their] privacy." "Similarly, due to the sometimes controversial nature of the issues . . . the Center [addresses], many of its [supporters] require assurances that their identities will not be disclosed," and the Center provides those assurances. R. 3-4. The Center cannot both speak and disclose the identities of its supporters because the result of disclosure would be the loss of the financial support necessary to its speech. R. 4. Simply stated, to speak and communicate its views about core public issues, the Center must avoid speech that may later be determined to trigger reporting and disclosure obligations with accompanying civil and criminal sanctions.

In the fall of 2004, the Center again wished to speak in Louisiana concerning justice issues. R. 9, 11. It allocated the necessary funds, retained a vendor, and prepared draft ads. R. 9, 37, 47; Supp. R. 11. But because the ads were to appear during an election season and refer to candidates, the Center was deterred by the threatened application of Louisiana's campaign laws. R. 10, 49. When preliminary judicial relief was denied, the Center ultimately self-censored to the point of standing mute. R. 37.

Public discourse on an issue is a fluid process and may move rapidly. Ads must be developed and revised, often at the last minute, as new developments

occur. R. 9. This free exchange is possible only if the Center knows in advance the precise, objective, and tailored standards it must meet.

The Center remains committed to addressing justice issues in Louisiana in the future, particularly during election periods when the public is most attuned to such discussion. R. 15; Supp. R. 11.[2] However, so long as the present definition of "expenditure" remains, the Center will have to continue to self-censor. R. 37. This self-censorship constitutes a classic restraint on political speech and infringes on associational freedoms.

Defendants and Their Enforcement Roles

Defendants are legally responsible for construing and enforcing, civilly and criminally, the laws of the State of Louisiana that are challenged in this action. R. 4. "Each of them has sworn to enforce the laws of the State of Louisiana within their field of responsibility, and each stands ready, willing, and able to do so." *Id.* The Defendants-appellees primarily comprise the membership of the Louisiana Board of Ethics ("Board") that, sitting as the Supervisory Committee for Campaign Finance ("Committee"), is mandated to "administer and enforce" the challenged

[2] Because the Center plans to continue to speak in Louisiana, this case presents a live controversy. Moreover, frustration of the Center's efforts to speak prior to the September election presents a controversy that is "capable of repetition, yet evading review." *Dart v. Brown*, 717 F.2d 1491, 1493 n.3 (5th Cir. 1983) (reasoning that the case was not moot "[b]ecause the Louisiana Election Code will affect candidates and parties in similar situations in future elections"); *Hatten v. Rains*, 854 F.2d 687, 690 n.4 (5th Cir. 1988) (noting that the "Supreme Court has heard a number of election cases after the general election, even when there was no chance of retrospective relief, because the cases were capable of repetition yet evasive of review.") (citing authority).

laws by R.S. 18:1511.1. R. 4-6. The Board has express statutory authority to "clarify," "define," and "render an advisory opinion on" the campaign law under R.S. 18:1511.2, and has done so, as in Ethics Board, No. 99-580 (Sept. 17, 1999) ("Advisory Opinion") (Attached as Ex. B) and in *RSLC* (Attached as Ex. C), discussed below. As explained in further detail, the Board repeatedly has construed Louisiana's definition of "expenditures" to turn on subjective intent and projected audience understandings.

The other Defendant-appellee is Paul J. Carmouche, the District Attorney for the 1st Judicial District in Shreveport. R. 4. He has responsibility for criminal enforcement of the challenged laws in Shreveport, the central area in which the Center sought to speak. R.S. 18:1511.6; R. 9.

The Challenged Laws

Louisiana has adopted complex laws that operate to restrict the rights of Americans to discuss issues of public importance during periods when, due to the pendency of an election, citizens are most interested in and attuned to such discourse. Those laws are referred to generally as the Campaign Finance Disclosure Act, R.S. 18:1481, *et seq*. In a nutshell, the challenged laws heavily burden the independent public speech of any person if the speech costs more than $500 (a trivial amount in the context of independent public issue advocacy) and has content that the statute regulates.

As relevant here, the challenged laws regulate "expenditures." An expenditure includes any "purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office." R.S. 18:1483(9)(a) (emphasis added).[3] This "purpose of . . . influencing" standard has been in effect since at least 1980. 1980 La. Acts 786. As discussed below, *Buckley*, 424 U.S. at 38-40, 75-80, *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 245-50 (1986) ("*MCFL*"), and *Chamber of Commerce v. Moore*, 288 F.3d 187, 194 (5th Cir. 2003), hold that such a standard is too vague, subjective, and untailored to satisfy the First Amendment.

