IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO RIGHT TO LIFE SOCIETY, INC.	:	
Plaintiff,	:	**Case No. 2:08 CV 492**
v.	:	**Judge Smith**
OHIO ELECTIONS COMMISSION, et al.	:	**Magistrate Judge King**
Defendants.	:	

MEMORANDUM OF *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND OHIO CITIZEN ACTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION & SUMMARY OF ARGUMENT

For decades, the U.S. Supreme Court has recognized that requiring the disclosure of political spending protects our institutions of government from the threat of corruption. In its landmark decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), for example, the Supreme Court upheld federal campaign finance disclosure requirements on the grounds that disclosure requirements serve the government interests of providing the electorate with information "to aid the voters in evaluating those who seek federal office," *id*. at 66-67 (footnotes omitted), preventing corruption, *id.* at 67, and gathering the data necessary to detect violations of campaign finance laws. *Id*. at 67-68.

In analyzing the constitutionality of disclosure requirements, the *Buckley* Court articulated the appropriate standard as whether there was a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed," *id*. at 64, deeming this intermediate standard of review appropriate because disclosure requirements "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Id*. at 68 (footnotes omitted); *see also McConnell v. FEC*, 540 U.S. 93, 201 (2003).

The State of Ohio has enacted disclosure requirements to advance the State's vital interests in informing the electorate, preventing corruption and enabling the enforcement of other campaign finance laws. State disclosure laws require any person who makes a payment to produce and air "electioneering communications" aggregating in excess of $10,000 in a calendar year to file a statement identifying that person's full name and address, the amount of the disbursement for the ad, the name of the candidate identified in the ad and the identity and contribution amount of anyone contributing $200 or more to produce the ad. *See* O.R.C. § 3517.1011(D). The term "electioneering communication" is defined to include any "broadcast, cable, or satellite communication that refers to a clearly identified candidate" distributed from

the time the identified candidate actually becomes a candidate until the thirtieth day preceding the election—at which time a disbursement for such a communication is deemed an "expenditure" subject to similar "expenditure" disclosure requirements. *See* O.R.C. § 3517.1011(A)(7) (defining "electioneering communication"); *see also* O.R.C. § 3517.01(B)(6) (defining "expenditure"); *see also* O.R.C. § 3517.10 (establishing "expenditure" disclosure requirements for political committees); *see also* O.R.C. § 3517.105 (establishing "independent expenditure" disclosure requirements for individuals and others).

In this case, plaintiff Ohio Right to Life Society, Inc. (ORTL) wishes to broadcast ads in the coming months clearly identifying state senators who are candidates in the November 4, 2008 election, *see* ORTL Complaint at 3 ¶¶ 8-9, but to do so anonymously—free from the modest disclosure requirements enacted by the State. ORTL has asked this Court to preliminarily and permanently enjoin the enforcement of O.R.C. §§ 3517.01(B)(6) and 3517.1011, alleging that these provisions, both on their face and as-applied to ORTL's proposed ads, violate ORTL's First Amendment rights. *See* ORTL Complaint at 15-16.[1] The result of an injunction would include the elimination of not only the "electioneering communication" disclosure requirements established by O.R.C. § 3517.1011, but also the disclosure requirements applicable to "expenditures" established by O.R.C. § 3517.01(B)(6) (defining "expenditure") together with O.R.C. §§ 3517.10 and 3517.105 (establishing disclosure requirements for "expenditures"). For the sake of simplicity, *amici* use the term "electioneering communication" to refer both to those communications meeting the definition at O.R.C. § 3517.1011(A)((7), as

[1] ORTL also wishes to run its advertisements free from the constraints of O.R.C. § 3517.1011(H), which prohibits the use of contributions received from a corporation or labor organization to pay for any broadcast, cable, or satellite communication that refers to a clearly identified candidate during the 30 days preceding a primary or general election. *See* ORTL P.I. Mem. at 6-11. *Amici* limit their Memorandum to a discussion of the application of Ohio disclosure requirements to ORTL.

well any broadcast, cable or satellite communication referring to a clearly identified candidate within 30 days of an election, defined as an "expenditure" by O.R.C. § 3517.01(B)(6).

