IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CENTER FOR INDIVIDUAL FREEDOM, INC.,

Plaintiff,

v.

BETTY IRELAND, *et al.*,

Defendants.

No. 1:08-CV-190

Hon. David A. Faber

MEMORANDUM IN SUPPORT OF MOTION OF DEFENDANT-INTERVENORS WEST VIRGINIA AFL-CIO AND WEST VIRGINIA EDUCATION ASSOCIATION TO VACATE PRELIMINARY INJUNCTION

I. Introduction

This case began as a constitutional challenge to West Virginia campaign finance statutes that parallel the federal Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002), *codified at* 2 U.S.C. § 431 *et seq.* ("BCRA" or "McCain-Feingold"), Congress' recent attempt to regulate the influence of large sums of money in modern election campaigns. The West Virginia provisions at issue, like their federal counterparts, restrict corporate and labor union contributions to entities that engage in certain political campaign advocacy independent of candidates or political parties, and regulate "electioneering communications" by requiring reporting and disclosure of their funding sources.[1]

[1] The specific provisions originally at issue were W. Va. Code § 3-8-1a(11) (definition of electioneering communications), § 3-8-1a(14) (definition of independent expenditures), § 3-8-5(a) (general reporting and disclosure requirements), § 3-8-8(a) (general prohibition against corporate contributions for election expenses), § 3-

The BCRA restriction on corporate and union treasury funding of electioneering communications was upheld on its face in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 192-94 (2003). And in its next landmark decision, *Wisconsin Right to Life Inc. v. Federal Election Comm'n*, 127 S. Ct. 2652, 2667 (2007) ("*WRTL II*"), the Court held that even as applied to particular independent political expenditures, the financing of "express advocacy or the functional equivalent of express advocacy" of the election or defeat of an identified candidate is regulable regardless of whether the funded communications use the famous "magic words" listed in *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) ("vote for," "elect," "defeat," and the like). Moreover, *McConnell* upheld the BCRA's funding source reporting and disclosure provisions for all BCRA electioneering communications, not just those that are "express advocacy" or its "functional equivalent," and *WRTL II* did not in any way disturb that holding.

McConnell and *WRTL II* apply equally to state statutes that contain the BCRA terms construed in those decisions. *See*, *e.g.*, *North Carolina Right to Life Committee, Inc. v. Leake*, 525 F.3d 274, 282-83 (4th Cir. 2008). Although West Virginia's campaign finance statutes emulate the BCRA in most respects, this Court held that certain terms of those statutes—terms that emulated the Watergate-era federal statutes construed in *Buckley* rather than the far more recent BCRA—were vague and overbroad. Order Granting Prelim. Inj., Apr. 22, 2008 (Doc. 38), at 1-2; Mem. Op. on Prelim. Inj., Apr. 22, 2008 (Doc. 37), at 14-17. The Court's vagueness rationale was the same as that which led the *Buckley* Court to narrow the federal statutes at issue in that case. [2]

8-8(b)(2)(H) (prohibition against corporate expenditures to influence voters), and § 3-9-14 (penalties for corporations that give things of value to influence any election).

[2] This Court's opinion stated that:

> [T]o thaw the chill of free speech imposed by the West Virginia Election Code, the court enjoins the defendants from applying West Virginia Code Sections 3-

West Virginia's legislature responded to the April 22 order by enacting superseding legislation during its brief June 2008 special session. The amended provisions apply to political campaign advocacy occurring on or after October 1, 2008, and specifically limit the reach of corporate and union treasury funding restrictions to "express advocacy" or its "functional equivalent," as upheld against constitutional challenge in *McConnell* and *WRTL II*. *See* H.B. 219, W. Va. 2d Sp. Sess. 2008 (enacted June 28, 2008), *available at* www.legis.state.wv.us/Bill_Text_HTML/2008_SESSIONS/2X/BILLS/hb219%20enr.htm (codified at W. Va. Code § 3-8-1(a)(1) through (19) (legislative findings), § 3-8-1a(13) (revised and narrowed definition of "expressly advocating"), § 3-8-8(a) (revised and narrowed corporate and union source funding restriction)); *McConnell*, 540 U.S. at 194 (holding that BCRA definition "raises none of the vagueness concerns that drove our analysis in *Buckley*"), cited in Mem. Op., Apr. 22, 2008 (Doc. 37), at 8.