In Ethics Board Docket No. 99-580, the Board and Committee ruled that spending for speech is an "expenditure," even in the absence of explicit words of express advocacy, if a reasonable audience, viewing the speech as a whole and in light of surrounding circumstances, would find its only "plausible meaning" to be to communicate the speaker's subjective "preference of one candidate over another candidate." R. 41 (Attached as Ex. B). Among the circumstances to be considered are the perceived political interests and positions of the speaker. *Id.* Thus, an otherwise objective and accurate statement of the position or conduct of a

[3] Certain voluntary personal services and internal organizational communications are excluded. R.S. 18:1483(d). The statute also regulates "contributions," which when made to finance speech, are defined using the same purpose standard as "expenditures." R.S. 18:1483(6)(a).

candidate may or may not be regulated, depending on whether the position is found to be a matter of importance to the speaker.

On January 13, 2005, the Board reaffirmed that Louisiana's definition of expenditure does not demand "explicit words 'expressly advocating' [a candidate's] election or defeat as required by *Buckley v. Valeo*." *RSLC* at 5 (Attached as Ex. C). Instead, speech is regulated if the Board predicts that a hypothetical reasonable audience would infer that the speaker subjectively "sought to influence" the election. *Id.* In addition to reaffirming the vague, subjective, and broad standard the Board applies, this ruling confirmed that substantial penalties are imposed on those found to have made a regulated expenditure without filing disclosures and reports.

When speech is determined to be "for the purpose of . . . influencing" an election, substantial burdens flow. Any person (individual, corporate, or otherwise) who makes an "expenditure" of more than $500 for such speech must promptly file detailed, intrusive, and burdensome reports. R.S. 18:1501.1; 18:1491.7. The required contents of such a report include, in addition to basic organizational and identifying information:

- The full name and address of each person who has made any contribution to the reporting entity in any amount for any purpose at any time during the entire reporting period. R.S. 18:1491.7.B.(4)(a).

- The aggregate amount of all contributions received during the reporting period. R.S. 18:1491.7.B.(4)(b).
- The gross proceeds received and accepted by the reporting entity during the reporting period from "the sale of items such as political campaign pins, buttons, badges, flags, emblems, hats, banners, literature, and similar materials." R.S. 18:1491.7.B.(5).
- The gross proceeds received and accepted by the reporting entity during the reporting period from the sale of tickets to testimonials or similar fundraising events, and each sale must be treated as a contribution with full disclosure of the purchaser's name and address. R.S. 18:1491.7.B.(6).
- The total amount of all expenditures made by the reporting entity during the reporting period. R.S. 18:1491.7.B.(12).
- The full name and address of "each person to whom an expenditure has been made" during the reporting period, along with "the amount, purpose, and date of each such expenditure." R.S. 18:1491.7.B.(13).
- "All payments made during the reporting period to repay loans, the amount, date, and source thereof." R.S. 18:1491.7.B.(15).
- The total amount of cash and investments on hand at the end of the prior reporting period, the total of all contributions received during the

reporting period, and all cash income from investments during the reporting period. R.S. 18:1491.7.B.(1), (2), (3).[4]

Failure to file a required report that accurately discloses all of the mandated information is a violation. R.S. 18:1505.1. A knowing failure risks a civil penalty of up to $100 per day until the report is properly filed, plus $10,000. R.S. 18:1505.4. Enhanced civil penalties are provided for "knowing and willful" violations, which include any "conduct which could have been avoided through the exercise of due diligence." R.S. 18:1505.5. Moreover, criminal penalties of a fine and imprisonment for up to six months may be imposed for violations committed "knowingly, wilfully [sic], and fraudulently." R.S. 18:1505.6. Indeed, a disagreement over the meaning of "expenditure" led to the imposition of a $20,000 sanction just months ago. *RSLC* at 6 (Attached as Ex. C).

SUMMARY OF ARGUMENT

Campaign statutes requiring reports or disclosures concerning "expenditures" for core First Amendment activity trigger an "exacting" and "strict standard" of judicial scrutiny. *Moore*, 288 F.3d at 191-92 (quoting *Buckley*, 424 U.S. 64-67, 75). Among other things, defenders of such a statute must show that the statute's definition of "expenditure" is precise, objective, and narrow. *Buckley*,

[4] These standards are particularly onerous when applied to entities like the Center whose primary operations are outside Louisiana but who occasionally need to speak there on issues of significant public concern. Also, disclosures relating to non-Louisiana actions are both highly burdensome and of little relevance to Louisiana's purposes.