The basis for ORTL's facial and as-applied challenges to the State's disclosure requirements is based largely on a misreading of the Supreme Court's recent decision in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) ("*WRTL*") and several "anonymous speech" cases unrelated to disclosure in the candidate election and lobbying contexts. In *WRTL*, the Court held that the federal law prohibiting corporations and labor unions from using treasury funds to pay for electioneering communications was unconstitutional as applied to any electioneering communication that was not express advocacy or the functional equivalent of express advocacy. 127 S. Ct. at 2667 (defining the "functional equivalent of express advocacy" as communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"). ORTL reads this holding expansively, arguing that the *WRTL* Court implicitly found that electioneering communications that do not meet its standard for express advocacy or its functional equivalent are wholly-protected issue speech and are not merely exempt from corporate and union funding restrictions, but also from disclosure requirements. ORTL maintains that its proposed ads are not express advocacy or its functional equivalent and, therefore, constitute speech exempt from disclosure requirements. *See, e.g.*, ORTL Complaint at 15-16 (requesting that the Court limit the application of the disclosure requirements to ads that are the functional equivalent of express advocacy).

ORTL further argues that several "anonymous speech" cases, including *NAACP v. Alabama*, 357 U.S. 449 (1958), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) and *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), establish its First Amendment right to "wear the cloak of anonymity" when broadcasting

ads that clearly identify candidates in the months leading up to Ohio's November 2008 election. *See* Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction ("ORTL PI Mem.") at 12-16.

These arguments have no merit. First, ORTL's assertion that *WRTL* implicitly exempted communications that were not express advocacy or its functional equivalent from disclosure requirements is pure conjecture. The *WRTL* Court examined only the federal electioneering communication funding restriction. The Court had no reason to, and indeed did not, consider whether the ads at issue in the case could constitutionally be subject to disclosure requirements. The *WRTL* decision therefore provides no basis for this Court to depart from the *McConnell* decision, wherein the Supreme Court upheld an electioneering communication disclosure requirement by an 8-1 majority. *McConnell*, 540 U.S. at 194-202. Second, ORLT completely disregards the decisions of the Supreme Court and lower federal courts upholding statutes requiring disclosure of lobbying activities, as well as ballot measure advocacy. These cases contradict ORTL's assertion that issue advocacy can not be subject to disclosure laws and must be exempt from all regulation. Third, ORTL's reliance on certain "anonymous speech" cases is misplaced because these cases do not pertain to communications in the candidate election or lobbying contexts and, consequently, gave no consideration to the important government interests present in those contexts. Finally, despite the fact that the Supreme Court has made clear that the appropriate standard of review for disclosure requirements is intermediate scrutiny, ORTL incorrectly argues that this Court must apply strict scrutiny to the challenged State disclosure laws. *See* ORTL PI Mem. at 14, 17.

For the foregoing reasons, ORTL is unlikely to prevail on the merits of its claims regarding State disclosure laws, and this Court should accordingly deny ORTL's motion for a temporary restraining order and preliminary injunction.

ARGUMENT

I. The U.S. Supreme Court Applied Intermediate Scrutiny and Upheld Electioneering Communication Disclosure Requirements in *McConnell v. FEC*.

There is no dispute that the Supreme Court in *McConnell* rejected a facial challenge to the federal electioneering communication disclosure requirements. Applying intermediate scrutiny, eight Justices upheld both the reporting requirement and the disclaimer requirement, finding that these requirements were substantially related to important state interests.[2] *See* 540 U.S. at 196 (Stevens, J.) and 321 (Kennedy, J.) (upholding the electioneering communication reporting requirements); 540 U.S. at 230 (Rehnquist, C.J., joined by all Justices except Thomas, J.) (upholding the electioneering communication disclaimer requirements).

A. *McConnell* Reviewed Electioneering Communication Disclosure Requirements Under Intermediate Scrutiny.

Relying upon the analysis in *Buckley*, the Supreme Court in *McConnell* applied an intermediate level of scrutiny to the federal electioneering communication disclosure requirements. In *Buckley*, the Supreme Court reviewed comprehensive federal reporting and recording-keeping requirements for political committees, *see* 424 U.S. at 60-74, as well as more limited reporting requirements for independent expenditures, *see id*. at 74-82. The standard of review established by the Court was whether there was a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id*. at 64. This intermediate standard of review was appropriate because disclosure requirements

[2] The three concurring Justices noted one exception, and found unconstitutional the federal requirement that speakers provide "advance disclosure" of executory contracts to purchase airtime for electioneering communications to be run in the future. 540 U.S. at 321 (Kennedy, J., concurring).

"appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id*. at 68 (footnotes omitted).

Although the majority opinion in *McConnell* did not explicitly state the standard of review applicable to the electioneering communication disclosure requirements, the opinion made clear that the Court was adopting *Buckley*'s standard of review. 540 U.S. at 196.[3] Moreover, the three concurring Justices expressly employed *Buckley*'s "substantial relation" standard, holding that disclosure requirements "do[] substantially relate" to the governmental interest in providing the electorate with information. *Id*. at 321 (Kennedy, J., concurring). Undeterred by this precedent, ORTL asserts that this Court should nonetheless apply strict scrutiny to the electioneering communication disclosure requirements, and that consequently the State of Ohio must demonstrate that O.R.C. § 3517.1011 serves a "compelling state interest." ORTL PI Mem. at 17.

ORTL's argument, however, is inconsistent with the "substantial relation" test applied to disclosure provisions in *Buckley* and *McConnell*, which bears no resemblance to strict scrutiny. Even a cursory reading of these cases indicates that the Supreme Court did not consider whether the challenged disclosure requirements implicated a "compelling state interest," nor whether the requirements were "narrowly tailored" to serve that interest.

Indeed, because the *Buckley* Court recognized that disclosure requirements are the "least restrictive" of campaign finance regulations, it would be illogical to subject disclosure requirements to the strictest level of scrutiny. On the spectrum of campaign finance regulations,

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

the *Buckley* Court realized that expenditure limits were the most burdensome regulations because they bar individuals from "any significant use of the most effective modes of communication." 424 U.S. at 19-20. Consequently, expenditure restrictions, such as the electioneering communication *funding restriction* reviewed in *WRTL*, are subject to strict scrutiny. *Id*. at 44-45; *McConnell*, 540 U.S. at 205. Contribution limits are deemed less burdensome of speech because they "permit[] the symbolic expression of support evidenced by a contribution but do[] not in any way infringe the contributor's freedom to discuss candidates and issues." *McConnell*, 540 U.S. at 135; *see also FEC v. Beaumont*, 539 U.S. 146, 161 (2003). They thus warrant "less rigorous" review. 540 U.S. at 137. On the opposite end of the spectrum are disclosure requirements, described as the "least restrictive" requirements because they "impose no ceiling on campaign-related activities." *Buckley*, 424 U.S at 64, 68; *see also McConnell*, 540 U.S. at 201 (observing that disclosure requirements "'d[o] not prevent anyone from speaking'") (quoting *McConnell v. FEC*, 251 F. Supp. 2d 176, 241 (D.D.C. 2003) (per curiam)). Logic thus dictates that disclosure requirements should receive less stringent review than limits on expenditures or contributions. It would confound reason to apply strict scrutiny both to expenditure limits, the most restrictive campaign finance regulation, and disclosure requirements, the least restrictive regulation, as ORTL urges here.

B. *McConnell* Made Clear that Electioneering Communication Disclosure Requirements Are Supported by Important Governmental Interests.

The *McConnell* Court's analysis of the state interests supporting the federal electioneering communication disclosure requirements is equally applicable to Ohio's disclosure requirements and has its roots in the *Buckley* decision. The *Buckley* Court acknowledged that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but identified three "substantial" governmental interests "sufficiently

important to outweigh the possibility of infringement." *Id.* at 66 (*quoting Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." *Id*. at 66-67 (footnotes omitted). "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Id*. at 67. And finally, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations" of campaign finance laws. *Id*. at 67-68.

The *McConnell* Court relied upon this analysis, holding that the three "important" state interests identified by *Buckley*—providing the electorate with information, deterring corruption, and enabling enforcement of the law—"apply in full" to electioneering communication disclosure requirements. 540 U.S. at 196. In so holding, the majority also suggested that the governmental interests recognized by *Buckley* supported disclosure of electioneering communications even if some percentage of "genuine issue ads" were covered by the electioneering communication disclosure requirement.

