UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
Shreveport Division

CENTER FOR INDIVIDUAL FREEDOM, Plaintiff, v. PAUL J. CARMOUCHE, District Attorney, 1st Judicial District; et al. Defendants.	)	Case No. _____ Judge: _____

MEMORANDUM IN SUPPORT OF PLAINTIFF'S
MOTION FOR TRO AND PRELIMINARY INJUNCTION

Plaintiff Center for Individual Freedom ("Center") engages in independent public speech nationwide. It recently perceived a need to address residents of Louisiana concerning justice issues that the Louisiana public currently is disposed to hear because of the September 18 primary (and likely final) election for a seat on the Louisiana Supreme Court. As it began its planning, however, the Center found its speech barred by vague, untailored, and overbroad laws that threaten civil and criminal sanctions and demand onerous and intrusive reports and disclosures the Center cannot provide. But for those laws, the Center would be speaking to Louisianans right now. Only immediate judicial relief can alleviate this irreparable injury to the First Amendment rights of the Center, its contributors, and Louisianans who wish to hear its speech. Once the September 18 election occurs, public interest in and attention to the issues the Center wishes to address will fade. Accordingly, the Center respectfully but urgently requests that the Court hear this matter on an expedited basis and rule no later than September 3, 2004.

FACTS

The facts are detailed in the Verified Complaint and supporting Declaration of Jeffrey L. Mazzella. In a nutshell, Plaintiff Center is a non-profit, non-partisan organization, existing under the laws of Virginia and operating as tax exempt under § 501(c)(4) of the Internal Revenue Code. An important aspect of its activities is public education on issues relating to the constitutional functioning of government and the rights of individuals. Because public speech is expensive and its resources are limited, the Center must target its speech to places and times when the public is primed to pay attention. In this case, the impending September 18 primary election to the Louisiana Supreme Court has created such a window of opportunity. The Center has researched its opportunity, prepared a draft ad, and retained a vendor, all with an eye to running television and radio advertisements in western Louisiana during that window.

The Center discovered, however, that Louisiana law makes it a civil and criminal offense, R.S. 18:1505.4-1505.6, to spend more than $500 "for the purpose of supporting, opposing, or otherwise influencing" any election, R.S. 18:1483(9), unless the speaker files onerous and intrusive reports and discloses confidential details of its supporters and financing nationwide, R.S.18:1501.1. Whether speech has a "purpose" that triggers regulation turns on "what the speaker intends and what the reader understands." Elections Bd. Dkt. 99-580 (attached).

Because the Center's contributors strongly value their privacy, any hint that the Center might disclose their contributions and support would be fatal to its revenues and preclude its speech. The Center's own privacy values also forbid such disclosures, and the Center cannot afford to dissipate its resources filing reports across the country as a condition of its right to speak. Thus, the Center does not have the option of speaking and disclosing. In short, the laws of Louisiana have effectively muzzled the Center.

Defendant Paul J. Carmouche is the District Attorney in the 1st Judicial District who is specially charged by the challenged laws to enforce them by criminal prosecution within his territory. R.S. 18:1511.6. The other Defendants are the members of the Louisiana Board of Ethics ("Board"), which also sits as the Supervisory Committee for Campaign Finance ("Committee"). The Board/Committee has special statutory responsibility for interpretation and civil enforcement of the laws, and actually has enforced them within the last few weeks. These are proper defendants under *Ex parte Young*, 209 U.S. 123 (1908).

ARGUMENT

The Supreme Court has held that the First Amendment allows government some leeway to regulate speech, including spending for speech, in connection with elections. But that Court, and the Fifth Circuit, have stressed that such regulation strikes at core of the First Amendment and, hence, must be extremely precise and narrowly tailored to the claimed justifying interests. The restrictions and burdens that Louisiana seeks to impose upon the independent issue advocacy of non-partisan speakers disregards clearly established First Amendment limits, causing concrete and immediate irreparable injury that requires prompt relief by this Court.

I. BY ESTABLISHING PROBABLE FIRST AMENDMENT VIOLATIONS, THE CENTER SATISFIES ALL FOUR CRITERIA FOR PRELIMINARY RELIEF.

As a party seeking preliminary relief, the Center has the familiar four-fold burden of showing a substantial (i) likelihood of success on the merits and (ii) probability of irreparable injury, along with a favorable balance of (iii) private equities and (iv) the public interest. *Blue Bell Bio-Medical v. Cin-Bad, Inc.,* 864 F.2d 1253, 1256 (5th Cir. 1989).