424 U.S. at 41-44; *Moore*, 288 F.3d at 191-94. This is because a vague, subjective, or overly broad standard leads to self-censorship, hedging, trimming, and steering clear of regulated areas. *Buckley*, 424 U.S. at 41 n.48 (collecting authority), 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)), 76-77. Such self-censorship of core speech violates the First Amendment rights of both speaker and audience. *See Hill v. City of Houston, Texas*, 789 F.2d 1103, 1106-07 (5th Cir. 1986) (*en banc*) (facial "overbreadth or vagueness" challenges are allowed because, if a speaker refrains, "society as a whole then would be the loser"); *Davis v. E. Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 926 (5th Cir. 1996) ("[w]here a speaker exists … the protection afforded is to the communication, to its source and to its recipients") (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976)).

Moreover, a vague or subjective standard "may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality); *id.* at 65 (concurrence); *Kolender v. Lawson*, 461 U.S. 352, 361-62 (1983) (statute "encourages arbitrary enforcement" due to inadequate "particularity"). Where the vague standard is "capable of reaching expression sheltered by the First Amendment, the [vagueness doctrine] demands a greater degree of specificity" than is required for ordinary legislation. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974).

Defendants acknowledge (Tr. 40, 42-43) that Louisiana's statutory definition of an "expenditure" – spending "for the purpose of influencing" an election – is indistinguishable from language that *Buckley* held to be unconstitutionally vague, subjective, and overbroad in 1976. Yet in the decades following *Buckley*, Louisiana has failed to adopt either (i) the requirement of explicit words of express advocacy that *Buckley*, *MCFL*, and *Moore* imposed to cure the problem, or (ii) some equivalently precise, objective, and provably tailored standard. Instead, the Board has adhered to a loose construction that plainly does not satisfy *Buckley* and *MCFL*, and that this Court expressly rejected as "too vague" and overbroad in *Moore*. 288 F.3d at 194; *RSLC* at 5 (Attached as Ex. C); R. 41 (Attached as Ex. B).

Defendants mistakenly argue that *McConnell v. FEC*, 540 U.S. at 190-93, overturned *Buckley*'s demand for a precise, objective, and tailored standard. In fact, *McConnell* merely held that the First Amendment allows legislatures to craft alternative standards provided they meet *Buckley*'s demand for precision, objectivity, and provably narrow tailoring. *Id.* at 193-94. But Louisiana has not offered any such alternative standard.

So long as Louisiana's "expenditure" standard remains in effect, the Center and other speakers will have to self-censor, hedge, trim, and steer clear, suffering irreparable injury to their own First Amendment rights and inflicting such injury

on their audiences. The whole point of First Amendment facial challenges is to eliminate such situations. Louisiana's law must be declared either invalid or subject to an adequate narrowing construction. *Anderson v. Spear*, 356 F.3d 651, 664-66 (6th Cir. 2004), *cert. denied*, 125 S. Ct. 453 (2004) (post-*McConnell* ruling saving Kentucky's regulation of "electioneering" by imposing the same "express advocacy" standard announced in *Buckley*). *See also Hill*, 789 F.2d at 1112 (an overbroad statute "must be rewritten by the legislature . . . not upheld as constitutional") (internal quotes omitted).

ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*.

This facial challenge to the constitutionality of Louisiana law presents a purely legal issue. The Court of Appeals reviews *de novo* a district court's conclusions of law. *Williams v. Kaufman County*, 352 F.3d 994, 1001 (5th Cir. 2003). "Recognizing that first amendment problems present intertwined questions of law and fact, Fifth Circuit precedent prescribes *de novo* review of the district court order." *Bailey v. Morales*, 190 F.3d 320, 322 (5th Cir. 1999); *see also Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 497 (5th Cir. 2004) ("[r]eview of questions of constitutional law is *de novo*") (emphasis in original).

II. CAMPAIGN STATUTES THAT BURDEN "EXPENDITURES" FOR INDEPENDENT SPEECH MUST PRECISELY, OBJECTIVELY, AND NARROWLY DEFINE THE SPEECH THAT TRIGGERS REGULATION.

The core purpose of the First Amendment and similar provisions of the Louisiana Constitution is to protect free and open discussion of issues of public importance, particularly when conducted during election periods and with reference to the records or positions of candidates for public office. *See Buckley*, 424 U.S. at 14-19, 39-40; *Moore*, 288 F.3d at 191-192. A government that substantially burdens such core activity must justify its statute under the First Amendment's "exacting" and "strict standard of scrutiny." *Moore* at 191-92; *Buckley*, 424 U.S. at 44, 64-65, 75.