In sum, review of the *McConnell* decision to uphold federal law electioneering communication disclosure requirements yields two key propositions. First, electioneering communication disclosure requirements are subject to intermediate scrutiny; and second, the governmental interests in providing the electorate with information, deterring corruption, and enforcing the law apply to the "entire range" of electioneering communications, without an exception for "genuine issue advertisements."

II. The *WRTL* Decision in No Way Undercuts the *McConnell* Decision Upholding Electioneering Communication Disclosure Requirements.

ORTL mischaracterizes the Supreme Court's *WRTL* decision as establishing that:

> [T]here are only two types of political communications that can be regulated without violating the First Amendment guarantee of freedom of speech: (i) a political communication that contains words that expressly advocate the election or defeat of a candidate; and (ii) a narrowly defined category of communications that are the functional equivalent of express advocacy, insofar as the expression is susceptible of " … no reasonable interpretation other than as an appeal to vote for or against a specified candidate."

ORTL PI Mem. at 3 (citing *WRTL*, 127 S. Ct. at 2667 and *McConnell*, 540 U.S. 93).

In so arguing, ORTL conflates two very different types of campaign finance "regulation"—funding source restrictions of the sort actually litigated in *WRTL* and disclosure requirements. The Court's decision in *WRTL* did not even consider, let alone invalidate, electioneering communication disclosure requirements. The narrow focus of *WRTL* is apparent on the face of the decision. The first sentence of the controlling opinion announces that the Court is considering the constitutionality of the federal electioneering communication funding prohibition, 2 U.S.C. § 441b(b)(2), as applied to WRTL's specific ads. The Court did not even mention disclosure requirements, much less consider their constitutionality. Indeed, WRTL explicitly did not seek review of these disclosure requirements. In the complaint filed by WRTL that led to the Supreme Court decision, the plaintiff made clear that, "WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements." Complaint at ¶ 36, *WRTL v. FEC*, No. Civ. 04-1260, 2005 WL 3470512 (D.D.C. 2005).

In its brief to the Supreme Court, WRTL repeatedly stressed the narrow scope of its suit, stating that, "WRTL challenged the prohibition, not disclosure, and was prepared to provide the full disclosure required under BCRA." Brief for Appellee, *FEC v. Wisconsin Right to Life*, No. 06-969 (March 2006) at 10; *see also id*. at n.18 ("Full disclosure of WRTL's identity and activities would have been forthcoming."); *id*. at 29 n.39 ("WRTL did not challenge the

electioneering communication disclosure requirements."). WRTL emphasized that its challenge to the statute, if successful, would leave a fully "transparent" system. *See id.* at 49.

Given that the plaintiff in *WRTL* did not challenge the constitutionality of the electioneering communication disclosure requirements and that the Court accordingly did not address these requirements, the *WRTL* decision provides no basis for overturning the 8-1 decision of *McConnell* upholding electioneering communication disclosure requirements.

The U.S. District Court for the District of Columbia recently rejected precisely the argument that ORTL makes here. In *Citizens United v. FEC*, 530 F. Supp. 2d 274 (D.D.C. 2008), just as in the present case, the plaintiff sought an injunction of electioneering communication disclosure provisions, arguing that *WRTL* permits application of disclosure requirements only as to ads that contain express advocacy or are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specified candidate. *See id.* at 280. The court in *Citizens United* denied the motion for preliminary injunction, concluding that the *WRTL* Court had not considered the constitutionality of electioneering communication disclosure requirements and that the *McConnell* Court had upheld the disclosure requirements for the "entire range of electioneering communications" by an 8-1 majority. *Id.* at 281 (quoting *McConnell*, 540 U.S. at 196). The district court explained:

> We know that the Supreme Court has not adopted that line as a ground for holding the disclosure and disclaimer provisions unconstitutional, and it is not for us to do so today. And we know as well that in the past the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment.

Citizens United, 530 F. Supp. 2d at 281 (footnote omitted) (citations omitted).