At a status conference on August 27, 2008, the Court established a briefing schedule for motions to vacate the April 22 preliminary injunction in light of the legislature's action. This motion and the present memorandum are submitted under that schedule. The undersigned intervening defendants urge that the preliminary injunction be vacated as moot, because the enjoined provisions have been superseded by fully constitutional enactments.

> 8-1a(14), 3-8-2(b), 3-8-5(a), 3-8-8(a), 3-8-8(b)(2)(H), and 3-9-14, and West Virginia Code of State Rules Section 146-1-3, to anything other than communications that expressly advocate the election or defeat of a clearly identified candidate. In limiting the applicability of these provisions to communications constituting express advocacy, this court adopts the bright-line definition of the term as stated in *Buckley*. 424 U.S. at 44 n. 52 ("vote for," "elect," "support," "cast your ballot for," [sic] "Smith for Congress," "vote against," "defeat," "reject."). To cure the vagueness and overbreadth of West Virginia's definition of "electioneering communication," W. Va. Code § 3-8-1a(11), the court limits its scope to only the broadcast media covered by its federal counterpart, and enjoins the defendants from applying Section 3-8-2b's reporting and disclosure requirements to the following forms of political advocacy: mailings, faxes, emails, phone banks, leaflets, pamphlets, and other printed or published materials.

II. Discussion

A. Superseding legislation that cures defects found in its predecessor is a proper basis to dissolve an injunction as moot

A "superseding statute or regulation moots a case . . . to the extent that it removes challenged features of the prior law." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1310 (11th Cir. 2000), *cited in Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 Fed. Appx. 566 (4th Cir. 2007) (mem.), 2007 WL 3193854, at *4. This is exactly what has occurred here. Because the Court has limited the present briefing cycle to vacation of the preliminary injunction, that is the only relief sought in this motion; but it would be proper both to dissolve the injunction and to dismiss the action where, as here, both have become moot. *See*, *e.g., Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.*, 511 F.3d 407, 412 (4th Cir. 2007) (preliminary injunction dissolved after superseding regulation adopted).

The undersigned intervenor-defendants rely on their prior briefing of the standards for preliminary injunctions under Fed. R. Civ. P. 65. *See* Defendant-Intervenors' Mem. in Op. to Prelim. Inj., Apr. 7, 2008 (Doc. 22), at 2-9. They agree that the most important factor for preliminary injunction determinations in a First Amendment context is likelihood of success on the merits. *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 254-55 (4th Cir. 2003). Even if the burden is on the defendants to show that changed circumstances warrant the lifting of the existing preliminary injunction, *see*, *e.g., Favia v. Indiana University of Pennsylvania*, 7 F.3d 332, 340 (3d Cir. 1993), the legislative amendments to the statutes at issue plainly make that showing, as is further explained below.

B. *McConnell* and *WRTL II* make clear that regulable "express advocacy" includes its "functional equivalent"

In the BCRA, Congress invented a new approach to the problem of regulating so-called "soft money," *i.e.*, campaign contributions and expenditures independent of political parties, activities that had come to pose serious problems of corruption or the appearance thereof but that federal campaign finance law as written in the 1970s did not reach. *McConnell*, 540 U.S. at 133 ("Title I [of the BCRA] is Congress' effort to plug the soft-money loophole"). The cornerstone of the BCRA's new approach was to define, as narrowly and plainly as possible, the category of speech that posed the danger of improper or unseen influence on voters' ballot choices: an "electioneering communication," defined in two viewpoint-neutral terms—proximity in time to an election, and explicit reference to a named candidate for office. 2 U.S.C. § 441i(f), *cited in McConnell*, 540 U.S. at 134.

In *McConnell* the Supreme Court expressly held that the BCRA's definition of "electioneering communication" was constitutional on its face. 540 U.S. at 194. And in *WRTL II* the Court's controlling opinion held that the definition was constitutional as applied to speech during political campaigns that was "express advocacy" or its "functional equivalent." *WRTL II*, 127 S. Ct. at 2667 (opinion of Roberts, C.J., and Alito, J.).[3]

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[3] The Court provided some guidance as to whether an ad is "the functional equivalent of express advocacy," beginning with the statement that it must be "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL II,* 127 S. Ct. at 2667. Describing the Wisconsin Right to Life ads at issue and why they were not covered, the Court wrote:

> First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy. The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate's character, qualifications, or fitness for office.