"The electorate [is] increasing[ly] dependen[t] on television, radio, and other … expensive modes of communication." 424 U.S. at 19. Targeting regulation on spending for such speech thus does not "introduce a nonspeech element or … reduce the exacting scrutiny demanded by the First Amendment." *Id.* at 16-19. To the contrary, such regulations burden a "pure form of expression" involving "free speech alone." *Id.* at 17. Thus "contribution and expenditure limits operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Id.* at 14-19, 39-40 (collecting authority). They can escape

"invalidation" only if they satisfy "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Id.* at 43-45.

The Supreme Court has never wavered from these fundamental constitutional principles. A decade after *Buckley*, in *MCFL*, the Court ruled that "[i]ndependent expenditures [for speech] constitute expression at the core of our electoral process and of the First Amendment freedoms." *MCFL*, 479 U.S. at 251 (internal quotation marks omitted).[5]

To satisfy this exacting judicial scrutiny, the legal standard that determines which core speech is subject to regulation must be particularly precise, objective, and narrow. *Buckley*, 424 U.S. at 41-44, 78-80; *MCFL*, 479 U.S. at 245-50; *Moore*, 288 F.3d at 192. This is doubly true where, as here, civil or criminal penalties may be imposed. *Buckley*, 424 U.S. at 40-41.

The reason such a uniquely demanding standard applies is that imprecise, subjective, or overbroad standards unconstitutionally induce self-censorship as speakers "hedge and trim" and "steer far wider of the [forbidden] zone … than if the … forbidden areas were clearly marked." *Buckley*, 424 U.S. at 43, 41 n.48 (collecting authority; internal quotation marks omitted).[6] And such self-censorship

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[5] Similarly, this Court's decision in *Moore* applied stringent and exacting First Amendment review to Mississippi's definition of a campaign "expenditure." 288 F.3d at 191-92.

[6] *See Smith v. California*, 361 U.S. 147, 151 (1959); *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.6 (1982). *See generally Reno v. ACLU*, 521 U.S. 844, 872 (1997) (noting that the First Amendment demands greater precision than the Due

is First Amendment injury to both speaker and audience. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (self-censorship is constitutional harm); *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) ("self-censorship" is "constitutionally recognized injury"); *Davis*, 78 F.3d at 926-27 (the First Amendment protects the right to receive the speech of a willing speaker); *Virginia State Bd. of Pharmacy*, 425 U.S. at 756. Moreover, a standard that allows official judgment or discretion impermissibly establishes governmental censorship over core political speech. *See Kolender*, 461 U.S. at 358; *Goguen*, 415 U.S. at 572-75. Officials administering a vague, subjective, or broad standard for speech content are little different than censors or a speech licensing board.

Buckley made clear that any substantial burden on core First Amendment speech triggers the First Amendment's most stringent standards. 424 U.S. at 44-45. In particular, although the government may be able to justify imposing certain reporting and disclosure obligations on those who spend for such speech, the burden thus imposed on speech demands that the regulated "expenditures" be defined precisely, objectively and narrowly. *Id.* at 41-44.

Although *Buckley* allowed some regulation of expenditures for core speech, the Court was deeply concerned that inviting the camel's nose of regulation into

(Continued . . .)
Process Clause of the Fifth Amendment to avoid the "obvious chilling effect on free speech," and that potential criminal punishment further heightens the risk of self-censorship).

the central tent of the First Amendment might lead to an incremental erosion of core speech rights. Thus, the Supreme Court in *MCFL* cautioned that:

> Freedom of speech plays a fundamental role in a democracy [and] is the matrix, the indispensable condition, of nearly every other form of freedom. Our pursuit of other governmental ends … may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction.

479 U.S. at 264-65.

First Amendment facial challenges help prevent such erosion by assuring that concerns that may trigger self-censorship or government censorship "will be remedied prior to the chilling of political discussion by individuals and groups in this or future election years." *Buckley*, 424 U.S. at 41 n.47.[7] Only a precise, objective, and narrow standard will permit regulation of the First Amendment's core and "preserve [such a] provision against invalidation." *Id.* at 44. *See Hill*, 789 F.2d at 1110 (a facially inadequate standard must not be upheld).

We show below that Louisiana does not provide a precise, objective, and narrow definition of "expenditure," that the result is an impermissible risk of self-censorship and arbitrary enforcement, and that Louisiana's statute therefore must either be given an adequate construction or declared invalid because it contravenes the Constitution.

[7] All emphasis herein is added unless otherwise noted.

A. Regulated "Expenditures" Cannot Be Defined In Terms Of The Hypothetical Inferences That Enforcement Authorities Believe Audiences May Draw.