III. Lobbying and Issue Disclosure Laws Are Likewise Constitutional.

ORTL's challenge to Ohio's electioneering communication disclosure requirements is based on a fundamental mischaracterization of Supreme Court precedent regarding political

speech. ORTL asserts that "that regulation of core political speech in this type of scheme is only permissible when speech sought to be regulated is either 'express advocacy' or the 'functional equivalent' of express advocacy." ORTL PI Mem. at 8 (referencing *WRTL*). The error of ORTL's argument is underscored by two types of disclosure laws regulating issue advocacy that have been approved by the Supreme Court, namely laws relating to lobbying and ballot measure advocacy. This case law confirms that constitutionality of a disclosure requirement does not depend on whether the regulated speech constitutes express advocacy. For the purpose of analyzing the constitutionality of disclosure laws, the ORTL's dichotomy between "express advocacy" and "issue advocacy" is irrelevant.

Both federal and state courts have consistently upheld lobbying disclosure statutes. The leading Supreme Court case on lobbying disclosure, *U.S. v. Harriss*, 347 U.S. 612 (1954), considered a federal law that required every person "receiving any contributions or expending any money for the purpose of influencing the passage or defeat of any legislation by Congress" to report information about their clients and their contributions and expenditures. *Id*. at 615 & n.1. After evaluating the law's burden on First Amendment rights, the Court held that lobbying disclosure was justified by the state's informational interests, explaining:[4]

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. … Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose.

[4] The *Harriss* decision has been followed by lower courts to uphold state lobbying statutes on the grounds that the state's informational interest in lobbying disclosure outweighs the associated burdens. *Fl. League of Prof'l Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11th Cir. 1996); *Minnesota State Ethical Practices Board v. NRA*, 761 F.2d 509 (8th Cir. 1985); *Commission on Independent Colleges and Universities v. New York Temporary State Commission*, 534 F. Supp. 489 (N.D.N.Y. 1982).

Id. at 625-626.

The fact that the Lobbying Act was unrelated to candidate campaigns and instead pertained only to issue speech was not constitutionally significant. The Supreme Court nonetheless found that the disclosure it required served the state's informational interest and "maintain[ed] the integrity of a basic governmental process." *Id*. at 625. *See also National Association of Manufacturers v. Taylor*, 549 F. Supp. 2d 33 (D.D.C. 2008) (dismissing First Amendment challenge to federal lobbying disclosure law).

Further, the Supreme Court has recognized that even "grassroots" or "indirect" lobbying, *i.e.* communications to persuade the *public* to lobby government officials, may be constitutionally subject to disclosure. The *Harriss* case upheld not only disclosure of lobbyists' *direct* communications with legislators, but also their "artificially stimulated" public "letter campaign[s]" to Congress. *Id*. at 620; *see also id*. at 621 n.10 (noting that the Act covered lobbyists' "initiat[ion] of propaganda from all over the country, in the form of letters and telegrams," to influence the acts of legislators); *see also* CRS REPORT: GRASSROOTS LOBBYING: CONSTITUTIONALITY OF DISCLOSURE REQUIREMENTS (Jan. 12, 2007), *available at* http://assets.opencrs.com/rpts/RL33794_20070112.pdf (noting that state and federal courts have followed *Harriss* to uphold state disclosure laws that reach "indirect" or "grassroots" lobbying).[5] Such communications generally describe a legislative action favored by the sponsor, and urge the public to contact the relevant lawmakers regarding this action. *See, e.g., Minn. State Ethical*

[5] Over twenty states have laws that require disclosure of expenditures funding grassroots lobbying. GAO REPORT, INFORMATION ON STATES' LOBBYING DISCLOSURE REQUIREMENTS, B-129874 (May 2, 1997), at 2. These statutes have been routinely upheld by the courts. *See, e.g., Fl. League of Prof'l Lobbyists, Inc.*, 87 F.3d at 460-61 (upholding Florida law which required disclosure of expenditures both for direct lobbying and for indirect lobbying activities which did not involve contact with governmental officials); *Kimbell*, 665 A.2d at 46 (upholding provisions of Vermont statute requiring reporting of indirect contacts to influence legislators, such as "solicitation of others to influence legislative or administrative action").

Practices Bd. v. NRA, 761 F.2d 509, 511 (8th Cir. 1985) (upholding Minnesota disclosure requirement as applied to four communications sent from the NRA to its Minnesota members urging them to contact their state legislators about pending legislation). That these "classic" issue ads can be subject to disclosure gives lie to ORTL's claim that only "express advocacy" and its functional equivalent can be constitutionally regulated.