Id. at 2667. The plurality described its test as being "objective, focusing on the substance of the communication rather than the amorphous consideration of intent and effect." *Id.* at 2666. The Court held that ads that fall within BCRA's definition of electioneering communications and include those "indicia of express advocacy" (*i.e.*, mention

This Court ruled in April that certain West Virginia statutory restrictions on corporate-funded campaign speech were unconstitutionally vague and overbroad in that they reached otherwise protected "issue advocacy." Mem. Op., Apr. 22, 2008 (Doc. 37), at 7-8. To the extent that this Court's prior ruling enjoined West Virginia from regulating the "functional equivalent" of "express advocacy," the undersigned intervenors respectfully continue to maintain that the decision was a misapplication of *McConnell* and *WRTL II*. Likewise, they continue to maintain that West Virginia's highest court gave the prior statutes a definitive narrowing construction in *Anderson's Paving, Inc. v. Hayes,* 170 W. Va. 640, 642, 295 S.E. 2d 805, 807 (1982), that should have preserved those statutes from a vagueness challenge.

However, the legislation this Court enjoined in April has now been superseded by new provisions that definitively cure any vagueness this Court discerned in the prior language. The June 2008 amendments explicitly define "express advocacy" to include its "functional equivalent," precisely as upheld in *McConnell* and *WRTL II*, and limit to such advocacy the state's existing restriction on corporate and union source funding of campaign speech. H.B. 219 (2008), *codified at* W. Va. Code § 3-8-1a(12), § 3-8-8(a), § 3-8-8(b)(1)(D). There is no longer any constitutional justification to rewrite the statutory language to vary its obvious meaning or obstruct its operation. Indeed, the Court should be satisfied that the state legislature has now taken substantially the same action as the Federal Election Commission ("FEC"), which recently approved a new BCRA regulation in light of *WRTL II* that limits enforcement against corporate and union source funding to "express advocacy" or its "functional equivalent."[4]

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an election, candidacy, political party, or challenger and take a position on a candidate's character, qualifications, or fitness for office) may permissibly be subject to BCRA's funding restrictions, under which a corporation or union may run such ads only through a separate segregated fund, similar to a political action committee ("PAC"), contributions to which are subject to limits on source and amount. *Id.* at 2667.

[4] The FEC rule amending 11 C.F.R. § 114.15 specifies that "express advocacy" includes speech susceptible of no reasonable interpretation other than as such advocacy. Federal Election Comm'n, Final Rule on 11 C.F.R. Part

Additionally, the Court and the parties now have the benefit of *North Carolina Right to Life Committee, Inc. v. Leake*, 525 F.2d 274 (4th Cir. 2008) (Wilkinson, J.) ("*NCRTL*"), decided shortly after the April injunction was issued.[5] The court in *NCRTL* held that, under *WRTL II*, states may regulate the same "express advocacy" or its "functional equivalent" in state elections that Congress may regulate in federal elections. *NCRTL* turned on whether a North Carolina statute regulated speech that was neither express advocacy nor its functional equivalent. 525 F.3d at 282-83. Indeed, the court's view of that North Carolina statute illuminates and distinguishes the simpler and more precise West Virginia provisions at issue here: the court said the defect in the North Carolina law was its "complete lack of notice as to what speech is regulable, and the unguided discretion given to the State to decide when it will move against political speech and when it will not." *Id.* at 285.

The North Carolina express advocacy statute at issue in *NCRTL* purported to restrict political speech during election campaigns based on "contextual factors" that *suggested* the speech advocated a candidate's election or defeat. *Id.* Those factors included "the language of the communication as a whole, the timing of the communication in relation to events of the day, the distribution of the communication to a significant number of registered voters for that candidate's election, and the cost of the communication," all of which "may be considered in

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104, Nov. 20, 2007, *available at* www.fec.gov/pdf/nprm/electioneering_comm/2007/provisions_approved_nov-20-2007.pdf. The new West Virginia enactment defines express advocacy in identical terms, W. Va. Code § 3-8-1a(13), and limits application of the corporate source funding ban to communications that constitute such advocacy. W. Va. Code § 3-8-8. The FEC rule contains an explicit "safe harbor" that specifically lists types of speech that are not express advocacy or its functional equivalent, and that are protected from campaign finance regulation. 11 C.F.R. § 114.15(b). The West Virginia amendments contain a virtually identical list. W. Va. Code § 3-8-8(b)(1)(D)(i) through (iv).