Two parts of the Supreme Court's seminal *Buckley* opinion are particularly important for this case. First, *Buckley* held that a federal provision regulating "any expenditure … relative to a clearly identified candidate" unconstitutionally failed "to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. Recognizing that defect, the D.C. Circuit tried to save the provision by construing it to apply only to speech "advocating the election or defeat of" a candidate. *Id.* at 42 (citing *Buckley v. Valeo*, 519 F.2d 821, 823 (D.C. Cir. 1975)). But the Supreme Court in *Buckley* held that the circuit court's narrowing construction remained too imprecise, subjective, and broad to satisfy the First Amendment. *Id.* at 42.[8]

Buckley held that requiring a speaker to predict "whatever inference may be drawn as to his intent" by his audience "blankets with uncertainty" the status of the speech, thus impermissibly causing the speaker "to hedge and trim." *Id.* at 43 (quoting *Thomas*, 323 U.S. at 535). To assure that a speaker could know with confidence before speaking whether speech would be regulated, *Buckley* further narrowed the D.C. Circuit's standard to speech containing "explicit words" that "in

[8] The D.C. Circuit's standard – "advocating the election or defeat" of a candidate – is more precise and narrower than Louisiana's challenged standard – "for the purpose of … influencing" an election. R.S. 18:1483(9)(a). Thus, the Supreme Court's strong rejection of the D.C. Circuit's standard in itself establishes that Louisiana's standard is unconstitutional on its face. *See Buckley*, 424 U.S. 42-43.

express terms advocate" a clearly identified candidate's election or defeat. *Id*. at 43-45. *See Moore*, 288 F.3d at 193 (noting "*Buckley's* emphasis on … the need for a bright line rule.")

The second important part of *Buckley* is its review of a provision defining "expenditure" or "contribution," as a transfer of value "for the purpose of influencing" an election. *Buckley*, 424 U.S. at 77. That is the same wording Louisiana's statute uses, as discussed below. *Buckley* held that this "for the purpose of influencing" standard failed the "constitutional requirement of definiteness." *Id.* at 77-78. "To insure that the reach of [the language] is not impermissibly broad, [*Buckley*] construe[d] 'expenditure' … in the same way [that it] construed ["relative to" a candidate] to reach only funds used for communications that expressly advocate." *Id*. at 80. And to drive the point home, *Buckley* cited back to its earlier footnote giving examples of the types of explicit language the standard demanded. *Id.* 80 n.108 (citing n.52 – the "magic language" footnote).

Buckley explicitly recognized that its stringent narrowing construction would substantially impair the effectiveness of the statute. *Id.* at 43. Indeed, it struck down one of the provisions because, when it was narrowed to regulate only express advocacy, it did not promise sufficient benefit to justify its burden on core First Amendment activity. *Id.* at 42-51. But *Buckley* stressed that "only" such a precise

and objective test was sufficient to prevent self-censorship. *Id.* Moreover, demanding express advocacy assured that the speech was the type Congress had shown adequate cause to regulate, and, as a result, that Congress had achieved narrow tailoring. *Id.*

A decade later, the Supreme Court addressed yet another challenge to a definition of "expenditure." In *MCFL*, the Supreme Court analyzed spending "in connection with" an election. 479 U.S. at 245. Finding that the statute's "in connection with" definition violated the First Amendment's demands for precision and narrowness established in *Buckley*, the Supreme Court in *MCFL* "therefore (held) that an expenditure must constitute 'express advocacy'" to be regulated. *Id.* at 249.

Every federal appellate court to assess these holdings of *Buckley* and *MCFL* has refused to water down their demand for a precise, objective, and narrow definition. *See Moore*, 288 F.3d at 194 (demonstrating that other circuits have "essentially rejected" *Furgatch*) (collecting authority).

Statutes or regulations found to fall short of the *Buckley* standards uniformly have been either invalidated[9] or subjected to stringent narrowing constructions.[10]

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[9] *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2d Cir. 2000).

[10] *FEC v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980).

Only the Ninth Circuit has approved a looser definition of "expenditure," in an opinion that overlooked *MCFL*. *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987).[11] *See Moore*, 288 F.3d at 193 (*Furgatch* is "the sole departure from this bright-line approach"). The aberrant *Furgatch* opinion has been uniformly rejected by other circuit courts. *Moore*, 288 F.3d at 193-95 (collecting cases). Indeed, a recent Ninth Circuit panel sought to align the *Furgatch* opinion with the federal consensus.[12] But most importantly, the *Furgatch* standard was rejected as unconstitutional by this Court in *Moore.*

Moore arose when Mississippi's Attorney General threatened to enforce a Mississippi statute regulating "express advocacy" using a broad construction based on *Furgatch*, thereby regulating ads that lacked explicit words of advocacy but whose electoral purpose was "unmistakable and unambiguous" to "reasonable minds" when viewed with "limited reference to the context of the communication." *Id*. at 190, 194 (quoting and describing *Furgatch*, 807 F.2d 857). This Court blocked Mississippi's enforcement effort, discussing the stringent constitutional standards established by *Buckley* and *MCFL* and declaring that Mississippi's

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[11] The *Furgatch* opinion was issued just weeks after *MCFL* and did not even cite the Supreme Court's *MCFL* ruling.