Similarly, the Supreme Court has expressed approval of statutes requiring the disclosure of expenditures relating to ballot measures, although such statutes also lack a connection to candidate campaigns and thus implicate none of the corruption concerns raised by candidate campaigns. *See, e.g.*, *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203 (1999) (noting that "ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates"). In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the Court struck down limits on corporate expenditures to influence ballot measures, but did so in part because "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. Citing *Buckley* and *Harriss*, the Court took note of "the prophylactic effect of requiring that the source of communication be disclosed." *Id.*

The Court again recognized this state "informational interest" in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), where it considered a challenge to the City's ordinance that limited contributions to committees formed to support or oppose ballot measures. Although the Court struck down the contribution limit, it based this holding in part on the disclosure that the law required from ballot measure committees. *See* 454 U.S. at 298 ("[T]here is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known

under [a different section] of the ordinance, which requires publication of lists of contributors in advance of the voting."); *see also Am. Constitutional Law Found.*, 525 U.S. at 205 (invalidating several Colorado regulations concerning the state's ballot petition process but upholding the regulation requiring "sponsors of ballot initiatives to disclose who pays petition circulators, and how much" because this requirement informed voters of "the source and amount of money spent by proponents to get a measure on the ballot").

These precedents led the Ninth Circuit to hold that, "[g]iven the Supreme Court's repeated pronouncements, we think there can be no doubt that states may regulate express ballot-measure advocacy through disclosure laws." *Calif. Pro-Life Council v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003), *appeal after remand Calif. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007). It also noted that "[t]hough the *Buckley* Court discussed the value of disclosure for candidate elections, the same considerations apply just as forcefully, if not more so, for voter-decided ballot measures." *Id*. at 1105. Otherwise stated, the court recognized that the informational interest recognized by *Buckley* applies equally to ballot measure disclosure, although the underlying speech is not express advocacy under the standard established by *WRTL*.

IV. ORTL's Reliance on the "Anonymous Speech" Cases Is Misplaced.

Ignoring the *McConnell* decision upholding the federal electioneering communication disclosure requirements and Supreme Court precedent establishing the constitutionality of lobbying and ballot measure advocacy disclosure, ORTL rests its case on several decisions it claims establish that "the issue advocate may always wear the cloak of anonymity." ORTL PI Mem. at 12-13.

ORTL's reliance on *NAACP v. Alabama*, 357 U.S. 449 (1958), is inapposite. ORTL quotes *NAACP* for the proposition that "it is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy *may* constitute … a restraint on freedom of

association," ORTL PI Mem. at 13 (citing *NAACP*, 357 U.S. at 462) (emphasis added), but conveniently omits the facts that led the Court to conclude that the state action in *NAACP* did *in fact* constitute a restraint on the organization's freedom of association. The Court found that the NAACP had "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP*, 357 U.S. at 462. Weighing this factual showing, the Court concluded: "[u]nder these circumstances, we think it apparent that compelled disclosure of petitioner's Alabama membership is likely to affect adversely the ability of petitioners and its members" to freely associate. *Id.* at 462-63. Further, the Court concluded that disclosure of the NAACP's members had no substantial bearing on the state's asserted interest in obtaining the information—determining whether the organization was conducting intrastate business in violation of the Alabama foreign corporation registration statute. *Id.* at 464.

Relying on *NAACP*, the Supreme Court in *Buckley* rejected a claim that campaign finance disclosure requirements violate the First Amendment rights of minor parties and independent candidates and articulated a rigorous test for exemption from a disclosure statute, namely that the regulated party had to demonstrate a "reasonable probability" that the disclosure would subject the regulated parties to "threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. *See also McConnell*, 540 U.S. at 198, 199 (reiterating *Buckley*'s standard for as-applied challenges). ORTL has not even attempted to meet the rigorous standard. *See also Citizen United v. FEC*, 530 F. Supp. 2d at 281 (D.D.C. 2008) (noting that plaintiff "states that there may be reprisals, but it has presented no evidence to back up this bald assertion"). And unlike the insufficient government interest asserted in *NAACP*, it is well-

established that electioneering communication disclosure is substantially related to the government's interest in a well-informed electorate. *See McConnell*, 540 U.S. at 196.