However, "[i]t is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary

injunction." *Deerfield Med. Center, v. City of Deerfield Beach,* 661 F.2d 328, 338 (5th Cir. 1981) (collecting authority) (emphasis added). Thus, proof that the Center's First Amendment rights likely have been violated simultaneously is proof of irreparable injury. In this case, the injury is more immediate because of the Center's need to speak while the public is listening, a situation that will end with the September 18 primary election. Moreover, the Center actually has been denied contributions by potential donors who are unwilling to accept the risks of reporting and disclosure laws.

Both the interests of the State and the citizenry at-large favor vigorous protection of First Amendment and other fundamental rights. *See Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). Everyone benefits when public issues are addressed publicly. Indeed, suppression of the Center's right to speak simultaneously inflicts irreparable constitutional injury on the right of Louisianans to receive the Center's speech. *Landell v. Sorrell,* 2004 WL 1837394, at *15 (2d Cir. Aug. 18, 2004) (First Amendment protects "the communication, … its source and … its recipients") (collecting authority). Thus, proof that the Center's First Amendment rights likely are being violated establishes that the balance of equities favors relief.

In short, the controlling issue is whether there are substantial grounds to expect the Center's First Amendment challenge to prevail on the merits. We now show that, under binding authority, the Center's claims are certain to succeed, a far stronger showing than is necessary to obtain preliminary relief.

II. THE CENTER IS LIKELY TO PREVAIL ON THE MERITS.

The Center challenges two interrelated aspects of Louisiana's campaign finance laws: (A) the definition of "expenditure," which is the term the laws use to identify the categories of independent speech that are subject to regulation; and (B) the reporting obligations that are imposed on independent "expenditures" in excess of $500. Each violates the First Amendment

as it applies to the States through the Fourteenth Amendment.[1] These defects are clearly demonstrated by the leading precedents in the field: *Buckley v. Valeo,* 424 U.S. 1, 16-19, 39-45, 64-66, 75-81 (1976), *FEC v. Massachusetts, Citizens For Life, Inc.*, 479 U.S. 238, 246, 248-49 (1986) ("*MCFL*"); *McConnell v. FEC*, 124 S.Ct. 619, 686-89 (2003); and *Chamber of Commerce v. Moore*, 288 F.3d 187, 191-92 (5th Cir. 2002).

A. The Definition Of "Expenditure" Is Unconstitutional.

The first element of the statutory violation that threatens the Center is in making "expenditures" in excess of $500. As relevant here, "expenditure" is defined in terms of the "purpose" and perceived message of the financed speech. That definition violates established standards of precision, objectivity, and tailoring.

1. Where spending for speech is burdened by reporting and disclosure requirements, stringent First Amendment scrutiny is required.

The First Amendment seeks both to foster free and open debate on issues of public importance and to assure the ability "to associate with others for the common advancement of political beliefs and ideas." *Buckley v. Valeo,* 424 U.S. 1, 14-17, 65-66 (1976). In modern society, "virtually every means of communicating ideas … requires the expenditure of money." *Id.* at 19. In particular, "television, radio, and other mass media" have become indispensable. *Id.* A constitutional guarantee of free speech that does not also protect spending for that speech would be "like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 19 n.18. Thus, regulating the money that can be spent on speech does not differ from regulating speech itself, *id.* at 39-41, and targeting expenditures rather than the

[1] The First Amendment, as construed by the U.S. Supreme Court in federal campaign finance cases, applies to the states in full strength. *See Suster v. Marshall*, 149 F.3d 523, 529-30 (6th Cir. 1998) (collecting authority); *Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002) (applying federal cases to Mississippi law.) Moreover, Art. I, § 7 of the Louisiana Constitution also provides free speech protection. *See Mashburn v. Collin,* 355 So.2d 879, 891 (La. 1977).

financed speech does not "reduce the exacting scrutiny required by the First Amendment." *Id.* at 16.

Imposing any substantial burden on the right to spend for public speech triggers the First Amendment. In particular, a law that imposes reporting obligations on expenditures for speech burdens that speech and must withstand a "strict standard of scrutiny" under the First Amendment. *Id.* at 64-65, 74-75. This is so, not only because requiring disclosure burdens the speech, but also because "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. Thus, "the First Amendment constrains the government's power to compel the disclosure of independent … expenditures just as it constrains government's power to regulate the amount of money that a person or group can spend." *Chamber of Commerce v. Moore,* 288 F.3d 187, 191-92 (5th Cir. 2002) (demanding a "strict standard of scrutiny" where disclosure requirements are triggered by speech expenditures).