[5] This decision is one of two issued on May 1, 2008, by two Fourth Circuit panels in two separate challenges to North Carolina campaign statutes brought by parties with similar names. Judge Wilkinson wrote for the panel in *NCRTL*, the express advocacy opinion discussed here. Judge Michael wrote for a different panel in *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2008), which upheld certain North Carolina reporting and disclosure requirements, as well as mandatory public financing of elections and rescue provisions for participants in the state's public financing scheme who had high-spending non-participant opponents. That decision is cited *infra* at 11.

determining whether the action urged could only be interpreted by a reasonable person as advocating the nomination, election, or defeat of that candidate in that election." N.C. Gen. Stat. § 163-278.14A(a)(2). And the list was specified in the statute not to be exhaustive, *i.e.,* to license regulators or reviewing courts to add other "factors" to it in considering whether speech could reasonably be interpreted only as advocacy of a candidate's election or defeat.

The West Virginia enactments now at issue in this case impose no such fuzzy "factor" test, but limit their reach exclusively to the "express advocacy" and its "functional equivalent" that *NCRTL* acknowledges states may regulate, *i.e.*, speech "susceptible of no reasonable interpretation other than as an appeal to vote for or against an identified candidate."[6] *NCRTL*, 525 F.3d at 283, citing *WRTL II*, 127 S. Ct. at 2667. *NCRTL* is the Fourth Circuit's up-to-date pronouncement that this definition is sufficiently precise to withstand a vagueness challenge.

In sum, with the June 2008 amendments the vagueness rationale for this Court's earlier intervention has disappeared, taking with it any justification for treating *Buckley* "magic words"—which were never a constitutional requirement for all purposes, but only a customized formula for saving a particular, now outdated statute from constitutional infirmity—as the outer limit of what West Virginia may permissibly regulate today, under an amended scheme that is fully in line with modern federal provisions upheld by the Supreme Court. See *McConnell*, 540 U.S. at 191-92 ("the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command").

[6] H.B. 219, enacted June 28, 2008, codified at W. Va. Code § 3-8-1a(13)(B) (a communication is the functional equivalent of express advocacy "[w]hen[,] considered in its entirety, the communication can only be interpreted by a reasonable person as advocating the election or defeat of one or more clearly identified candidates because: (i) [t]he electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (ii) [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates.")

C. West Virginia's inclusion of certain non-broadcast communications as "electioneering communications" is constitutional

The West Virginia statutory provisions at issue go beyond the letter of the BCRA in only one respect: they extend the definition of electioneering communications beyond radio, television, cable and satellite broadcast transmissions to certain non-broadcast communications. W. Va. Code § 3-8-1a(12)(A) (defining "electioneering communication" to include any "paid communication made by broadcast, cable or satellite signal, mass mailing, telephone bank, billboard advertising, or published in any newspaper, magazine or other periodical" that satisfies the definition's other elements). Approximately ten U.S. states have similar provisions, of which none has been the subject of a constitutional challenge to date.[7] This Court's April 22 ruling enjoined enforcement of West Virginia's definition of electioneering communications beyond broadcast media—but only because the state had not built a record for extending its regulations to print, billboard, and telephonic electioneering. Mem. Op., Apr. 22, 2008 (Doc. 37), at 11-12.

The June 2008 enactment specifically addresses this concern by including legislative findings, in new W. Va. Code § 3-8-1(a), that the small size of West Virginia legislative and other voting districts, and the economics and typical uses of various forms of electioneering communication in this state, make it inevitable that non-broadcast media will be widely used for campaign communications to target audiences; that indeed they are so used; that failing to regulate these non-broadcast messages would permit an end run around the principles and policies that existing state law was designed to serve; and that this extended coverage is as narrowly tailored to the realities of West Virginia political campaigns as are the target audience size and other features of BCRA broadcast electioneering regulations for federal campaigns.