ORTL's reliance on *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), is also misplaced. *See* ORTL PI Mem. at 15-16. Like *NAACP*, *McIntyre* did not involve candidate elections and the important state interests present in the candidate election context. Instead, the disclosure statute struck down in *McIntyre* had required the ballot initiative handbill at issue in the case to identify the author of the literature. The Supreme Court noted that no anti-corruption interest was implicated by ballot initiative activity, in contrast to lobbying, because the former has no nexus to candidates, political parties or officeholders. *McIntyre*, 514 U.S. at 356 n.20. Further, the Supreme Court noted the limited utility of information required by the statute in *McIntyre—i.e.*, the identification of private individuals who may make at most minimal expenditures for a ballot initiative handbill. *Id.* at 348-49. Whereas the ads in the instant case relate to candidates for office and trigger disclosure requirements only when their value exceeds $10,000, in *McIntyre* the handbill made no mention of candidates and had been produced at insubstantial cost. The *McIntyre* decision therefore should not bear upon this Court's analysis of the constitutionality of O.R.C. § 3517.1011.

Finally, the Supreme Court's decision in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), likewise has no bearing on this case because *Watchtower* involved neither candidate election related disclosure, nor lobbying disclosure. *See* ORTL PI Mem. at 16. The *Watchtower* Court struck down a municipal license requirement for door-to-door canvassing but, for obvious reasons, gave no consideration whatsoever to the unique government interests at stake in the context of candidate election advertising and lobbying.

For the foregoing reasons, *amici curiae* respectfully urge the Court to disregard the cases cited by ORTL that have nothing to do with speech in the candidate election or lobbying context and to instead apply the clear standards established by the Supreme Court in *Harriss*, *Buckley* and *McConnell* for determining the constitutionality of disclosure laws applicable to candidate election and lobbying communications.

V. Ohio's Disclosure Requirements Are Constitutional As Applied to ORTL's Proposed Advertisements.

ORTL proposes to run broadcast ads in the coming months clearly identifying state senators who are candidates in the November 2008 election and urging viewers to call the senators to "express their opinions, and request action" on Ohio Senate Bill 174. *See* Pl. Complaint at 3 ¶¶ 8-9. Such ads would be subject to the "electioneering communication" and "expenditure" disclosure requirements established by O.R.C. §§ 3517.01(B)(6), 3517.10, 3517.105 and 3517.1011. As discussed in the foregoing sections, the applicable standard to determine the constitutionality of these disclosure requirements is *not* ORTL's proposed strict scrutiny test, but rather the "substantial relation" standard set forth in *Buckley* and its progeny. Under this standard, the application of Ohio's disclosure requirements to ORTL's proposed advertisements (*i.e*. to non-express-advocacy electioneering communications) is constitutional because such disclosure is "substantially related" to the governmental interests in informing the electorate and enabling the enforcement of state campaign finance law.

A. The State's Informational Interest Justifies Ohio's Disclosure Requirements.

The Supreme Court has made clear that the principal state interest justifying compelled disclosure is its interest in "providing the electorate with information," *McConnell*, 540 U.S. at 196, and has sustained disclosure laws on the basis of this interest alone. *See, e.g.*, *Buckley*, 424 U.S. at 80-81 (upholding federal law independent expenditure disclosure provisions although

they did not "stem corruption or its appearance" but rather "serve[d] another, informational interest," namely "increasing the fund of information concerning those who support the candidates"); *see also* discussion of ballot measure cases in Section III, *supra*. ORTL offers no reason why this interest would not support application of the electioneering communication disclosure requirements to its proposed advertisements.

First, the *WRTL* Court recognized that even those electioneering communications that do not constitute express advocacy or its functional equivalent are not necessarily "pure" issue advocacy. Instead, such communications will often consist of a *mix* of issue advocacy and electioneering. 127 S. Ct. at 2669 (acknowledging that distinction between electioneering and issue advocacy "may often dissolve in practical application," and that "discussion of issues" may be "pertinent in an election") (internal quotations omitted). *WRTL*'s test for express advocacy is whether an ad is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id*. at 2667. This means that an electioneering communication that is susceptible of dual interpretations—both as issue advocacy and as electioneering—will not be deemed express advocacy.