Standards that turn on whether speech is sufficiently related to an election are "content based." *Landell*, 2004 WL 1837394, at *14; *Burson v. Freeman,* 504 U.S. 191, 197 (1992). Although the First Amendment is not absolute, content based burdens on core speech are "presumed invalid" until and unless the government bears its heavy burden of justification. *Ashcroft v. ACLU,* 124 S.Ct. 2783, 2788 (2004). Among other things, the government must prove both that such laws are "narrowly tailored" to advance compelling governmental interests and that the statutory terms are clear, objective, and definite. *Buckley,* 424 U.S. at 43-44, 79-82.

2. Where the content of speech determines whether spending for that speech is regulated, the First Amendment demands a precise, objective, bright line standard that is narrowly tailored to the justifying interest.

"Precision of regulation must be the touchstone" where First Amendment rights are being regulated. *Buckley*, 424 U.S. at 41 (citation and internal quotation marks omitted). Because the

challenged statutes threaten criminal penalties for core speech, the First Amendment demands "even greater degree of specificity" than the due process standards for ordinary criminal statutes. *Id.* at 77 (citation and internal quotation marks omitted). Such stringent standards are essential because, if there is doubt, speakers will "steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked." *Id.* at 41 n.48 (citation and internal quotation marks omitted).

Where the content of independent public speech determines whether spending on that speech is regulated, the content standard must be extremely precise, objective, and clear. *Buckley,* 424 at 41-44; *Moore,* 288 F.3d at 191-94.[2] In particular, the standard must not involve assessment of what the speaker intended or what an audience would or did understand because such a standard

> puts the speaker … wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a [subjective] distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.

Buckley, 424 U.S. at 43.

Buckley held that "advocating the election or defeat of" a candidate was too vague to serve as a content standard because it turned on how the speech was perceived. 424 U.S. at 42. It similarly rejected "for the purpose of … influencing an election" as too vague and broad to be a constitutional content standard. *Id.* at 79-82 (internal quotation marks omitted). *FEC v.*

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[2] We stress that the Center here contemplates truly independent speech. *Buckley* suggested that less precision may be necessary to identify the regulated speech of "candidates" and "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate" because their expenditures "are, by definition, campaign related." 424 U.S. at 79.

Massachusetts Citizens for Life, Inc., 479 U.S. 238, 246, 248-49 (1986) ("*MCFL*"), rejected that same "purpose of influencing" standard.

In lieu of those statutory standards, *Buckley* and *MCFL* insisted on a content standard that focused exclusively on the explicit language used: whether the speech "expressly advocated" in "explicit" language the "election or defeat" of a "clearly identified candidate." *Buckley,* 424 U.S. at 43-44; *MCFL*, 479 U.S. at 248-50. The Court clearly intended to demand just that high degree of objective precision and clarity. Thus, the Fifth Circuit rejected as "too vague" a Mississippi content standard that was very similar to *Buckley*'s but that allowed "(1) limited reference to the context of the communication and (2) reference to whether reasonable minds could differ about the meaning of the communication." *Moore*, 288 F.3d at 194-95 (citations and internal quotation marks omitted).

Of course *Buckley*'s "express advocacy" standard is not the only possible objective bright line a legislature may draw. *McConnell v. FEC*, 124 S.Ct. 619, 686-89 (2003), approved an even more precise and objective "electioneering communication" standard that turned on whether speech in specified media clearly referred to federal candidates during precisely defined time periods. *McConnell* stressed, however, that it was <u>not</u> undercutting *Buckley*'s vagueness holdings. The new standard it approved was "neither vague nor overbroad," *id.* at 686-89, and "raises none of the vagueness concerns that drove our analysis in *Buckley*." *Id.* at 689. Thus, federal courts since *McConnell* continue to rely on *Buckley* to demand an objective and precise bright line standard. *See Landell*, 2004 WL 1837394, at *11 (*Buckley* remains the seminal case demanding exacting scrutiny of expenditure limits); *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004).

a. The speech content standard by which Louisiana classifies spending as a regulated "expenditure" is unconstitutionally vague.

Louisiana classifies spending on speech as a regulated "expenditure" if the speech is made "for the purpose of supporting, opposing, or otherwise influencing" an election. R.S. 18:1483(9) (emphasis added). Thus, the entire focus of the definition is subjective. It turns on the enforcer's judgment as to what the speaker sought to accomplish and the goals and meanings that may be inferred. That is precisely what *Buckley, MCFL,* and *Moore* forbid.