[12] In *California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003), after describing *Furgatch* as "standing apart from other circuit precedent," the panel sought to reduce the disharmony by ruling that *Furgatch* actually holds that "express advocacy must contain some explicit *words* of advocacy." (Emphasis in original). Louisiana's standard does not require such explicit words and, hence does not even comply with *Furgatch* as its own circuit now construes it.

proposed *Furgatch*-based standard was "too vague" to comply with the First Amendment. *Id.* at 194. Instead, to avoid "the pitfalls of making application of the First Amendment depend[ ] on the understanding of the reasonable person under the circumstances," this Court declared that Mississippi could not construe "express advocacy" more loosely than had *Buckley*. *Id*. at 194-97.[13]

B. ***McConnell* Does Not Relax The Stringent Demands Of The First Amendment.**

Defendants mistakenly argued to the district court that the Supreme Court's 2003 *McConnell* opinion overruled *Buckley*'s holding that the First Amendment demands a precise, objective, and narrow definition of regulated expenditures. Tr. 41-43; R. 132-34; Supp. R. 22-24. What *McConnell* actually held was that, if a legislature crafts a new standard that is at least as precise and objective as the express advocacy standard and provides a sufficient factual record to justify the scope of that new standard, it also may satisfy the First Amendment standards established in *Buckley*. Put another way, what the First Amendment demands is some precise, objective, and narrowly tailored standard, whether that standard is "express advocacy" or something else.

McConnell was a facial challenge to the newly enacted Bipartisan Campaign Reform Act of 2002 ("BCRA"). One provision of BCRA restricted independent

[13] Interestingly, although the panel in *California Pro-Life Council, Inc.*, 328 F.3d at 1097-98, did not (and could not) flatly overrule *Furgatch*, it noted that "introducing context and … not

spending for a newly defined category of speech termed an "electioneering communication." *See* 540 U.S. at 189-90 (describing 2 U.S.C. § 434(f)(3)). For some purposes, the "electioneering communication" standard supplanted the former "express advocacy" standard.

McConnell stressed that *Buckley* had imposed "express advocacy" as a narrowing construction to save provisions that were "impermissibly vague" and "impermissibly broad" under First Amendment standards. 540 U.S. at 190 & n.75. It said that *Buckley*'s "concept of express advocacy and the concomitant class of magic words were born of an effort to avoid constitutional infirmities." *Id.* at 192. *McConnell* stressed that *Buckley* "nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." *Id.*

McConnell found that BCRA's new "electioneering communication" standard "raise[d] none of the vagueness concerns that drove [the] analysis in *Buckley*." *Id.* at 194. To the contrary, the statute limited the term "(1) to a broadcast, (2) clearly identifying a candidate for federal office, (3) aired within specific [30- or 60-day pre-election] time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. <u>These components are both easily</u>

(Continued . . .)
tethering express advocacy to explicit words of advocacy . . . raises serious First Amendment concerns."

understood and objectively determinable." *Id.*[14] Thus, *McConnell* held that the First Amendment's demands for precise and objective standards were met.

Because the "electioneering communication" standard included speech without explicit words of electoral advocacy, it was broader than the "express advocacy" standard. But *McConnell* found that "the record in this litigation" empirically justified the additional scope. *Id.* at 152, 193. Thus, abundant record evidence proved that the new test was narrowly tailored. As a result, *McConnell* held that all three First Amendment demands were met – precision, objectivity, and tailoring.

Defendants below made much of *McConnell*'s observation that imposing the "express advocacy" standard had greatly diminished the practical significance of the prior regulatory scheme and that Congress had good reason to create a new standard. But *Buckley* made precisely the same point. 424 U.S. at 45. *See Moore*, 288 F.3d at 195 (noting *Buckley*'s recognition that the express advocacy standard is easily circumvented). As *McConnell* acknowledged, 540 U.S. at 221 (citing *Buckley* at 42-51), *Buckley* even struck down part of the statute because, once it was narrowly construed to regulate only "express advocacy," it lost any practical benefit. Thus, *McConnell*'s recognition of the weakness of the express advocacy standard was nothing new and did not impair *Buckley*'s strong holdings that (i)

[14] The terms listed in this summary are further defined in the statute. *See* 2 U.S.C. § 434(f)(3).

effective regulation must be achieved, if at all, through precise, objective, and narrow standards, and (ii) a statute that fails to provide such a definition must be struck down unless an adequate narrowing construction is imposed. *Buckley*, 424 U.S. at 43-44, 79-80.