[7] See Ariz. Rev. Stat. § 16-901.01(A)(2); Cal. Elec. Code § 85310; Conn. Gen. Stat. § 9-601b; Fla. Stat. Ann. § 106.011(13), (18); Haw. Rev. Stat. § 11-207.6(B), (C); Me. Rev. Stat. tit. 21-A, §§ 1014(2-A), 1019-B(1)(A) & (3); Okla. Stat. tit. 257, §§ 1-1-2, 10-1-2(d)(2); S.C. Code §§ 8-13-1300(31), 8-13-1304, 8-13-1308; Vt. Stat. Ann. tit. 17, §§ 2891, 2892, 2893; Wash. Rev. Code §§ 42.17.020, 42.17.110, 42.17.510.

H.B. 219, enrolled as enacted June 28, 2008 (codified at W. Va. Code § 3-8-1(a)(1) through (19)).

Importantly, the amended provisions reach only those non-broadcast electioneering communications that are necessarily, significantly, and increasingly used in West Virginia elections, *i.e.*, that fit the state-specific pre-election circumstances described in the legislative findings. These selected communications are thus, in effect, the functional equivalent of the broadcast communications that also come within the definition.

The findings just cited reflect the legislative determination that to regulate express advocacy, but not its functional equivalent, would permit widespread and absurdly easy end runs around the rules, and therefore would threaten the legislation's purpose to inform the electorate of the sources of attempted influence on their votes and to guard against corrupt influence, or the appearance of corrupt influence, of "soft money" in campaigns for state office. The same findings reflect the legislative determination that to regulate broadcast communications, but not their non-broadcast functional equivalents, would cause the same end runs and lead to the same problems. *Cf. McConnell*, 540 U.S. at 172 (upholding BCRA anti-circumvention measures despite their impact on speech). The legislature's findings on the need for these protections are entitled to deference. *See*, *e.g.*, *Federal Election Comm'n v. National Right to Work Committee*, 459 U.S. 197, 210 (1982); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-39 (2002), *citing City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986).

Moreover, constitutional scrutiny of reporting and disclosure requirements is not as stringent as that employed for review of contribution or expenditure limitations, and the strong governmental interests underlying disclosure requirements as to the "entire range of 'electioneering communications'"—whether or not they amount to "express advocacy" or its

"functional equivalent"—should be sufficient to meet the test as to such requirements. *McConnell*, 540 U.S. at 195-96; *see also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978); *Buckley*, 424 U.S. at 66-68;[8] *North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 440 (4th Cir. 2008) (Michael, J.) (upholding similar reporting and disclosure requirements on authority of *Buckley* and *McConnell*).

III. Conclusion

This Court entered its initial injunction for the same reason it believed the Court in *Buckley* had done so: to conform a statute to the Constitution because of vagueness objections to the law as written. Without conceding that the West Virginia statutes then at issue were vague or overbroad, the undersigned intervenors submit that West Virginia's legislature has addressed the Court's vagueness concerns with a superseding enactment, and that no basis exists to enjoin the new provisions' operation. Certainly the Court has no reason to limit or rewrite them using a construct—the *Buckley* "magic words" formulation—that the Supreme Court has held was never an all-purpose constitutional minimum, but was created solely to cure a vagueness defect in a particular federal statute that Congress later superseded with the BCRA, a statute the Supreme Court has upheld under the Constitution. See *McConnell*, 540 U.S. at 191-92.

For the foregoing reasons, the undersigned defendant-intervenors respectfully request that the preliminary injunction of April 22, 2008, be vacated as moot.

[8] So far in this litigation, the plaintiff's only vagueness objection specifically aimed at West Virginia's non-broadcast electioneering regulation has been the specious argument that "disseminate" in the electioneering communications definition of W. Va. Code § 3-8-1a(12)(a)(ii) is imprecise enough that periodicals with some shelf life could be found to "disseminate" electioneering communications printed in them, and thus come within the regulations, even where first publication preceded the start of the regulated pre-election period. However, "disseminate" in the definition of "disclosure date" in the very same statute, W. Va. Code § 3-8-1a(10), is unambiguously defined as the date of first dissemination. Thus the clear import of the statute is that only first publications within the pre-election period are covered.

Respectfully submitted,

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Dated: September 5, 2008

CERTIFICATE OF SERVICE

I, Stephen B. Pershing, do hereby certify that on the 5th day of September 2008, I electronically filed the foregoing "Memorandum in Support of Motion of Defendant-Intervenors West Virginia AFL-CIO and West Virginia Education Association to Vacate Preliminary Injunction" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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