The subjective focus of the challenged standard is confirmed by the opinion of the Louisiana Board of Ethics issued to Progress Louisiana, Inc., Dkt. No. 99-580 (copy attached). That opinion ruled that, for purposes of identifying the types of ads that result in expenditures, "words derive their meaning from what the speaker intends and what the reader understands." *Id.* (emphasis added). What is more, the Board even went so far as to rule that if Progress Louisiana provided objective information as to the positions of candidates on issues of importance to it, spending for that speech would be an "expenditure," triggering all the requirements imposed by the Louisiana campaign finance laws. *Id.*

Much of the language used by Louisiana's statute has been flatly disapproved. As already noted, *Buckley* held that a standard of "advocating the election or defeat" of a candidate was too vague because it turned on the message an audience or regulator would take from speech, something that the speaker could not be certain of in advance. 424 U.S. at 42-43. That language is indistinguishable from the Louisiana statute's standard of "supporting or opposing," except that the Louisiana statute also expressly demands a subjective assessment of the speaker's "purpose."

Similarly, *Buckley* and *MCFL* both rejected "for the purpose of … influencing." *Buckley,* 424 U.S. at 79-82; *MCFL*, 479 U.S. at 246. That is the same broad and vague language used in

the Louisiana statute. This is not a trivial part of the statute. To the contrary, the Louisiana Board of Ethics (and the First Circuit Court of Appeal that adopted its entire opinion) emphasized just this clause: "for the purpose of supporting, opposing, *or otherwise influencing*." *In re Jefferson Alliance,* 841 So.2d 15, 24 (La. App. 2003) (emphasis by Board and Court).

Simply stated, Louisiana's standard is not at all the type of precise, objective and clear standard approved by *Buckley, MCFL, McConnell*, or *Moore*. Instead, it is a standard that binding precedent holds to be impermissibly vague. For this reason alone, the Center is likely to prevail and the requested preliminary relief should be approved.

b. The content standard also is untailored.

Moreover, the statutory definition of "expenditure" is not tailored. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger." *MCFL*, 479 U.S. at 265. Thus, "the government must also prove that the mechanism chosen is the least restrictive means of advancing that interest." *Landell*, 2004 WL 1837394, at *11 (collecting authority). Until and unless the government proves narrow tailoring, burdens on core First Amendment activity must be deemed invalid. *FEC v. Nat'l Conservative Political Action Comm*., 470 U.S. 480, 496 (1985).

The Louisiana standard extends to speech at any time, no matter how remote from an election; it extends to all types of speakers; and it encompasses even speech that does not support or oppose a candidate or referendum but merely intends to "otherwise influence" an election in any way. R.S. 18:1483(9). On its face, Louisiana's expansive intent to influence standard would reach a pastor who, weeks before an election, broadcast a sermon on the Golden Rule and urged his flock to apply that abstract teaching in deciding how to vote. No compelling government

interest justifies casting the regulatory net so wide. And, to the extent that Louisiana does not intend to apply the term "otherwise influence" literally, its already fatal vagueness increases.

Because Louisiana's expenditure standard is unconstitutional, there is no valid basis for imposing any reporting obligation on the Center for its contemplated speech. But beyond that, the reporting obligations themselves are invalid, as we now show.

B. The Reporting Requirement Is Untailored.

If any person makes expenditures exceeding $500 during an election period, that person must promptly file a public report. R.S. 18:1501.1. This requirement applies equally to all types of persons – individuals, nonprofits, and commercial entities.

The report must disclose a wide range of information, *e.g.*, the full name and address of each person who has made any contribution to the reporting group for any purpose at any time during the entire reporting period. R.S. 18:1491.7.B.(4)(a). It also must include the total amount of cash and investments on hand and all cash income during the reporting period. R.S. 18:1491.7.B.(1), (2), (3). Disclosures are required even of information about out-of-state activities, income, and assets.

These requirements go beyond the demands of any justifying interests Defendants might offer. For example, compelling disclosure of the names and addresses of any persons who contribute any amount, from as little as one cent to as much as millions of dollars, does not serve any compelling State interest but materially injures the privacy and associational rights of the contributors and imposes a substantial burden on the speaker. Indeed, if the speaker has been accepting contributions from a wide variety of sources and then decides that events in Louisiana require comment, digging out and assembling such data would be a very heavy burden. Perhaps there is room for legislative judgment as to the size of contribution that merits disclosure, but including even the smallest clearly goes too far.