For these reasons, the Sixth Circuit recently relied on *Buckley* to impose an "express advocacy" narrowing construction on Kentucky's ban on "any electioneering" within 500 feet of a polling place. *Anderson*, 356 F.3d at 664-65. Kentucky had defined "electioneering" to include signs or statements "for or against any candidate or question." *Id.* at 663. The Sixth Circuit held that this "for or against" standard failed to provide the precise, objective, and narrow guidance that *Buckley* required of standards for restricting core speech. *Id*. at 665. The Sixth Circuit rejected arguments that *McConnell* undermined *Buckley*, pointing out that the standard approved in *McConnell* was not vague and its scope was supported by "evidence that such a broad definition is necessary." *Id.* Forced to choose between invalidating Kentucky's provision and subjecting it to a narrowing construction, the Sixth Circuit construed it to apply only to "express advocacy." *Id.* at 665-66.

Similarly here, Louisiana's definition of "expenditure" must be measured against the First Amendment's call for precision, objectivity, and narrow tailoring

established in *Buckley* and *Moore*. It fails that First Amendment test, as we now show.

III. LOUISIANA'S DEFINITION OF "EXPENDITURE" DOES NOT PROVIDE THE PRECISE, OBJECTIVE, AND NARROW GUIDANCE THAT THE FIRST AMENDMENT DEMANDS.

Louisiana's campaign laws define a regulated "expenditure" as a "purchase, payment, advance, deposit, or gift, of money or anything of value made for the purpose of supporting, opposing, or otherwise influencing the nomination or election of a person to public office." R.S. 18:1483(9)(a). Defendants conceded below (Tr. 40, 42-43) that this language cannot be distinguished from the "purpose of influencing" standard that *Buckley* held to be unconstitutionally vague and overbroad. 424 U.S. at 77. Nor can it meaningfully be distinguished from the other standards that *Buckley* and *MCFL* held to be constitutionally inadequate.

Despite *Buckley*'s clear warning in 1976, Louisiana did little to conform to the First Amendment. To the contrary, in Ethics Board Docket No. 99-580, the Board and Committee held that, to decide whether spending for speech is an "expenditure," enforcement authorities must decide whether, when speech is viewed as a whole and in light of the circumstances (including the perceived goals of the speaker), the only "plausible meaning" is "a preference of one candidate over another candidate." R. 41 (Attached as Ex. B). In short, the Board adopted a loose (and even more constitutionally violative) version of the Ninth Circuit's

aberrant *Furgatch* standard – one that gives it substantial discretion to approve of or punish core political speech based on content.

When this Court's 2002 *Moore* opinion held that the *Furgatch* standard violated the First Amendment, Louisiana still took no action. To the contrary, during the pendency of this appeal and after *Moore*'s holding had been directly called to the Board's attention, the Board reaffirmed that Louisiana's definition of "expenditure" does not demand "explicit words 'expressly advocating' [a candidate's] election or defeat as required by *Buckley*." *RSLC* at 5 (Attached as Ex. C). Instead, Louisiana's definition is met if, in the view of the Board, a reasonable audience would unmistakably infer from the overall content and circumstances of the speech that that the speaker "sought to influence" an election. *Id.* Thus, Louisiana law simply disregards *Moore*'s warning against "the pitfalls of making application of the First Amendment depend[ ] on the understanding of the reasonable person under the circumstances." *Moore*, 288 F.3d at 195.

Because Louisiana persistently has failed to provide a precise, objective, and narrow definition of "expenditure," the remaining issue is what to do about that failure.

IV. LOUISIANA'S DEFINITION OF "EXPENDITURE" MUST EITHER BE DECLARED UNCONSTITUTIONAL OR SUBJECT TO A NARROWING CONSTRUCTION.