Although the *WRTL* Court determined that such a dual-interpretation ad could not be subjected to the heavy burden of the federal electioneering communication funding restriction, such ads certainly can be subject to the far less onerous disclosure requirements. It is important to remember that an electioneering communication, by definition under Ohio law, is an advertisement referring to a clearly identified candidate who is campaigning for election (*i.e.*, the "electioneering communication" disclosure requirements apply only to ads identifying an individual who has "become[] a candidate"). *See* O.R.C. § 3517.1011(A)(7). As such, it is likely to affect viewers' perception of the candidate and to thereby influence the election.

If the Ohio's electioneering communication disclosure requirements do not encompass the "entire range of electioneering communications," *see McConnell*, 540 U.S. at 196, the public will have difficulty discovering who is broadcasting such communications, and will be deprived of information crucial to their assessment of the ads and the formulation of their electoral decisions. Even those electioneering communication that do not meet *WRTL*'s high bar for express advocacy will likely be *susceptible* of an interpretation as an electioneering message, and thus will directly implicate the state's informational interest in "aid[ing] the voters in evaluating those who seek federal office." *Buckley*, 424 U.S. at 66-67.

Furthermore, as the case law on lobbying and ballot measure advocacy demonstrates, the state has an interest in providing information to the public about even those activities that constitute "pure" issue advocacy. *See, e.g., Harriss*, 347 U.S. at 625 (lobbying and grassroots lobbying disclosure); *Am. Constitutional Law Found.*, 525 U.S. at 205 (ballot measure disclosure). Indeed, the courts have consistently upheld statutes requiring the disclosure of "grassroots lobbying" communications—a far broader category of advertisements than electioneering communications: grassroots lobbying ads, for instance, do not necessarily mention a candidate or air in the pre-election period when the candidate is campaigning, as is the case under Ohio's disclosure requirements. *See* O.R.C. §§ 3517.01(B)(6) and 3517.1011(A)(7). There is value in disclosure connected to issue advocacy, as the Ninth Circuit recognized in the context of ballot measure advocacy: "[M]oney produces a cacophony of political communications through which [] voters must pick out meaningful and accurate messages. … Given the complexity of the issues … we think being able to evaluate who is doing the talking is of great importance." *Calif. Pro-Life Council*, 328 F.3d at 1105. *See also Bellotti*, 435 U.S. at 792 n.32 (noting disclosure relating to ballot measure issue advocacy is necessary "so that the

people will be able to evaluate the arguments to which they are being subjected"). Thus, even if ORTL's advertisements are deemed pure issue speech or lobbying, the public has an interest in receiving information about the sponsor and funders of the ads in order to judge the legitimacy and credibility of their messages.

B. The State's Enforcement Interest Justifies Ohio's Disclosure Requirements.

McConnell also upheld the federal electioneering communication disclosure requirements based upon a second governmental interest, namely "gathering the data necessary to enforce more substantive electioneering restrictions." 540 U.S. at 196. *See also Buckley* 424 U.S. at 67-68. This interest is not any less relevant when applied to electioneering communications that do not constitute express advocacy or its functional equivalent under *WRTL*.

Without disclosure of the entire range of electioneering communications, the State will have a limited ability to enforce the longstanding requirement that money spent by outside groups in coordination with candidates be regulated as political contributions to those candidates under O.R.C. § 3517.1011(A)(5), (G) and (H). If this Court were to enjoin the enforcement of section 3517.1011, electioneering communications could be directly coordinated with candidates in circumvention of contribution limits, posing a serious threat of corruption of those candidates to the detriment of voters in the State of Ohio. Similarly, without disclosure of the entire range of electioneering communications, the State will have a limited ability to enforce the State law prohibiting the use of contributions from corporations or labor organizations to make, during the 30 days preceding an election, any broadcast, cable, or satellite communication that refers to a clearly identified candidate. *See* O.R.C. § 3517.1011(H)

CONCLUSION

For the foregoing reasons, this Court should deny ORTL's motion for temporary restraining order and preliminary injunction of O.R.C. §§ 3517.01(B)(6) and 3517.1011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2008, a copy of the foregoing memorandum was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing memorandum and the Notice of Electronic Filing has been served by first-class mail, postage prepaid, upon all parties for whom counsel has not yet entered an appearance electronically.

s/ Jennifer L. Branch
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