Similarly, Louisiana has no justification for compelling every person – individual, partnership, or corporation – who spends $500 on independent speech to publicize all cash and investments on hand and all cash income from investments. R.S. 18:1491.7.B.(1), (2), (3). This and similar untailored reporting obligations increase the burden of speaking without advancing any compelling interest.

The untailored requirement of disclosing names and addresses of contributors is particularly troubling because, in addition to burdening the reporting entity's speech, it also burdens the contributors' rights of association, *Buckley* 424 U.S. at 65-66, and anonymous speech on public issues.[3] These additional First Amendment rights do not flatly preclude narrowly tailored disclosure obligations, at least in the absence of public animosity to supporters of the reporting group. But the burden on these rights is an additional substantial reason why the government is obliged to show that its reporting demands are narrowly tailored.

III. PRELIMINARY RELIEF SHOULD BE GRANTED.

For the reasons just discussed, the Center is very likely to prevail on its constitutional challenges. But because the challenged statutes facially burden core First Amendment interests, the burden really is upon Defendants to show that the Center is likely to fail. *Ashcroft v. ACLU,* 124 S.Ct. 2783 (2004). That is the consequence of our nation's firm constitutional commitment to free speech.

Ashcroft upheld a preliminary injunction against enforcement of a federal statute that Congress had just revised for the specific purpose of satisfying constitutional defects identified in an earlier opinion. Because the revised statute still burdened First Amendment rights,

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[3] *See Watchtower Bible & Tract Soc. of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002) ("The decision to favor anonymity may be motivated by fear of economic or official retaliation … or merely by the desire to preserve as much of one's privacy as possible.") (*quoting McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 341-42 (1995)).

triggering the government's burden of justification, the Court held that the plaintiffs "must be deemed likely to prevail unless the Government has shown" that it is likely to carry each aspect of its burden of justification. 124 S.Ct. at 2791-92; *see also Landell,* 2004 WL 1837394, at *14. For the reasons just discussed, Defendants are unlikely to be able to show that the definition of expenditures and the reporting requirements meet First Amendment standards of tailoring and precision. Indeed, the defects are clear under binding authority.

As *Ashcroft, Buckley, McConnell* and a host of other cases granting pre-enforcement review establish, a plaintiff who is actually being deterred from speaking by a credible fear of prosecution is entitled to seek judicial protection without being forced to violate the law and risk the consequences.[4] Precisely this point was made by the *Ashcroft* district court, which granted a TRO and subsequent preliminary injunction against a new federal speech restriction, even though it had never been enforced and the defendants denied that it applied to the plaintiffs' activities. *ACLU v. Reno*, 31 F.Supp.2d 473, 479-80 (E.D. Pa. 1999) ("a credible threat of … future prosecution is itself an injury," and any resulting "self-censorship … is itself an injury") (collecting abundant authority); *see also New Hampshire Right to Life Political Action Comm. v. Gardner,* 99 F.3d 8, 12-15 (1st Cir. 1996) (analyzing authority). As noted above, the Supreme Court held that the preliminary injunction had been properly granted. *Ashcroft,* 124 S.Ct. at 2795.

[4] In the present case, the statute has been and is being enforced. Even outside the First Amendment context, where a law poses a credible legal threat that is having a present and concrete adverse effect on the plaintiff, the matter is ripe for review. *See Metropolitan Milwaukee Ass'n v. Milwaukee Cty.,* 325 F.3d 879 (7th Cir. 2003) (collecting and analyzing authority).

In this case the Center reasonably fears that its contemplated ads, which will discuss favorable and unfavorable policy positions with reference to candidates in a pending election, will subject it to criminal or civil penalties. Thus, the Center actually is self-censoring at this minute, delaying final action on a draft script with a retained vendor. It has spent resources that, unless this Court grants relief, will be lost, as will the chance to speak effectively. Moreover, persons who otherwise would contribute to the Center because of the threat posed by laws like those challenged here also are self-censoring, refraining from protected association and group speech because of the threat posed by Louisiana's laws. The challenged laws are causing injury in a concrete and immediate way. There could not be a more concrete and immediate claim short of an actual prosecution.

CONCLUSION

The Center should not be required to curtail its independent speech to avoid the threat of civil and criminal liability under these vague and untailored standards. Such curtailment irreparably injures the Center, those who wish to receive its speech, and the public interest

in free and open public debate. Instead, the Court should temporarily enjoin enforcement of the challenged laws *pendente lite*. In particular, the Court should restrain enforcement of any obligation to make reports or disclosures based on supposed "expenditures." For the reasons explained above, it is respectfully requested that the Court's order should issue no later than September 3, 2004.

Respectfully Submitted,

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