In the trial court, Defendants took comfort from the fact that *Buckley* and *MCFL* did not strike down the "expenditure" provisions challenged there. But the reason those provisions were not struck down is that the Court declared they were subject to a stringent narrowing provision to cure the invalidity. *Buckley*, 424 U.S. at 43-44, 80; *MCFL*, 479 U.S. at 249; *McConnell*, 540 U.S. at 121-22. Given the similarities in the wording of the Louisiana definition and the language that *Buckley* and *MCFL* construed to mean "express advocacy," Louisiana's statute seemingly could be preserved in the same way, just as the Sixth Circuit did in *Anderson*, 356 F.3d at 651. Such a declaratory judgment would satisfy the Center because, as its papers have made clear, it does not intend to engage in express advocacy in Louisiana. R. 10.

However, it is not clear that federal courts may impose narrowing constructions on State law when they are not proposed by the State. *See Kolender*, 461 U.S. at 355 (federal courts should "consider any limiting construction that a state . . . enforcement agency has proffered"). Defendants here have emphatically rejected narrowing the Louisiana statute to express advocacy. The Center has found no Fifth Circuit precedent imposing a narrowing construction that the State

flatly rejected.[15] And principles of federalism counsel against forcing a narrowing construction on an unwilling state. Thus, this may be a case in which the task of framing a new standard is best "left to the State." *Universal Amusement Co. v. Vance*, 587 F.2d 159, 172 (5th Cir. 1978) (*en banc*).

But if Louisiana's unconstitutional provision is not to be narrowed, it must be struck down. As *McConnell* explained, if *Buckley* had not imposed an adequate narrowing construction, it would have had to declare the expenditure standard invalid. *McConnell*, 540 U.S. at 121-22; *see Hill*, 789 F.2d at 1110 (court may not uphold a facially inadequate standard).

Louisiana's vague, subjective, and overbroad standard forces speakers such as the Center to self-censor, hedge, trim, and steer clear of commenting about vital public issues; consequentially, the Center as well as its audience are deprived of the core benefits of the First Amendment. We are a democracy, and when core First Amendment speech is suppressed, the listeners' rights are violated and society as a whole is the loser. *Davis*, 78 F.3d at 926. The key purpose of First Amendment facial challenges is to prevent just such injury <u>before</u> it occurs. Such First Amendment injury, even for short periods, is irreparable and forbidden.

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[15] *Moore* is not such a case. There, the Court merely insisted that a post-*Buckley* campaign statute that expressly required "express advocacy" be given its obvious meaning, forbidding an effort by enforcement authorities to impose an unconstitutional broadening. In *Hill v. City of Houston, Texas*, the *en banc* majority refused to impose a narrowing construction when (i) the government refused to proffer a limiting instruction and (ii) no obvious basis for narrowing was discerned. 789 F.2d 1103, 1111-13 (5th Cir. 1986).

Elrod v. Burns, 427 U.S. 347, 373 (1976); *Moore*, 288 F.3d at 192. The district court was required to grant some remedy, either by striking the offending provision down or by imposing a constitutionally adequate narrowing construction. Otherwise, both the Center and its audience, as well as other potential Louisiana speakers and listeners, will continue to experience irreparable injury to core First Amendment rights, the very injuries *Buckley*, *MCFL*, and *Moore* went to great lengths to prevent.

V. CONCLUSION

The First Amendment is not a loophole in statutes regulating public speech around the time of elections. To the contrary, such statutes are the exception to the First Amendment's central command that *no law* shall restrict free speech about public issues and candidates, a command that has its fullest and most urgent application to speech concerning how we are governed. *Buckley*, 424 U.S. at 14; *Moore*, 288 F.3d 187 (citing *Christian Action Network v. FEC,* 100 F.3d 1049, 1051 (4th Cir. 1997)).

Louisiana has known for decades that, if it wished to regulate "expenditures" for independent speech, it had to provide a precise, objective, and narrowly tailored definition of the speech to be regulated. It has failed to do so. Instead, Louisiana opted for an unconstitutional standard administered on an *ad hoc* basis riddled with subjective criteria. This situation flatly violates the First Amendment.

The Center cannot constitutionally be required to exercise its First Amendment rights under the Damoclean swords of criminal and civil penalties, particularly when Louisiana's statute contravenes Supreme Court decisional law as well as the law of this Circuit. Instead, this Court should either (i) declare that Louisiana's definition of "expenditure" is limited to advocacy that contains explicit words that expressly advocate the election or defeat of a clearly defined candidate, or (ii) respecting Louisiana's emphatic repudiation of the express advocacy standard, declare Louisiana's definition of "expenditure" unconstitutional and void.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Harry Rosenberg, certify that today, April 18, 2005, a copy of the brief for appellant, one computer-readable disk copy of the brief, a copy of the record excerpts, and the official record in this case, consisting of one volume of the pleadings, one volume of record, and one volume of supplemental record were served upon the following individuals by Federal Express:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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